'No Records. No Time. No Reason'

Protecting Rape Victims' Privacy and the Fair Trial

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The slogan 'No Records. No Time. No Reason' has been coined by the feminist coalition in Canada to highlight the need for an absolute ban on the disclosure of confidential personal information of sexual assault survivors during criminal proceedings. In Australia, the vulnerability of information contained in healthcare and counselling records to subpoena and thus to cross-examination in criminal proceedings was catapulted into public view by the decision of a rape crisis worker during a NSW committal to withhold production of her client's confidential file. Refusing to hand over her file notes to the court landed the rape crisis worker in gaol for contempt (*Police v White*).[1] Her decision to resist the subpoena was likely to have been influenced by a keynote address delivered by a Canadian feminist legal academic, Elizabeth Sheehy, at the First National Conference on Sexual Assault and the Law held in Melbourne in November 1995. Her address outlined how rape myths remain entrenched in the substantive law of consent and mistake and highlighted the defence strategies being employed to circumvent and frustrate the objectives of Canadian feminist reforms (Sheehy 1996). Most notably, the almost routine disclosure of information contained in healthcare and counselling records was providing new avenues for defence counsel to attack the credibility of the complainant and shift the focus of the trial to the moral character of the complainant. Australian feminists, particularly lawyers and rape crisis workers, were urged to resist these new tactics: 'No records. No time. No reason'!

This article will explore the evidential and procedural issues surrounding defence access to the confidential healthcare and counselling records of sexual assault victims. In determining whether confidential communications should be disclosed in legal proceedings, the court must balance competing public interests. Both the common law doctrine of public interest immunity and its statutory counterparts require the court to weigh the importance of preserving healthcare and counselling confidentiality *against* the right of the accused to a fair trial. However, in the criminal context, the 'balancing' approach (which is reflected in the current proposals for reform in NSW) is structurally skewed in favour of the accused and against sexual assault victims. Notwithstanding the existence of rights to

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1 She was released after four hours having provided the information in a locked briefcase on the understanding that the matter of admissibility would be determined at the trial, rather than at the committal.

privacy, access to justice and medical treatment, it is extremely difficult for sexual assault victims to construct a persuasive case for non-disclosure. In light of this inequality, the author explores an alternative framework of exclusionary rules that could be applied to confidential healthcare and counselling communications — a framework which aims to maximise the privacy of sexual assault victims and to protect the accused's right to a fair trial.

The NSW proposal: A guided judicial discretion

The publicity surrounding the committal in NSW led to intense political lobbying and the formation of a non-government working party of feminist lawyers, legal academics and counsellors to investigate the legal options for reform. The NSW Working Party Concerning the Confidentiality of Counsellors' Notes prepared a background paper which recommended the creation of a statutory client privilege rather than a judicial discretion to permit a counsellor to refuse to disclose confidential information (Cossins et al 1996; see also, Jones 1996). The NSW Attorney-General, rather than commission a separate review of confidentiality in sexual assault trials, referred the matter to a review (already underway) of the law of privilege in civil and criminal proceedings. The resulting Discussion Paper focused on the need for *ad hoc* protection for witnesses, such as journalists, who were required to breach a professional confidence in legal proceedings (NSW Attorney General's Dept 1996). The Discussion Paper included draft legislation to expand the categories of privilege to include 'professional confidential relationship privilege' (*Evidence Amendment (Confidential Communications) Bill* 1996, hereafter 'NSW Bill').

Media confidentiality raises important issues of freedom of expression but these are *fundamentally* different from the tension between the rights to privacy and a fair trial which arises when confidential personal records are disclosed in a sexual assault trial. In the context of a general review of the law, the Discussion Paper paid only scant attention to the concerns that had been raised by various feminist lobby groups. By contrast, the Canadian Justice Minister has recently announced legislation, specifically addressing feminist concerns, which would limit defence access to confidential records in sexual assault trials (*The Globe and Mail*, Toronto, 31/5/96:1).

Rather than create a specific privilege for healthcare or counselling communications, the NSW Bill proposes the adoption of a 'guided discretion' to exclude evidence of a 'protected confidence'. A 'protected confidence' is defined as a confidential communication made by one person to another person acting in a professional capacity; it includes the contents of documents or information which reveals the identity of the person who made the communication (Clause 126A, *Evidence Amendment (Confidential Communications) Bill* 1996). The Discussion Paper, whilst acknowledging the special case of legal professional privilege, concurred with other law reform reports that 'no rationale could be found for a blanket privilege for other professionals'(NSW Attorney General's Dept 1996:14).

