

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

# 1. Executive Summary

## How to use this paper

This paper responds to the Australian Law Reform Commission (ALRC) Review of the Family Law System. In particular, it addresses question 25 in the [Issues Paper](#) released by the ALRC in March 2018:

*How should the family law system address misuse of process as a form of abuse in family law matters?<sup>1</sup>*

This question encompasses the misuse of process in evidence gathering by, for example, issuing a subpoena to obtain access to sensitive material such as a survivor's therapeutic counselling records or sexual assault service records.<sup>2</sup> This paper outlines the problems associated with this practice and sets out a number of options and recommendations for change.

RAP invites you to use the research and options presented to formulate your own submissions to the ALRC review on this important issue.

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1. Australian Law Reform Commission, Review of the Family Law System, Issues Paper 48 (March 2018).  
2. We acknowledge that the terms survivor and victim, in relation to sexual assault, carry different connotations for different people who have experienced sexual violence. While the term 'victim' has been associated with passivity and

disempowerment; the term 'survivor' has also been criticised for expecting heroic efforts to surmount difficult and distressing experiences. We do not propose to venture into this important discussion, and will use the term 'survivor' consistent with the practices of many specialist centres against sexual assault.

## 2. **The Problem: Access to sensitive information of survivors**

Brad and Mary have 2 children.

Things have not gone well in their relationship. Brad drinks and sometimes hits Mary. He has also sexually assaulted her on several occasions.

Mary goes to see a counsellor for professional assistance.

She ultimately decides to leave Brad and commences family law proceedings for

custody of their children.

Brad's lawyers issue a subpoena for Mary's counselling records to show that she would not be a good parent. The records are produced to the Court and inspected by Brad and his lawyers. Mary feels humiliated and now mistrusts her counsellor. She stops attending counselling.<sup>3</sup>

A litigant's ability to issue subpoenas is a powerful tool to compel the production of information held by third parties which is relevant to their case. However, the use of subpoenas can also result in a breach of confidence and irreparable damage to the relationship between the subpoenaed person (for example, a counselling service) and the person whose information is produced (the survivor of a sexual offence). When sexual assault counselling records are sought and obtained as a matter of course in family law proceedings, it may expose survivors to the

risk of further psychological harm and dissuade them from seeking counselling services in the first place.

This paper calls for the introduction of procedural protections in family law, including a qualified sexual assault counselling privilege, to ensure that sensitive information of this kind can be compelled for production only where there is a legitimate forensic purpose and with full consideration by the court of competing interests for and against the production of such information.

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3. In drafting this report, we have consulted with a number of counselling, domestic violence and sexual assault support services and organisations.

This story is a compilation of the anecdotes and issues reflected to us in the consultation process.

### 3. **The Solution:** **Our recommendations for change**

1. That a qualified privilege be introduced to protect sexual assault counselling communications in family law proceedings;
2. To ensure people can enforce their rights in family law proceedings:
  - a. That legal services be funded to provide legal support and resources to counsellors wishing to object to a subpoena for their counselling records; and
  - b. That resources be available and accessible to increase awareness and enforcement of protections of counselling information offered by family law.

## 4. Detailed recommendations and analysis

### Recommendation 1: Qualified privilege for sexual assault counselling communication in family law proceedings

#### Background

In family law proceedings, subpoenas can be issued for production of records by various health professionals, including counsellors. Such subpoenas typically pass the threshold for relevance, either because alleged sexual offending is disputed or because the record is asserted to evidence some unfitness or incapacity of the survivor to parent. As a result, the information sought can be compelled for production and made available to the court and the other parties.

However, these records are not developed to document or prove that a particular event has happened. The role of a counsellor or a health professional is to treat their client's condition; not to forensically examine the reasons for that presentation. There is a risk that such records will present a distorted, deficit-focused account of the events and people involved.

Further, a survivor may be exposed to a risk of psychological or mental harm by having some of their most sensitive information disclosed to the court, lawyers and possibly to their ex-partner. Compulsory disclosure can be disempowering for survivors and can lead to their re-victimisation through the court process.

Given that sexual violence is much more prevalent between partners as compared with strangers,<sup>4</sup> there is a risk that perpetrators of sexual violence could obtain counselling records of their ex-partners. Even where access to the records is restricted to the perpetrator's lawyer, there remains a risk that where the

perpetrator then becomes self-represented, he or she would be entitled to access the records produced pursuant to a subpoena, unless the Court orders otherwise.

Furthermore, the breach of therapeutic confidence in complying with a subpoena may have significant consequences on the willingness of survivors to seek treatment in the first place because of the risks that the confidential information disclosed to their counsellor will, in turn, be disclosed in the legal process.<sup>5</sup> This, of course, is in a context where we know that counselling treatment is directed to assisting survivors of sexual offending to process and recover from their trauma.

