The Sexual Assault Communications Privilege Pro Bono Scheme

By Catherine Gleeson

In April 2009 the Women's Legal Service, together with the New South Wales Bar Association, Freehills, Clayton Utz and Blake Dawson and with the assistance of the Office of the Director of Public Prosecutions launched a pro bono referral program directed at offering assistance to complainants in sexual assault proceedings who wish to make a claim of Sexual Assault Communications Privilege (SACP). The scheme was initially limited to trials in the District Court, but participants have offered assistance in other courts in and outside Sydney.

SACP is a statutory privilege created by the provisions of Part 5, Division 2 of Chapter 6 of the *Criminal Procedure Act 1986* (NSW). Its object is to protect records of counselling communications (whenever made and whether or not related to the event about which a report of sexual assault is made) made by complainants in sexual assault matters. The policy basis for the privilege is that disclosure of confidential records of counselling in the course of a sexual assault trial is likely to cause harm, and may lead to a reduction in reports of sexual assault, withdrawal of complaints once made, and disruption of the counselling process.

Since inception, the legislature has recognised that the disclosure of counselling records in response to subpoenas issued in sexual assault trials has the potential to cause significant embarrassment and trauma to a sexual assault complainant. The potential outcomes have been recognised as being contrary to the public interest.[1]

The principal challenge facing those who may be affected by disclosure of counselling records in sexual assault trials is the need for information and legal representation to enable them to protect their rights. The ODPP cannot give advice to complainants in relation to this aspect of their rights. Further, the protection of privileged material often rests on the hope that the recipient of a subpoena seeking counselling records is aware of the existence of the privilege and raises the issue. Complainants frequently do not receive notice that a subpoena has been issued or that a party seeks to use evidence of their counselling records until it is too late.

The object of the pilot program was twofold: first, to provide sexual assault complainants with free legal advice and representation in relation to claims for sexual assault communications privilege, and second, to provide a practical reference for submissions in relation to legislative reform of the privilege, both in New South Wales and in relation to the Commonwealth Model Uniform Evidence Bill. This article deals with the author's personal experiences in the former context, both as a solicitor at one of the participant firms and as junior counsel since coming to the bar.[2]

Legislative framework

A series of amendments made in response to a restrictive interpretation of the scope of the privilege by the Court of Criminal Appeal[3] has broadened the scope of the privilege considerably.

What is protected?

The starting point for identification of counselling communications protected by the SACP provisions is whether they fall within the definition of 'protected confidences' in section 296 of the CPA. A protected confidence is a confidential counselling communication made by, to or about a victim or alleged victim of a sexual assault offence (s 296(1)). Counselling communications fall within section 296 even if the communication is made before the acts constituting the relevant sexual assault offence occurred or are alleged to have occurred; and even if not made in connection with a sexual assault offence or alleged sexual assault offence or any condition arising from it (s 296(2)).

A counselling communication will be caught by the legislation if made in a number of circumstances. These include:

(a) communications by a person (the 'counselled person') to another person (the 'counsellor') who is counselling the person in relation to any harm the person may have suffered (s 296(4)(a));

(b) communications to or about the counselled person by the counsellor in the course of counselling (s 296(4)(b));

(c) communications between the counsellor and another person who is counselling, or has at any time

counselled, the person (s 296(4)(d));

(d) communications about the counselled person by a counsellor or a parent, carer or other supportive person who is present to facilitate communication between the counselled person and the counsellor or to otherwise further the counselling process (s 296(3), s 296(4)(c)).

The legislation defines a counsellor as a person who has undertaken training or study or has experience that is relevant to the process of counselling persons who have suffered harm; and listens to and gives verbal or other support or encouragement to the other person, or advises, gives therapy to or treats the other person, whether or not for fee or reward (s 296(5)). The definition is deliberately broad and is intended to encompass persons such as psychiatrists and psychologists as well as more general medical practitioners and those who have no formal medical or psychological qualifications but training or experience in counselling or other support services.

The relevant counselling must be undertaken in relation to any harm the person may have suffered (s 296(4)(a) ff). The term 'harm' is again defined broadly, to include actual physical bodily harm, financial loss, stress or shock, damage to reputation or emotional or psychological harm, such as shame, humiliation and fear (s 295(1)).