The NSW Bill, which would amend the *Evidence Act* 1995 (NSW), provides:

Division 1A Professional confidential relationship privilege

...

126B Exclusion of evidence of protected confidences

(1) The court may direct that evidence not be adduced in a proceeding if the court finds that adducing it would disclose a protected confidence.

(2) The court may give such a direction:

(a) on its own initiative, or

(b) on the application of the protected confider or confidant concerned (whether or not either is a party).

(3) The court must give such direction if it is satisfied that:

(a) if the evidence is adduced it is likely that harm would or might be caused (whether directly or indirectly) to a protected confider, and

(b) the nature and extent of the harm outweighs the desirability of the evidence being given.

Unlike the other categories of privilege recognised under the *Evidence Act* 1995 (NSW/Cth) (ss.117–126, client legal privilege; s.127, religious confessions — NSW only; s.128, privilege against self-incrimination) and the common law, the 'professional confidential relationship privilege' is based on a discretion. Although the idea of a 'case-by-case privilege' is one which is familiar to North American lawyers, it remains alien to Australian lawyers.[2] In the United Kingdom and Australia *ad hoc* content-based claims for protection of confidential material are framed in terms of 'public interest immunity' rather than privilege (*Conway v Rimmer*; *Sankey v Whitlam*; *Alister v R*). This immunity evolved from 'Crown privilege' which restricted the disclosure of confidential 'matters of state' in legal proceedings. The modern law of public interest immunity now extends to any communications where disclosure would be contrary to the public interest (*D v NSPCC*; see also, Ford 1996). However, both the English and the Australian courts have adopted a restrictive view of the scope of the immunity, demonstrating reluctance to extend its scope to hitherto unprotected classes of information (*Aboriginal Sacred Sites Protection Authority v Maurice*). The courts are reluctant to view information created in normal health care relationships as attracting any special interests which justify non-disclosure (*Science Research Council v Nassé*). In *Re M (a Minor) (Disclosure of Material)*, the English Court of Appeal held that social work records do not have absolute immunity from disclosure.

The NSW Bill purports to enact a new class of privilege — 'professional confidential relationship privilege'. This characterisation is somewhat misleading as the provision creates a judicial *discretion* not to admit evidence in certain defined circumstances.[3] This power, which may be exercised by the court on its own initiative (Clause 126B(2),[4] resembles the existing power to exclude, through the exercise of a discretion, evidence in the public interest.[5] Rather than distorting the meaning of privilege, the proposed power (if it is enacted) should be included in the division of the *Evidence Act* 1995 (NSW) dealing with the discretion to exclude evidence in the public interest (ss.130–131).

The NSW Bill attempts to structure the exercise of the judicial discretion by including a non-exhaustive list of matters which the court may take into account. These include the

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2 In the United States and Canada, in expanding the law of privilege to include case-by-case or limited privilege, the courts commonly cite the test laid out in the influential treatise by J Wigmore, *Evidence in Trials at Common Law* 1961:2285; see also *R v Beharriell* :110, 122–123, per L'Heureux-Dubé J.

3 Apart from its appearance in several subtitles in this Division, the proposed Bill does not use the term 'privilege'.

4 The courts are under a duty to consider the application of public interest immunity, even where the matter is not raised by one of the parties: *Science Research Council v Nassé*:681, per Lord Wilberforce. Since privilege is a personal right, the courts have never claimed an equivalent power to raise the issue of its own initiative.

5 In the *Evidence Act* 1995 (NSW/Cth), the discretion to exclude evidence in the public interest applies to evidence of reasons for judicial decisions (s.129), evidence of matters of state (s.130) and evidence of settlement negotiations (s.131).

importance of the evidence; the nature and gravity of the offence; the availability of other evidence relating to the subject matter of the protected confidence; the likely effect of disclosure to the confider; the means available to limit the extent of harm likely to be caused by disclosure; whether or not the defendant or prosecutor is seeking disclosure; and whether or not the substance of the protected confidence has already been disclosed (Clause 126B(4)(a)–(g)). The court is obliged to state its reasons for refusing to give a direction under this section (Clause 126B(5)).

Balancing metaphors: A choice between moral imperatives?

