

LEGAL AID NSW SUBMISSION

ROYAL COMMISSION INTO INSTITUTIONAL RESPONSES TO

CHILD SEXUAL ABUSE

Issues Paper 8: Experiences of Police and Prosecution Responses

June 2015

About Legal Aid NSW

The Legal Aid Commission of New South Wales (Legal Aid NSW) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW) to provide legal assistance, with a particular focus on the needs of people who are economically or socially disadvantaged. Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large inhouse legal practice and through grants of aid to private practitioners. Legal Aid NSW also funds a number of services provided by non-government organisations, including 35 community legal centres and 28 Women's Domestic Violence Court Advocacy Services.

The Sexual Assault Communications Privilege Service (SACPS) is a victims' legal service that helps protect the privacy of counselling notes and other confidential therapeutic records in criminal proceedings. The SACPS supports sexual assault victims to claim the privilege when their confidential records are subpoenaed. The privilege is based on some important guiding principles:

- Disclosure of therapeutic records can cause further harm if revealed to the accused or in court.
- Counselling and other types of treatment are therapeutic tools, not investigative ones.
- Counselling should be a safe place for open, honest and private communication and healing.
- Keeping records private helps encourage reporting and prosecution of sexual assaults.
- Ethical conflicts for counsellors and other practitioners should be minimised where possible.
- Therapeutic records can contain irrelevant or speculative material that should not be brought before a court.

The legislation enshrining the privilege seeks to balance the public interest in therapeutic confidentiality that would encourage victims of sexual assaults to report these offences and seek psychological and psychiatric care on the one hand, and the public interest in fairness of the trial, which may be prejudiced by exclusion of evidence pertinent to the forensic process on the other.¹

Legal Aid NSW welcomes the opportunity to respond to Issues Paper 8 and will be responding to questions 8 and 9 from that Issues Paper.

The law in relation to the Sexual Assault Communications Privilege (SACP)

In 1997, NSW became the first jurisdiction in Australia to create a specific category of legal privilege to prevent the counselling records of sexual assault complainants from being used in a court unless the court was able to find that it was in the public interest to do so.² The law in relation to the SACP is set out, in the main, in sections 295 to 306 of the *Criminal Procedure Act 1986* (the Act). It applies primarily to criminal offences as defined by the Act, as well as to apprehended violence proceedings. The privilege creates a presumption against the disclosure of any information that falls within the definition of a 'protected confidence', including any 'counselling communication' made by, to or about the complainant in confidence during the course of counselling. It only applies to information that arises from a relationship where an appropriately qualified person counsels, gives therapy to, or treats the counselled person. The counselling relationship is broad, and can include communications that took place before the sexual assault or which are not in any way related to the sexual offence except for the fact that they involve the same victim. The SACP provisions are of clear and direct relevance to police and prosecutorial processes and responses in cases of child sexual abuse in institutional and non-institutional contexts.

8. What are your observations of, and suggestions for improvements or reforms to, police processes for receiving reports of allegations, and investigating and responding to reports in relation to allegations of child sexual abuse in an institutional context?

Police and the sexual assault communications privilege

Section 300 of the Act enables sexual assault complainants to consent in writing to the production of information that would otherwise be covered by the privilege. It is not uncommon for police investigators to seek the written consent of complainants pursuant to this provision, although there is inconsistent compliance with the requirements of the 'form' of this consent. In addition, the SACPS is aware of investigators obtaining information that would otherwise be protected by the privilege in circumstances where the consent of the complainant has not been sought at all. In each case, almost without exception, complainants are not advised of their rights to claim the privilege and further, of the availability of legal advice to them in respect to same.

¹ Mendelson, D (2002) "Judicial Responses to the Protected Confidential Communications Legislation in Australia", 10 *Journal of Law and Medicine* 49.

² Van de Zandt, P (2011) *Judicial Officers Bulletin*, Vol. 23, No. 11, at p.100.

Police investigators might seek material of this kind, such as counselling notes, at an early stage in an investigation to corroborate allegations of child sexual abuse. There is, however, an inherent risk that information obtained in such a way will ultimately be furnished to an accused and their legal representatives in any subsequent prosecution. This might occur when such material is included in the brief of evidence or when it is otherwise provided to the defence in accordance with the prosecution's duty of disclosure. Such access to confidential and sensitive information can have adverse consequences for the welfare of complainants of child sexual abuse and further, for the successful prosecution of perpetrators. Issues disclosed in counselling can, for example, be used by the defence to undermine certain aspects of the prosecution's case and to discredit complainants.

From a legal point of view, counsellor's notes .. are both hearsay and of dubious reliability. They cannot be equated with other relevant evidence like police statements from the complainant and other witnesses, medical examinations of the complainant and DNA evidence. Moreover, complainants do not have the opportunity, as is the case with a police statement, to verify counselling records. Common sense ... would view counselling notes as peripheral to the trial process and a source of misinterpretation and bias... [T]he information they offer on the complainant's past history has no bearing on the facts in issue in a sexual assault trial or in the complainant's credibility.³

Parliament has established a robust legislative regime to protect confidential communications in the course of counselling, in order to prevent them from being used in evidence and to minimise the secondary victimisation of complainants going through the legal process. The privilege that attaches as of right to disclosures by victims of sexual assault during counselling is intended to provide confidence that they can freely disclose matters to their counsellor and that it will remain confidential. If this principle is undermined, sexual assault victims may be discouraged from seeking out and engaging in the very counselling services that are aimed toward assisting them.