When is disclosure permitted?

The SACP provisions create a staged process for protection of counselling communications.

The preliminary stage

Pursuant to section 297, there is an absolute privilege against production or adduction of evidence of protected confidences during preliminary criminal proceedings (including committals and bail hearings). This means that all that need be demonstrated at this stage is that documents sought by subpoenas or sought to be used in evidence record protected confidences.

The trial stage

Pursuant to section 298, the privilege is qualified at the trial stage, so that protected confidences may be revealed with the leave of the court. At this stage, the court must investigate the probative value of the documents containing or recording the protected confidences and balance the public interest in protecting sexual assault complainants from harm against the public interest in a fair trial of the issues in the proceedings.

The documents containing the protected confidences are to be produced to the court for the purpose of undertaking this exercise. Section 298 of the CPA provides that a person cannot be required to produce a document which records a protected confidence, and that leave is not to be granted to adduce evidence of protected confidences, unless the court is satisfied that:

(a) the evidence will, either by itself or having regard to other evidence adduced or to be adduced, have substantial probative value (section 298(1)(b)(i); (4)(a)) CPA);

(b) other evidence of the protected confidence or the contents of the document is not available (section 298(1)(b)(ii); (4)(b)) CPA); and

(c) the public interest in preserving the confidentiality of protected confidences and protecting the principal protected confider from harm must be substantially outweighed by the public interest in inspecting and admitting evidence of substantial probative value (section 298(1)(b)(iii); (4)(c)) CPA).

In undertaking the balancing exercise, the court is required to take into account the likelihood, and the nature or extent, of harm that would be caused to the complainant if inspection were permitted or the contents of the documents were disclosed (s 298(2), (5) CPA).

The complainant may be granted leave to appear in the proceedings for the purpose of protecting the privilege (s 298(7) CPA). Where the jury has been empanelled, any hearings on questions of privilege are to be conducted in the absence of the jury (s 298(8) CPA).

Consent and misconduct

Disclosure of protected confidences may also be effected by consent (s 300) and the privilege may be lost if the counselling communication was made in furtherance of a crime or fraud (s 301).

The misconduct exception to the privilege is similar to

those contained in Part 3.10 of the *Evidence Act 1995* (NSW). The consent provision is not. It does not provide for general or implied consent or waiver of privilege by acting in a manner inconsistent with the maintenance of the privilege as provided for in sections 121 and 122 of the Evidence Act. For the purposes of section 300 of the CPA, consent must be given in writing and must expressly relate to the production or adducing of the protected confidence in the proceedings.

The SACP Scheme in practice

The referrals system

The SACP referrals scheme is facilitated by the ODPP. When the DPP identifies a SACP issue (typically, when it comes to their attention that subpoenas have been issued seeking the complainant's counselling records), they obtain the consent of the complainant to pass on his or her contact details and details of the subpoenas for the purpose of referring the matter to WLS.

WLS then circulates the referral to the member firms for acceptance. If no member firm is able to accept the referral, WLS often assumes conduct of the matter. The member firm that accepts the referral then briefs counsel from a panel of barristers who have agreed to participate in the scheme. Sometimes the member firms brief counsel directly, sometimes counsel is obtained by an email referral to all barristers on the panel. Heather Sare of the New South Wales Bar Association is instrumental in co-ordinating the Bar's contribution to the scheme.

Typically, member firms and counsel then consult with the complainant and obtain instructions in respect of potential claims for privilege.

Co-operation with the ODPP and defence

In the writer's view it is essential that the complainant's representatives co-operate with both the ODPP and the Defence when acting in respect of SACP claims. Much can be achieved by accommodating the parties to the trial to the extent consistent with maintenance of the privilege.

In the writer's experience, the most efficient way of enabling a speedy resolution of privilege claims over material sought by subpoena is to seek orders for the complainant's representatives to have first access to any material that is produced for the purposes of identifying protected confidences, and then arranging for a regime to enable the parties to access non-privileged material without delay. This narrows the volume of the material at issue significantly.