The Supreme Court of Canada has consistently rejected the creation of a class privilege for confidential communications made in the course of a professional relationship (*O'Connor*; *Beharriell*; *Osolin*; see also Ford, 1996). In determining whether communications in particular proceedings are privileged, the Supreme Court has adopted a 'balancing approach' to the competing rights protected by the *Canadian Charter of Rights and Freedoms*: in each case, the trial judge weighs the rights of privacy of sexual assault victims *against* the accused's right to a fair trial. In balancing these two competing rights, the following factors must be considered (1) the necessity of the production of the record for the accused's right to make full answer and defence; (2) the probative value of the record; (3) the nature and extent of the expectation of privacy in the record; (4) whether production of the record would be premised on any discriminatory belief or bias; (5) and the potential prejudice to the complainant's dignity, privacy or security of person that would be occasioned by production of the record (*O'Connor*).

The proposed discretion in the NSW Bill, like public interest immunity, similarly involves *balancing* competing interests. In both cases, however, the use of the balancing metaphor obscures the fact that the law requires the trial judge, in each individual case, to make a *choice* between conflicting moral imperatives. To make this choice, the trial judge must assess the relative importance of two competing values — the public interest in preserving the confidentiality of counselling communications on the one hand, and the importance of the fair trial on the other (NSW Attorney-General's Dept, 1996:15). The central, indeed overriding, importance attached to the fair trial principle under both Australian (*Dietrich*) and international law (Article 14 of the *International Covenant on Civil and Political Rights*) means that establishing an individual case for non-disclosure during a sexual assault trial would be extremely difficult. As one English judge has recently observed, balancing competing public interests in the context of the criminal trial is inherently different from that undertaken in civil proceedings:

> In the context of a criminal trial how can there be a more important public interest than that the defendant should have a fair trial and that documents which might assist him to establish his innocence should be withheld from him. In civil cases where private interests are in competition, the interests of one party may from time to time have to be subordinated to the greater public good (Scott, 1996:7).

The NSW Bill proposes that the judge, in exercising the discretion, may consider *inter alia* the nature and gravity of the offence or defence and whether the party seeking disclosure is a defendant or the prosecutor (Clause 126B(4)(a) and (f)). Given the overriding public importance attached to the fair trial principle, trial judges naturally will be reluctant to restrict access to material which is likely to be relevant to the defence.[6]

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6 In Canada, the Supreme Court has held that where the confidential material is in the possession of the

Threshold tests: Relevance, reliability and 'fishing expeditions'

Before balancing these competing interests (either under the doctrine of public interest immunity or the NSW Bill) a court must first determine the threshold question of relevance. As a matter of general law, all evidence must be relevant in order to be admissible (section 56(1) and (2), *Evidence Act* 1995 (NSW/Cth)). The question of relevance (or more accurately, the question of *likely relevance* in the case of evidence whose disclosure is being sought from a third party) logically should be addressed *before* the balancing exercise is undertaken. Regrettably this two stage approach is not spelled out in the NSW Bill. By contrast, the Supreme of Canada held that the trial judge must consider the 'likely relevance' of the evidence before balancing the salutary and deleterious effects of disclosure and the limitations that non-disclosure would have on the accused's right to a fair trial (*O'Connor*:253–257).

There is plenty of scope for confidential professional communications to be *relevant* to the issues in a sexual assault trial. Healthcare or counselling records may contain information bearing on the competence or reliability of the witness to testify. But some claims of relevancy, particularly those which are not tied to specific lines of defence, will be difficult to sustain. Indeed, the Supreme Court of Canada has held that an accused was not entitled to cross-examine a sexual assault complainant on her psychiatric records in order to show 'what kind of person the complainant is'(*Osolin*: 481). Equally, the Court refused to authorise 'fishing expeditions' by subpoena merely because the accused has asserted that disclosure of the record may reveal prior inconsistent statements by the victim (*Osolin*: 495–496). On the other hand, the Court acknowledged that confidential records may be relevant to the issue of witness reliability where the techniques in counselling or therapy are capable of distorting memory (*O'Connor*: 257). Indeed, this type of challenge is likely to be increasingly common bearing in mind the emerging body of medical literature disputing the validity and reliability of allegations of sexual assault which are based on repressed memory (Freckleton 1996; Adams 1995).