Education is key to discouraging, wherever possible, the practice of obtaining confidential counselling records early in a police investigation that would otherwise be protected by the SACP. For this reason, the SACPS has invited various stakeholders, including specialist police from the Sex Crimes Squad, to participate in a working group to develop strategies to increase police awareness more generally about the privilege as well as the service. Protected confidences should remain out of the purview of the criminal justice system, save for where the evidence so obtained is likely to have significant probative value *and* the prosecuting authority has been consulted on the issue and recommends otherwise. Police consultation with the prosecuting authority has the benefit of triggering a referral to the SACPS, thus ensuring the instructions of complainants are sought and that their interests are protected by their own separate, specialist legal representative who is not otherwise involved in the trial process.

³ Liverani, MR (1998) "Confidential Communications: Support for the new subpoena law and bouquets to Attorney General from sexual assault lobby", *Law Society Journal*, April, 42 at p.44-5.

9. What are your observations of, and suggestions for improvements or reforms to, prosecution processes in relation to charges relating to child sexual abuse in an institutional context?

Criminal proceedings and the sexual assault communications privilege

In criminal proceedings, at trial and sentencing, the privilege is qualified. The legislation sets out a framework in which leave must be sought from the court in order to:

- compel production of evidence
- produce evidence, or
- adduce evidence in proceedings.

There remains, however, significant procedural uncertainty about several of the provisions in the Act. First, there is widespread non-compliance with the notice requirements in the legislation. Section 299C prevents the production or adduction of protected confidences unless the party seeking to do so gives reasonable notice in writing to the parties and the complainant. Leave cannot be granted until 14 days after notice is given. The court has the power to waive these notice provisions, but the legislation requires that to occur in “exceptional circumstances.” Anecdotally, these provisions are rarely enforced and often, in circumstances where no finding of exceptional circumstances is made. In practice, non-compliance with the notice provisions:

.. creates significant difficulties for complainants. Often [the SACP lawyer is]... asked to appear the day before the return date of the subpoena or the first day of the trial, when the ODPP receives information of the issue of subpoenas. When notice is given, it is often very late. When it is not, the complainant is left to hope that an objection will be raised by the party producing the document.⁴

Should further time be required to resolve outstanding disputes between parties concerning the application of the privilege, it is likely to lead to delays in the proceedings, which, in itself, can have an adverse impact on the wellbeing of complainants. Consistency in the application of the notice provisions is clearly required for the benefit of all parties.

Similar to the lack of compliance with the notice requirements, a significant proportion of subpoenas continue to be issued in contravention of sections 297(1) and 298(1) of the Act. This failure to comply with the legislation has arisen in the Court of Criminal Appeal (CCA). Both *KS v Veitch (No 2)*⁵ and *NAR*⁶ concerned cases where subpoenas were issued without the leave of the court. It is of concern that a significant proportion of subpoenas, including those clearly seeking privileged material, are in effect invalid. This is particularly apparent in sexual assault proceedings, or where a subpoena is issued for the records of a client of a sexual assault counsellor.

⁴ Gleeson, C “The Sexual Assault Communications Privilege Pro Bono Scheme”, (2010-2011) *Bar News* 73 at p.75.

⁵ [2012] NSWCCA 266.

⁶ [2013] NSWCCA 25.

The SACPS is working with the Sexual Assault Review Committee (SARC), Justice Policy and other key stakeholders to develop options for the diversion of subpoenas which are likely to catch protected confidences *before* they are given a return date and stamped by the court registry. To this end as well, SACPS is also actively involved in the education of those organisations and individuals who are likely to receive subpoenas encompassing protected confidences in the course of their work.

Conclusion

The sexual assault communications privilege is an important legal protection to prevent the counselling records of sexual assault complainants from being used in court, unless the court is able to find that it is in the public interest to do so.

Of relevance to the work of the Royal Commission, the SACP is enshrined in a legislative framework that affirms that sexual assault complainants' experience of the criminal justice system must improve if more victims are to pursue justice through the courts. In addition, it provides to complainants a level of confidence in the confidentiality of what is disclosed in the course of a therapeutic relationship. However, there remains some procedural uncertainty concerning the operation of the relevant legislation, some of which is highlighted above. SACPS will continue to work in collaboration with other relevant stakeholders to improve awareness of the privilege and the effectiveness of the legislation for the benefit of child sexual assault victims in institutional and non-institutional contexts.

Should you require any clarification or any further information the contact officer is Catriona Cotton, Solicitor Advocate Sexual Assault Communications Privilege Service on 9219 95818 or email: catriona.cotton@legalaid.nsw.gov.au.