One of the most significant issues faced by the participants in the SACP scheme is non-compliance with the notice requirements in the legislation. Section 299 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. The party seeking production of the documents may still access the documents with leave in the absence of notice.

Whether through oversight or otherwise, section 299 is a provision honoured more in the breach than the observance. This creates significant difficulties for complainants. Often the barrister participants in the scheme are 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. The busy registries of the District and Local courts have been known to miss an objection that is raised in writing by a counsellor when producing documents.

Difficulties can also arise with the provision of notice by the police and prosecution. In more than one matter in which the writer has appeared, protected confidences have appeared in the police brief. Sometimes the complainant had consented to this, sometimes she had not. None of the writer's clients had received advice in relation to their right to claim the privilege before consent was given. The fact that some protected confidences are 'out in the open' makes it difficult to sustain an argument that other protected confidences should not be revealed, despite the restrictive terms of the consent provisions in section 300.

It is important to raise awareness of the SACP legislation among criminal defence lawyers, investigating police, and prosecutors. Leaving aside the damage that can be done to a complainant if her counselling records

are unnecessarily disclosed, the provision of adequate notice is a procedural benefit to all parties. The earlier a complainant is notified of the intention to seek access to counselling communications, the less likely it is that a claim for privilege will unduly disrupt the parties' preparations for trial.

Conducting the hearing

The conduct of an application under section 298 of the CPA is not without its difficulties. The judge and complainant have access to the documents. The defence and prosecution do not. The party seeking to access protected confidences must therefore satisfy the court that the material sought is of substantial probative value without having seen it. It is however essential that this be so. It is recognised that harm may be suffered by victims of sexual assault when it is discovered that the accused's lawyers have been permitted to look over their counselling records.[4] The Court of Criminal Appeal has recognised the necessity of the protected confidences at issue being kept from the defence during argument.[5]

The complainant is similarly hamstrung in making arguments as to whether the evidence is of substantial probative value. The complainant's representatives are not in a position to know the whole of the evidence and arguments that may arise at trial, particularly those that might be raised by the defence, and how the protected confidences may bear on them. A detailed discussion of the contents of the documents during argument is not possible for fear of defeating the privilege. Most importantly, it should be borne in mind that the complainant's representative's role is to identify and protect privileged communications, not to make a judgment on whether they may contain material of substantial probative value. That is the onus of the party seeking disclosure.[6]

In the writer's experience, the proper approach is for the defence to be asked to identify the forensic purpose for which the documents are sought, and to satisfy the court that documents satisfying that purpose would be of substantial probative value. This requirement is no greater than the defence's usual obligations when seeking to access documents produced in response to a subpoena.[7] By identifying with precision the issue the documents are likely to go to, and the importance of that issue to the defence case, defence counsel will avoid being seen to wish to do no more than trawl though the complainant's personal records in the hope of uncovering fodder for cross-examination on credit.

The structure of subsections 298(1)(b) and (4) is such that the defence must establish substantial probative value, and the absence of alternative evidence from a non-privileged source, before the court turns to the balancing exercise in subsection 298(1)(b)(iii) and (4)(c). If the defence fails to do so, there is nothing for the court to balance against the public interest in protecting counselling communications.

In so far as is possible, it is also sensible to make the task of the judge who has to examine the documents to see if they are privileged, or if they ought be produced, as easy as possible. Often these matters will not be determined until the first day of the trial and the judge, prosecutor and counsel for the defence are usually anxious to empanel the jury and get the trial moving. In a recent case in which the writer was involved all of the documents the subject of a claim for privilege were paginated and put behind the subpoena in separate tabs in a folder. This made identification of the document easy so any concerns the judge had could be addressed without identifying the document or its contents.

The balancing exercise required by section 298 essentially rests on a comparison of the probative value of the material sought to be inspected after production and then adduced as evidence and the harm that may be caused to the complainant by the disclosure of the material. In a sense, once the court is satisfied that the material is of substantial probative value and is not available elsewhere, the public interest in ensuring that the accused is afforded a fair trial by admission of the evidence is a powerful reason to allow inspection of and adduction of the relevant protected confidences. One would expect that such evidence would be admitted (subject to the protections outlined below) in all but the most exceptional cases.