Some judges have doubted the relevance of counselling communications where the claims serve illegitimate purposes or are based on discriminatory or stereotypical reasoning (*O'Connor*:299, per L'Heureux-Dubé J; Sheehy,1996:105–106). Such sweeping claims of 'irrelevance' fail, however, to appreciate that relevance is determined by the *legal rules* that define and delimit the 'facts in issue'. Put simply, the concept of relevance does not exist in a legal vacuum; it is itself shaped by the discriminatory and stereotypical reasoning embedded in the substantive law.

In the context of sexual assault trials, the facts in issue are determined by the legal definition of the offence charged and by the defences which the accused legitimately may raise. In many jurisdictions, including NSW, claims of consent and/or mistaken belief in consent may allow the accused to raise dangerous rape myths *legitimately*. Often the woman's purported sexual history (that she enjoyed group sex) or even mental profile (that she was masochistic) will be central to these claims (*Director of Public Prosecutions v Morgan*).[7] A statement made during counselling may shed light on the defence of consent

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Crown, as opposed to a third party, the ordinary rules of disclosure apply — the material must be provided to the defence notwithstanding its potentially privileged nature: see *O'Connor*:247–251. The obligation of disclosure in Australia is less onerous for the Crown: see *Lawless*. It has been suggested that the law is outdated since it does not reflect the High Court's development of the common law right to a fair trial (Hunter and Cronin 1995: 199).

7 In NSW the Court of Criminal Appeal held that the accused's inadvertence to another person's consent

— for example, rape victims often explore their feelings toward the accused and whether they really 'wanted' the sexual intercourse to occur. Such statements may also have a bearing on the accused's mental state, in particular, the credibility of the claim of mistaken belief — survivors might also explore whether their conduct led the accused to believe that there was consent. The continued legal acceptance of these myths, and therefore the legitimacy accorded to them, frustrates the law's objective of promoting appropriate standards of sexual behaviour.

It is important to distinguish between relevance and reliability. Counselling communications, though relevant, may not be reliable. As one Canadian judge observed '[t]herapy is an opportunity for the victim to explore her own feelings of doubt and insecurity. It is not a fact-finding exercise' (*O'Connor*: 299, per L'Heureux Dubé J). Unreliable evidence does not cease to the relevant, but its admissibility may be challenged under the general judicial discretion (s.134 of the *Evidence Act* (NSW/Cth)) to exclude otherwise relevant evidence on the ground that its probative value is substantially outweighed by the danger that the evidence might (a) be unfairly prejudicial to a party; (b) be misleading or confusing; or (c) cause or result in undue waste of time. Counselling and healthcare records may be susceptible to exclusion under this section. Unfair prejudice may arise because of the adverse inference that the jury may draw from the fact that the complainant has a counselling or 'mental health' history. Moreover healthcare or counselling records are not verbatim transcripts of meetings with clients. The jury may not appreciate that statements made and recorded during these sessions are prepared for solely therapeutic purposes and should not be relied upon to establish accurate historical records for criminal proceedings (*Beharriell*: 117). Admissibility challenges of this type by the prosecution or third parties (victims, healthcare or counselling professionals) would contribute to trial delay. Arguably, the proposed discretion in the NSW Bill is redundant — it would offer little more protection than the present law provides to confidential healthcare or counselling communications.

The link between the rules of evidence and the substantive law requires careful attention. Indeed, their interrelatedness ultimately suggests that an *holistic* approach to rape law reform is required. Legal definitions which legitimate dangerous mythologies about female sexuality must be abandoned. In Canada, there has been some attempt to limit the scope of mistake defences based on dangerous rape myths: the accused can only raise mistake where (a) he is not intoxicated and (b) he has taken reasonable steps to ascertain that the women consented (s.273.2, *Criminal Code*; see also Bronitt 1994). Until such concerns are addressed in Australia, dangerous rape myths will continue to be relevant *legally speaking* to the issues raised at the trial, notwithstanding feminist objections (Standing Committee on Social Issues 1996: 37,52–4).