Concerns about the ease with which sexual assault counselling records can be subpoenaed has led every Australian State and Territory to introduce some form of sexual assault counselling privilege. In short, sexual assault counselling privilege puts the onus on the person seeking the information to show not only the relevance of the information being sought, but also that the public interest in compelling production of the information is greater than the public interest in protecting the information from production. In all States and Territories, the privilege applies to criminal proceedings, and some jurisdictions, including Victoria, have extended the privilege to all legal proceedings.<sup>6</sup>

In Australia, family law proceedings are within the jurisdiction of the Commonwealth. Despite this, the Commonwealth is the only jurisdiction that does not have a sexual assault counselling privilege.

Having consulted with various counselling, domestic violence and sexual assault support services and organisations, we consider

4. Australian Bureau of Statistics, Key Findings 4906.0 - Personal Safety, Australia 2016, (November 2017).

5. 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.

6. *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).

that it is important for a form of privilege to be introduced in family law to protect communications made by survivors of sexual offences to their counsellors. This is intended to minimise the re-victimisation of survivors of sexual offending in family law proceedings and to encourage survivors to seek professional counselling assistance in the aftermath of a sexual offence.

Of course, it is also important to acknowledge that confidential information may still be disclosed in the legal process where a qualified privilege, such as the one proposed by this paper, exists. Under such a model, survivors may still have concerns about the potential breach of therapeutic confidence and therefore about seeking treatment. However, the proposed privilege is intended to re-calibrate the balance, in our view more appropriately, between the interests of justice and the public interest in encouraging survivors to seek appropriate therapeutic assistance by placing the onus of proof on the party seeking to issue the subpoena for a narrowly defined class of protected information.

### **What would a sexual assault counselling communication privilege entail?**

According to the formulation in most States and Territories, sexual assault counselling privilege protects communication between a counsellor and a client who is the survivor of a sexual offence generated in the course of their professional relationship.<sup>7</sup> Records containing sexual assault counselling communication are protected from compulsion by the privilege, as is oral evidence by the counsellor. To issue a subpoena for such records, a party must first apply to the Court for leave to do so.

A sexual assault counselling privilege can take one of two forms: absolute privilege or qualified privilege. Each is explained in turn below.

**Absolute privilege**, where sexual assault counselling communication cannot be disclosed or produced in any family law proceedings, is the strongest degree of protection that could be

offered to such records.

A version of absolute privilege for counselling communications is in force in Tasmania, where section 127B of the *Evidence Act 2001* (Tas) protects counselling communications made by or to a survivor of a sexual offence in the course of counselling or treatment and in circumstances that give rise to a ‘reasonable expectation of confidentiality or a duty of confidentiality’. Once privilege is established over the communication, it can only be disclosed or produced if the survivor consents. There are no other exceptions available.

The strength of absolute privilege is that it highlights the important role of therapy in a survivor’s healing process following a sexual offence, and gives the survivor agency to control the disclosure. However, an absolute privilege lacks flexibility in that it may prevent production of counselling records in matters where there is a legitimate forensic purpose for seeking such records.

**Qualified privilege** allows for production of sexual assault counselling communication to be restricted, 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.

Qualified privilege is the policy position of all Australian States and Territories, except for Tasmania.

For example, the Australian Capital Territory has established 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.<sup>8</sup>

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

7. *Evidence Act 1927* (SA), ss 67D-67F; *Evidence Act 2001* (Tas), s 127B; *Evidence Act 1995* (NSW), ss 126A-126I; *Criminal Procedure Act 1986* (NSW), ss 295-306; *Evidence (Miscellaneous Provisions) 1958* (Vic), ss 32AB-32G; *Evidence Act 1939* (NT),

ss 56-56G; *Evidence Act 1977* (Qld) Pt 2 Div 2A; *Evidence (Miscellaneous Provisions) Act 1991* (ACT), ss 54-67.

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

confidentiality of the protected communication.

This two-step process ensures that any party seeking disclosure of sexual assault counselling communication is required to demonstrate a legitimate forensic purpose for doing so. However, the issuing party is not prevented, in the appropriate case, 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.<sup>9</sup>

In its 2010 review of the Uniform Evidence Law, the Australian Law Reform Commission recommended that the *Evidence Act 1995* (Cth) be amended to include sexual assault communication privilege, in the form of a qualified privilege similar to the privilege provisions that exist in NSW.<sup>10</sup> However, this recommendation was not adopted, leaving the Commonwealth as the only jurisdiction without any form of sexual assault communication privilege.

We consider that while the Commonwealth Uniform Evidence Law is still lacking protection of sexual assault counselling communications, a qualified privilege should be first introduced into the *Family Law Act 1975*, given the prevalence of sexual assault and violence in domestic relationships, the need to encourage survivors to seek counselling and other treatment by protecting the privacy and confidentiality of such therapeutic relationships and the welfare and safety of the survivor.

Recommendation 1: A qualified privilege for sexual assault counselling records be introduced into either or both the *Evidence Act 1995* (Cth) and the *Family Law Act 1975* (Cth).

## Recommendation 2: Funding and resources

To support the practical effectiveness of the reform, we also recommend the funding of legal services to assist individuals and counselling services wishing to object to the production of counselling records in family law matters.