The complainant's representative faces a difficult task in satisfying the court that harm will be caused to a complainant in anything but the most general sense. This is because the source of evidence of the likelihood

of subjective harm is likely to come from either the complainant or his or her counsellor, and is likely to disclose the substance of counselling communications. If evidence of specific harm is relevant (for example from a treating psychiatrist or other medical practitioner), it should be obtained with the consent of the complainant in compliance with section 300 and orders should be sought that the evidence be heard in camera. This was the course taken in one of the matters in which the writer provided assistance.

The final element to bear in mind is that the issue of whether documents recording protected confidences should be produced is separate from the question of whether those documents should then be admitted into evidence. Some defence lawyers and judges have expressed the view that the issue is exhausted once the documents have been disclosed to the defence. That is not the case. Section 298 expressly provides for the questions to be dealt with separately. Consideration of whether the evidence is of substantial probative value will differ at the evidence adducing stage, particularly when the tender occurs after much of the other evidence in the trial has played out.

In addition, the risk of harm to the complainant by disclosure of counselling records in open court is likely to be of a different magnitude than the risk of harm by inspection of counselling records by the accused and his or her representatives. The latter risk is related to the traumatic effects of revealing intensely private and personal details to the accused, the former includes the additional shame and humiliation of revealing these personal details to strangers in the courtroom, and potentially to the public at large, and then to have those details used against them.[8]

Ancillary orders and the media

If documents recording protected confidences are ordered to be disclosed to the defence, or leave to lead evidence of protected confidences is granted, the court may make a range of orders designed to limit the harm that may be caused by the disclosure. Pursuant to section 302 of the CPA, the court may make such orders as are necessary to protect the safety and welfare of any protected confider, including, but not limited to:

(a) orders that all or part of the evidence be heard or document produced in camera,

(b) orders relating to the production and inspection of documents (such as an order that access be limited to named legal representatives of the parties),

(c) orders relating to the suppression of publication of all or part of the evidence given before the court, and

(d) orders relating to disclosure of protected identity information.

The types of orders that may be made are a complement to the orders provided for in Part 5, Division 1 of Chapter 6 of the CPA for the protection of the complainant while giving evidence, in particular those set out in sections 291 to 292, as well as section 578A of the *Crimes Act 1900* (NSW). Section 302 empowers the court to make similar orders when evidence of protected confidences is led through witnesses other than the complainant.

Suppression orders have been made in respect of evidence concerning protected confidences, over the objection of representatives of the media. The public interest in open justice and fair reports of court proceedings is another element to be weighed in the balancing exercise comprehended by the SACP provisions.[9] While the need to protect sensitive witnesses and avoid deterrence from giving evidence has long been recognised as providing an exception to the general principle of open justice,[10] this will not be the case in relation to every complainant, and nor would it automatically be assumed that mere embarrassment or distress would be sufficient to ground a non-publication order.[11]

However, there will be circumstances in which the harm that is likely to be caused by publication of the contents of counselling communications will outweigh the need for open justice, and may not be overcome by the restrictions on disclosure of the complainant's identity by s 578A of the Crimes Act. This is because the publication of intensely private counselling communications in association with the event to which the proceedings relate, and the discussion of those records by the public at large, may cause significant shame and humiliation to the complainant and may disrupt the complainant's continuing treatment. Where there is evidence that specific harm will flow from the publication of counselling communications,

orders that the proceedings be heard in camera and orders suppressing publication of the content of the counselling communications will be appropriate.

Conclusion

The SACP Pro Bono scheme is a rewarding opportunity to provide assistance to people in great need of protection and assistance in the course of what is, for most sexual assault complainants, an extremely stressful and traumatic experience. It is also a great opportunity for members of the Bar to participate in the development of an interesting and difficult area of law. In the writer's experience, complainants referred to the scheme are grateful for the assistance provided by the scheme, and comforted that evidence of their counselling records will only come to light where it is necessary for that to occur. However, at the end of a long and difficult trial in which numerous records are sought of varying relevance, this may be small comfort. One benefit that will, it is hoped, emerge from the continuation of the scheme is that awareness of the privilege among practitioners and counsellors will be raised, so that counselling documents are sought only where their contents are likely to have a real bearing on the issues in the case.