Another weakness of the NSW proposal is that the Bill does not specify either the burden or standard of proof. Does the party seeking disclosure of the confidential communication need to establish (a) the likely relevance of the communication and (b) that non-disclosure would have an adverse effect on his right to a fair trial? Does the party arguing against disclosure need to prove 'likely harm'? What standard of proof applies? What happens in cases where the court desires to makes a direction not to disclose a protected confidence 'on its own initiative' under clause 126B(2)(a)? How would the court satisfy

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could constitute recklessness for the purpose of sexual assault: *Tolmie*. Although qualifying the Morgan principle, the decision did not disturb the principle that a *positive* mistaken belief in consent (however unreasonable) precludes liability for rape. Such mistakes in NSW may legitimately incorporate dangerous rape myths.

itself about these issues? These are significant practical questions which are not addressed in the proposed legislation.

Constructing the case against disclosure

Establishing the requisite 'harm' to justify exclusion under public interest immunity or the proposed discretion in the NSW Bill, will presumably require the party arguing against disclosure to adduce material establishing the likely negative impact of disclosure. This could include material on the likely negative impact of disclosure upon (a) the counselling relationship (in general and/or in the particular case) and/or (b) the criminal justice system (deterring victims from reporting or cooperating). It has been argued that these 'utilitarian arguments' favour a very high level of protection for confidential records (Laurence, 1984: 1221–1226). Of course, it should be recognised that the judicial act of inspection *itself* compromises the confidentiality of the professional relationship. Disclosure may be to the court *in camera* but it is still disclosure.

There is a considerable body of professional opinion (from rape crisis workers, counsellors, psychologists and criminologists) which highlights the importance of the counselling relationship to sexual assault victims and the detrimental health, personal and professional implications of unwanted disclosure of confidential communications. The Discussion Paper referred to 'anecdotal evidence' supporting the view that fear of disclosure has caused clients to leave counselling and/or withdraw complaints. The evidence alleged to be 'anecdotal' was based on more than 50 submissions (21 victims and 30 counsellors and Sexual Assault Services) to the NSW Working Party. The respondents provided evidence that unwanted disclosure would lead to re-victimisation by the legal process; hamper the recovery process; cause victims' to fear retribution (by disclosure of personal details to the accused etc); deter reporting of sexual assault; and pose ethical dilemmas for counsellors (Cossins et al 1996: 4–10). However, a court exercising this discretion against the accused to exclude the confidential communications may require *stronger* evidence than the possibility that the professional relationship would be compromised. Since few judges have experienced the trauma of sexual abuse, the likely negative impact of disclosure on the counselling relationship will be difficult to gauge without opinion evidence from experts. The success of such claims will depend on the persuasiveness (that is the credibility and credentials) of these expert witnesses. Expert opinion may assist the judge understand the importance of the counselling relationship. However, this dependence on experts means that women's experiences are only taken seriously in court where they are recounted through independent, credentialised voices of healthcare professionals (O'Donovan 1993; Easteal 1992). The practical question of 'who pays?' for this expertise must also be addressed. In Canada, legal aid has been denied both to sexual assault victims and rape crisis centres who have attempt to resist disclosure of their records (Sheehy 1996:108). Against these 'likely harms', which are often intangible and difficult to substantiate, the judge must weigh the fair trial principle, a central aspect of which is the right of the accused to make 'full answer and defence'.

The balancing exercise in the NSW Bill, which mirrors the law of public interest immunity, is unrealistic and unworkable in the context of sexual assault trials. The better approach is to create a blanket protection for communications between healthcare and counselling professionals and their clients. At common law, there are categories of confidential communications which are absolutely privileged, for example, legal professional privilege. The NSW Discussion Paper overlooked the leading case of *Carter* where the High Court recognised the paramount importance of protecting the privacy of communications between lawyers and their clients and unanimously rejected an argument that this rule was subject to a

public interest exception that disclosure should be allowed in a criminal trial where the information is relevant to establishing the accused's innocence.[8] The ruling, however, did not affect the established qualification that legal professional privilege cannot attach to communications which are prepared in the furtherance of the commission of fraud, an offence or an act which renders a person liable to a civil penalty.[9] The rationale for the breadth of protection under the common law is not just privacy of communications; it relates more fundamentally to the importance of maintaining the independence and integrity of the legal system:

> It plays an essential role in protecting and preserving the rights, dignity and freedom of the ordinary citizen — particularly the weak, the unintelligent and the ill-informed citizen — under the law (*Carter*: 26, per Deane J).[10]

Professional counselling relationships perform a similar support role for sexual assault victims. Disclosure undermines confidence in the counselling relationship and ultimately interferes with the administration of justice by deterring the reporting of serious criminal activity.