Not all counselling and sexual assault services have the resources or knowledge of legal processes to object to the production of counselling and therapeutic records in family law. This is even more so in the context of smaller counselling services or individual therapists, who may need to give up a day of work in a busy practice to attend court in order to object to a subpoena.

We also recommend that the government and Courts make available and accessible, user-friendly resources to assist survivors of sexual offending to enforce their rights throughout the family law process.

The availability of legal resources and services to assist counsellors and individuals wishing to protect their therapeutic records from disclosure would ensure the existing rights to object to subpoenas under family law – whatever those may be after this review – are actually enforced in practice.

Recommendation 2: That legal services be funded to provide legal support to counsellors wishing to object to a subpoena for their counselling records and that the government make available educative resources to help survivors of sexual offending enforce their rights in the family law system.

9. Ibid s 62.

10. Australian Law Reform Commission, *Family Violence - A National Legal Response*, Report No 114 (2010), [27.137].

## Other options for protection

Failing the introduction of these two recommendations, we note that there are other, smaller ways in which the experiences of survivors of sexual offending in the family law system could be improved.

### Restrictions on inspection

The *Family Law Rules 2004* (Cth) currently allow a person whose medical records are being subpoenaed to apply to the Court to inspect the medical records first before they decide whether they would object to the inspection or copying of the records by the issuing party.<sup>11</sup> Objections have to be lodged by a potential objector within 7 days from the date of production for the subpoena. No other person may inspect the medical records until the 7 day period expires, or if an objection is made, until after the objection has been determined.<sup>12</sup>

While the term ‘medical records’ is not expressly defined in the Rules, a broad interpretation of the term may cover some forms of sexual assault counselling communications. This may be a useful tool currently for a survivor of a sexual offence to first inspect what records have been produced pursuant to a subpoena, before deciding whether he/she would object to the issuing party accessing the information.

However, this mechanism is not without problems. Even with a 7 day initial inspection period, the idea of having to object to the production of sexual assault counselling records may further deter survivors of sexual offences from seeking counselling services. Further, a restriction on inspection still places the onus on the survivor or the counsellor to object, and not on the party seeking the records to establish that on balance, the public interest test favours production of sexual assault counselling

communication. For this reason, a qualified form of sexual assault counselling privilege is preferred.

Failing the introduction of sexual assault counselling privilege in family law, however, we suggest that the *Family Law Rules 2004* (Cth) be amended to clarify that the production of a sexual assault counselling communication shall be subject to an initial 7 day inspection period for a potential objector, as is currently the case with ‘medical records’.

### Enforcement of existing protections

Another option is to ensure a more responsible use of subpoenas by legal practitioners. This could be achieved through a practice direction by the Family Court or an attachment to the subpoena form setting out principles governing the issuing of a subpoena for sexual assault counselling communication, which might include:

- Emphasis on the detrimental impact that a subpoena may have on the therapeutic relationship between a survivor and their counsellor;
- Acknowledgement that access by an alleged perpetrator and/or their legal representatives may be subject to restrictions or certain undertakings;
- Highlighting the need for a legitimate forensic purpose in the seeking of subpoenas in relation to sexual assault counselling communication.

In the same vein, meaningful protection of counselling records under any of the avenues discussed above should be supported by appropriate and accessible resources and services to assist with the exercise of those rights.

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11. *Family Law Rules 2004* (Cth) r 15.31(3).

12. *Family Law Rules 2004* (Cth) r 15.31(4).



## 5. Conclusion

The prospect that counselling records concerning a sexual offence can be subpoenaed in family law proceedings exposes survivors of sexual offences to the risk of psychological, and possibly physical, harm and re-victimisation through the legal process. Furthermore, knowledge that their most sensitive information might one day be used against them in Court may dissuade survivors from seeking counselling services in the first place. At the same time, the need to protect the confidentiality of counselling communication should be balanced against the need for production of information to assist in the just determination of the dispute.

### **We recommend that:**

1. a qualified privilege be introduced to protect sexual assault counselling communication in family law proceedings. This would require a party seeking the issue of a subpoena for such counselling communication to demonstrate a legitimate forensic purpose, and the court to balance the public interest in protecting the communication against the public interest in disclosing the communication; and
2. the funding of legal services to counselling service providers and individuals wishing to object to a subpoena for their counselling records to increase awareness and enforcement of protections offered by family law, and the production of resources to ensure survivors are aware of, and can enforce their rights.

Failing the introduction of a qualified privilege, we recommend that other measures be taken to protect the interests of survivors of sexual offending in the court process. This may include promoting the responsible use of subpoenas by legal practitioners and clarifying in that the inspection restriction period for medical records includes counselling records.

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### **About this Paper**

This options paper was written by Chris Chosich and Julie Zhou as members of Liberty Victoria's *Rights Advocacy Project* ('RAP'). RAP is a community of lawyers and activists working to advance human rights in Australia. It is part of Liberty Victoria, one of Australia's leading human rights and civil liberties organisations.

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