Endnotes

1. Second Reading Speech, *Evidence Amendment (Confidential Communications) Bill 1997* (NSW Hansard, Legislative Council, 22 May 1997, the Hon Jeff Shaw MLC, 1120-1121).
2. This article is not intended to be a statement on behalf of the participants of the pro bono program or anyone else. The experience of each barrister participating in the program is likely to be different. Case studies are available elsewhere: see *National Pro Bono Resource Centre News* Issue 54 'Sexual Assault victims service meets a gap in need' 27 August 2009 http://www.nationalprobono.org.au/page.asp?from=1&id=255. The writer wishes to thank Andrew Coleman SC, a fellow participant in the scheme, for his helpful comments on the article. Any errors are the author's alone.
3. See *R v Young* (1999) 46 NSWLR 681 (the SACP provisions as then enacted applied only to the adducing of evidence and did not apply to the production of documents by subpoena) and *R v Norman Lee* (2000) 50 NSWLR 289 ('counselling' as then enacted confined to treatment of mental conditions by skilled professionals). A discussion of the earlier decisions and some of the amendments in response appeared in an earlier edition of *Bar News*: Bartley G 'Sexual Assault Communications Privilege Under Siege' *Bar News* Summer 2000-2001, 6-12.
4. See A Cossins and R Pilkinton, 'Balancing the Scales: The case for the inadmissibility of counselling records in sexual assault trials' (1996) 19(2) UNSWLJ 222 at 225; ALRC Report 102, 'Uniform Evidence Law' (2005) at [15.78], citing the results of a survey by the Australian Institute of Criminology.
5. *R v Norman Lee* (2000) 50 NSWLR 289 at [14] per Heydon JA.
6. Second Reading Speech, *Evidence Amendment (Confidential Communications) Bill 1997* (NSW Hansard, Legislative Council, 22 May 1997, the Hon Jeff Shaw MLC, 1121).
7. Although establishing that the evidence is likely to be of substantial probative value is obviously a much higher bar than establishing that it is 'on the cards' that the material sought may assist the defence case. See *Alister v The Queen* (1983-1984) 154 CLR 404 at 469–470; *R v Saleam* (1989) 16 NSWLR 14 at 18; *Principal Registrar of the Supreme Court of New South Wales v Tastan* (1994) 75 A Crim R 498 at 504; *Ran v The Queen* (1996) 16 WAR 447 at 453 per Franklyn J; *Attorney General (NSW) v Chidgey* (2008) 182 A Crim R 536 at [5].
8. See *O'Connor v The Queen* (1995) 130 DLR 4th 235 at 288; Second Reading Speech, *Evidence Amendment (Confidential Communications) Bill 1997* (NSW Hansard, Legislative Council, 22 May 1997, the Hon Jeff Shaw MLC, 1120-1121); Dawson, 'Production of Therapeutic Records to the Defence: Emerging Principles' (1998) 5(1) *Psychiatry, Psychology and Law* 63 at 67.
9. *John Fairfax & Sons Pty Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 465 at 481 per McHugh JA.
10. *R v Savvas* (1989) 43 A Crim R 331 at 336; *R v CAL* (1993) 67 A Crim R 562 at 564.
11. *John Fairfax Group Pty Ltd v Local Court of NSW* (1991) 26 NSWLR 131 at 142-143.

Stop press

Since the time of drafting this note the New South Wales Government has announced new laws designed to enhance protections of victims of sexual assault. The proposed changes follow submissions made by the participants in the SACP Pilot. The attorney general also announced funding for the creation of an independent specialist unit to provide free legal representation to complainants seeking to make claims for privilege in sexual assault trials, and to raise awareness of SACP among the legal profession, government departments and counsellors. At the time of going to press, the bill had not been made publicly available. The AG's announcement discloses that the principal change to the existing laws will be to provide an automatic right to complainants to appear in criminal proceedings and object to the production of documents or adducing of evidence containing protected confidences. The SACP provisions as presently drafted generally involve the record holder raising an objection to production, and the complainant appearing only with the leave of the court.