Absolute privacy and protecting the fair trial

The common law has the capacity to extend the law of privilege or public interest immunity to cover professional counselling communications. However, the Australian courts, unlike their US and Canadian counterparts, have guarded against the proliferation of privileges. Given this judicial reluctance, the legislature must intervene to protect the rights of victims of sexual assault. The potential violation of international human rights provisions caused by the unwanted disclosure of confidential communications may even provide a warrant for Commonwealth intervention through the external relations powers. Indeed, the Federal Government has already used this head of power to legislate to render inoperative Tasmanian homosexual offences which infringe international human rights provisions (*Human Rights (Sexual Conduct) Act* 1995 (Cth); see also Bronitt 1995a).[11]

Several human rights may be infringed by unwanted disclosure of counselling communications. Of primary important is Article 7 of the International Covenant on Civil and Political Rights (ICCPR) which prohibits 'cruel, inhuman or degrading treatment', and the right to privacy in Article 17 which provides that '[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation'.

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8 By contrast, s.123 of the *Evidence Act* 1995 (NSW) provides that privilege does *not* prevent a defendant in criminal proceedings from adducing evidence of an otherwise protected communication.

9 Brennan J noted that the privilege cannot be invoked for an illegal purpose, at 24. See also s 125, *Evidence Act* 1995 (Cth/NSW).

10 The privilege is not a 'mere rule of evidence, it is a substantive and fundamental common law principle': id. A recent decisions of the House of Lords similarly stressed the 'absolute and permanent nature of legal professional privilege'. The Court held that a witness summons (subpoena) could not be issued to compel the production of notes exchanged between a Crown witness (who the defendant alleged had in fact committed crime) and his solicitor: *R v Derby Magistrates' Court, ex parte B.*

11 The validity of the Act is currently being challenged before the High Court: *Croome and Toonen v Tasmania* (matter H4, 1995, argued 10/9/96).

The disclosure of this material in open court and allowing sexual assault victims to be cross-examined on such sensitive material by either the defence or prosecution may infringe both provisions. The prohibition in Article 7 is absolute and admits no qualifications or exceptions. The right to privacy however only offers protection against *arbitrary* interference with privacy — an accused seeking disclosure would argue that the evidence is necessary in order to protect the right to a fair trial guaranteed by Article 14 of the ICCPR.[12] The scope of the right to privacy in the ICCPR was considered in *Toonen v Australia.* Although the case concerned the legality of Tasmanian homosexual offences, the Human Rights Committee (HRC) provided some general guidance on the meaning of 'arbitrary interference with privacy'. The HRC recalled that the 'introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by the law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event reasonable in the circumstances' (*Toonen v Australia*: para 8.3). Reasonableness in this context means that the measure which interferes with privacy must be proportional to the end sought and be necessary in the circumstances of any given case. Although legal rules which interfere with privacy in order to protect the fair trial principle serve a legitimate objective, the creation of broad fair trial exceptions (for example where disclosure is necessary to prove the 'innocence' of the accused) is *not* proportional to that objective. Indeed, there exist other *equally effective* means of accommodating fair trial concerns without breaching the confidentiality of the counselling relationship, namely, the inherent jurisdiction of the courts to stay a prosecution on the ground that the trial, if it proceeds, would be unfair (*Dietrich*). The practicality of a framework of protection which explicitly incorporates this fair trial safeguard is discussed below.

Another source of international law which mandates a higher level of protection for sexual assault victims is the United Nations resolution entitled *Protection of the Human Rights of Victims of Crime and Abuse of Power* (1990). This resolution directed that Governments must take into account the United Nations *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (1985) in framing national legislation. The Declaration is not a binding instrument under international law, but as a form of 'soft law' serves as an important guide for law reform in this area. It aims to establish best practice standards for the treatment of victims in the criminal justice system. There are four types of protections for victims prescribed in the Declaration: (i) access to justice and fair treatment; (ii) restitution; (iii) compensation; and (iv) assistance. Access to justice and fair treatment requires the adoption of judicial and administrative processes for victims which are expeditious, fair, inexpensive and accessible. The Declaration highlights, inter alia, the right to obtain assistance throughout the legal process. The system's responsiveness to the needs of victims should be facilitated by adopting measures to 'protect their privacy, when necessary, and ensure their safety, as well as their families and witnesses on their behalf' (*Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (1985) DPI/895/August 1986/10M:5).

The 'right to assistance' envisages that 'victims should receive the necessary material, medical, psychological and social assistance through governmental, voluntary, community-based and indigenous means'. It also recognises that police, justice and other personnel should receive training to sensitise them to the needs of victims. Disclosure would

12 Article 14(3)(b), one of the minimum guarantees of the fair trial, protects the right of the accused to 'adequate time and facilities for the preparation of his defence'. It has been suggested that the term 'facilities' includes access to the documentation necessary for the defence (Muhammad, 1981:152).

clearly damage the effectiveness of the medical and psychological assistance which is offered to victims.

The creation of an *absolute* statutory privilege for a hitherto unprotected class of confidential information would not be unprecedented. Under Commonwealth and ACT law, documents or communications prepared or obtained in the course of a designated epidemiological study cannot be produced to a court (*Epidemiological Studies (Confidentiality) Act* 1981 (Cth); *Epidemiological Studies (Confidentiality) Act* 1992 (ACT)). These little-known and as yet untested provisions have been used to protect the confidentiality of studies conducted in the course of the 'heroin trial' feasibility study (Bronitt 1995b). Section 8(1) of the ACT statute provides:

Protection of information from court

8.(1) A person who has assisted, or is assisting in the conduct of a prescribed study shall not be required-

(a) to produce in a court, or permit a court to have access to, a document prepared or obtained in the course of that study, being a document concerning the affairs of another person; or

(b) to divulge or communicate to a court any information concerning the affairs of another person acquired by the first-mentioned person by reason of that person having assisted, or assisting, in the conduct of that study.

A similar exclusionary rule, rather than a discretion or privilege, should be enacted for confidential information relating to victims of sexual offences which has been obtained or prepared in the course of a professional relationship. As the need for confidentiality is greatest for victims of sexual offences, the protection should be limited to criminal proceedings for specified offences in the *Crimes Act* 1900 (NSW), that is, sections 61H–66F. For the reasons outlined above, broad exceptions relating to the fair trial interests (eg where disclosure is necessary to establish the 'innocence of the accused') must be rejected.

Enacting an absolute statutory protection carries the risk that those accused of sexual assault may be denied evidence which would materially assist with their defence, thus jeopardising their right to a fair trial. However, in such a situation the right to a fair trial is more than adequately protected by the inherent jurisdiction of the courts to grant a stay, permanent or temporary, to prevent an unfair trial (*Dietrich*). The stay has been used in NSW cases where the rape shield legislation, which prevents the admission of evidence relating to the complainant's sexual history, is alleged to have violated the accused's right to a fair trial (*R v Morgan*; *R v Bernthaler*; see also 'Editorial — Staying A Trial For Unfairness: The Constitutional Implications' 1994). More recently, the NSW Court of Criminal Appeal has held that trial judges do not have the power to invoke this inherent jurisdiction where the unfairness is caused by the operation of a validly enacted statute of Parliament (*R v PJE*; *Grills and PJE v R*).[13] The power of the court to restrain the operation of otherwise valid statutes is controversial, raising questions about the proper role of judiciary and the separation of powers. To clarify this issue, the statutory protection envisaged here

13 *R v PJE* per Sperling J, Cole JA and Grove J concurring. In dismissing the accused's application for special leave to appeal to the High Court, Brennan CJ (speaking for the majority of the Court) expressed the view that the Court of Criminal Appeal decision was 'clearly correct' and that a court could not invoke a stay because a law enacted by Parliament is unfair: *Grills and PJE v R* transcript :15.

should *expressly* reserve to the courts their inherent power to stay the trial on the grounds of unfairness.

It is well recognised that a temporary or permanent stay should be invoked only as a measure of 'last resort'. Its use frustrates the public interest in bringing offenders to trial and may also undermine public confidence in the administration of criminal justice (*Jago*: 49, per Brennan J). In the context of rape trials, it may also expose the complainant to the risk of re-victimisation or harassment by the accused. Before granting a stay, the judge would have to be satisfied that the material is *likely to be relevant* to an issue at trial. If some of the reforms of the substantive law outlined above are adopted the scope for *legitimate* claims of relevance may greatly diminish.[14] The burden should rest with the accused to establish that the non-disclosure has, on the balance of probabilities, impaired his right to a fair trial.

In its strongest form, protected material cannot be produced in court even for the purposes of inspection (s.8, *Epidemiological Studies (Confidentiality) Act* 1992 (ACT)). A less radical provision would allow the court *in camera* to inspect the protected communications and/or interview relevant witnesses. Only where a court is satisfied that, without the benefit of this evidence, there is real risk of an unfair trial, should a stay be granted.

The advantage of this approach is that it exposes the conflict between the competing imperatives of privacy and the fair trial, rather than merely retreating behind a judicial discretion which is structurally skewed in favour of the accused and against sexual assault victims. Some of the concerns about the drastic nature of the stay can be addressed by making the order conditional. Rather than grant a permanent stay, a court could stay the trial until or unless the relevant confidential communications were made available to the court. In the case of documents, the judge could take steps to ensure that only relevant parts of the communication were released to the accused. (The NSW Bill envisages this power to suppress part of the evidence: Clause 126E.) Where the victim complied with the condition, in effect exercising the right to waive the statutory protection, the trial would continue. With greater understanding of the relevance of this information, coupled with appropriate mandatory judicial warnings about the purpose of counselling and the dangers of misreading counselling communications, the trauma of disclosure in court should be much reduced. This scheme has the benefit that the sexual assault victim, rather than the court, has control over this significant decision. Indeed, my view on the role and value of waiver has been significantly influenced by discussions with rape crisis workers: from a counselling perspective, waiver empowers the victims to make decisions about the conduct of the case and helps to overcome common feeling of powerlessness experienced by victims (this view was expressed at a National Women's Justice Coalition forum, Canberra, 27/3/96). Of course, the countervailing concern is that women will feel unconscionable pressure to allow disclosure. In deciding whether to discharge the stay in these circumstances, the court must give careful consideration to the voluntariness of the decision.

Conclusion

The NSW Attorney-General must reconsider this issue of confidentiality in sexual assault trials in the context of a *range of measures* aimed to improve the treatment of victims of

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14 In the Canadian context, it has been suggested that the recent feminist reforms that clarify the law of consent 'should incidentally reduce the demand for past sexual history' (McInnes and Boyle 1995:360).

sexual violence by the legal system (Standing Committee on Social Issues 1996). The need to adopt an holistic approach is apparent when the broader questions about the success and failure of rape law reform are considered. Why is it that defence counsel in Canada and Australia are seeking disclosure of counselling communications in rape trials? The answer, in part, lies in the relative success of the 'rape shield' provisions in both countries which have severely limited the admission of evidence of sexual reputation and history in an effort to protect victims from further victimisation by the legal process (see s.409B, *Crimes Act* 1900 (NSW)). When the traditional avenues of discrediting the character and conduct of the sexual assault victims are closed, the defence seeks new lines of attack. This point has been recognised by Canadian feminist judge L'Heureux-Dubé J:

> It is not without significance that this challenge to the credibility of the witness has arisen in the context of a sexual assault trial. It has, since 1983, by reason of the now s. 277 of the Criminal Code, been impermissible to challenge the credibility of a complainant by adducing evidence about her sexual reputation. ... The amendments strongly evidence Parliament's desire to instate guidelines to prevent the diversion of sexual assault trials into inquiries into the moral character and past behaviour of the complainant. In my view, there is a real risk that the use of medical records may become the means by which counsel indirectly bring evidence concerning the complainant before the trier of fact which they are no longer permitted to do directly. Moreover, because of the beliefs which have typically informed notions of relevance and credibility in sexual assault trials, the mere existence of challenges to credibility on mental or psychiatric grounds in a sexual assault trial raises serious questions about the persistence of rape myths (*Osolin*: 497–498).

As one proponent of an absolute privilege for counselling communications concluded:

> In similar situations, judges deciding the admissibility of victims' past sexual activity have frustrated the protection intended by the rape shield laws. The judiciary is not immune from societal misconceptions about rape. As a result, judges with discretion over the admissibility of prior sexual conduct of the victim persist in admitting the evidence although legislatures intended otherwise. In addition, judges tend to admit evidence because they fear reversal on appeal. If judicial biases are typical, removing as much of the court's discretion from the privilege as possible would best protect the victim (Laurence 1984: 1235; see also Bargen and Fishwick 1995: 86–90; Mack 1993).

Rape law reform is being undermined on many fronts. A regime which seeks to protect women's interests through a judicial discretion is inadequate and ultimately unworkable.

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