Sexual assault communications privilege under siege

by Glenn Bartley

Introduction

In criminal proceedings, sexual assault communications privilege (SACP) prevents the disclosure of communications made for the purpose of counselling a complainant of sexual assault in the circumstances prescribed by Part 7 of the *Criminal Procedure Act 1986* (NSW) (CPA).

It is a statutory innovation that has surprised and perturbed many legal practitioners and judicial officers. There is continuing tension between the attempts of Parliament to implement a strong, broad, effective SACP and restrictive interpretations of the legislation by the NSW Court of Criminal Appeal (CCA).

This article outlines:

- The origins of SACP;
- Some underlying policy considerations;
- The legislative rationale of SACP;
- The short but turbulent legislative history of SACP;
- The provisions of Part 7 of the CPA; and
- *R v Norman Lee*[1], a recent decision of the CCA, which may have made Part 7 unworkable.

Most of the policy material on SACP that is readily available to legal practitioners emphasises arguments against the privilege[2]. This article collects together arguments and reference material favouring the privilege in order to balance the debate and enhance understanding of why the privilege has been introduced.

Emphasis in *italics* has been added by the author.

Origins of SACP

For centuries at common law there has been no doctor/patient, including no psychiatrist/patient, privilege.[3]

In the 1960s and 1970s the phenomenon of sexual assault became recognised as widespread and frequently occurring. It became a social issue. The treatment of victims and complainants by the criminal justice system became an issue. In the late 1970s and 1980s, several laws and procedures were introduced to ameliorate the ways in which complainants of sexual assault were treated in police investigations and criminal courts.

Among such laws were 'rape shield laws' such as s105 of the CPA (formerly s409B of the *Crimes Act 1900* (NSW)), which largely prevents the use of 'sexual reputation' and sexual experience to discredit a complainant in cross-examination. Whether s105 has caused injustice to some accused persons or whether the CCA 'has significantly eroded the protection afforded to complainants'[4] under the section has been the subject of robust debate.[5] Nevertheless, many complainants have benefited from the protection given by s105.

In recent decades the number of sexual assault counselling services has increased considerably as a result of increasing social and political recognition of the nature, extent and effects of sexual assault. However, complainants and counsellors became increasingly concerned that the effectiveness of sexual assault counselling was being impaired by the invasion of the privacy and confidentiality of counselling as a result of the subpoenaing of counsellors' notes.

Sexual assault was seen as involving violations more intimate, causing injury more intimate, and resulting in communications with therapists more intensely intimate and private, than when a purely 'physical' assault causes organic injury and results in communications about such assault and injury between patient and doctor. As the Supreme Court of Canada said:

> A rule of privilege which fails to protect confidential doctor/patient communications in the context of an action arising out of sexual assault perpetuates the disadvantage felt by victims of sexual assault, often women. The intimate nature of sexual assault heightens the privacy concerns of the victim and may increase, if automatic disclosure is the rule, the difficulty of obtaining redress for the wrong. The victim of a sexual assault is thus placed in a disadvantaged position as compared with the victim of a different wrong.[6]

Concerns about the use of subpoenas in criminal proceedings increased as complainants and sexual assault counsellors reached the view that defence lawyers were attempting to circumvent rape shield laws by accessing subpoenaed counsellors' notes in order to smear complainants as persons of bad character, by ventilating such details of their personal history as:

- past psychiatric treatment, psychotherapy or counselling;
- other aspects of their medical and psychological history;
- drug and alcohol problems;
- relationship problems, including ill-advised behaviour during times of conflict;
- terminations of pregnancies;
- having born ex-nuptial children; and
- rebellious childhood history.[7]

In *O'Connor v The Queen*, L'Heureux-Dube J observed that sexual assault complainants face psychological trauma from:

> ... the threat of disclosing to the very person accused of assaulting them in the first place, and quite possibly in open court, records containing intensely private aspects of their lives, possibly containing thoughts and statements which have never even been shared with the closest of friends or family.[8]

Anger and distress at such perceived subpoena strategies continued to increase. Boiling point was reached in December 1995 when Ms Di Lucas, Coordinator of the Canberra Rape Crisis Centre, was imprisoned for contempt of Queanbeyan Local Court for refusing to produce the counselling file in relation to a sexual assault complainant.[9] This received much publicity and generated much public debate, which culminated in the introduction of a statutory SACP.

Other Policy Considerations

In 1998, 14,568 reports of sexual assault were recorded by police in Australia.[10] The NSW Government probably took the view that the true incidence of sexual assault was substantially higher, as it is notoriously under-reported and therefore there probably are several thousand sexual assaults committed in NSW each year.[11] It appeared that the criminal justice system may have been coming into increasing disrepute amongst several thousand complainants, counsellors and others whose confidence in it is necessary for its effectiveness.

The NSW Bar Association strongly opposes SACP[12] as 'it involves a substantial infringement on the rights of accused persons and carries with it a grave risk of miscarriages of justice.'[13]

The Association argued:

> Those persons who might choose not to seek counselling where they know their files may be disclosed will be in no different position. They will have no guarantee that a court will not find the requirements of the legislation satisfied and order disclosure. Thus, they will continue to avoid counselling (assuming that is presently the case) and no benefit is gained.[14]

The Supreme Court of Canada had a different view:

> It must be conceded that a test for privilege which permits the court to occasionally reject an otherwise well-founded claim for privilege in the interests of getting at the truth may not offer patients a guarantee that communications with their psychiatrists will never be disclosed. On the other hand, the assurance that disclosure will be ordered only where clearly necessary and then only to the extent necessary is likely to permit many to avail themselves of psychiatric counselling when certain disclosure might make them hesitate or decline. The facts in this case demonstrate as much.[15]

The Bar Association's November 1999 submission gave a number of hypothetical examples of injustices resulting from the privilege. One was that Part 7 of the CPA would prevent disclosure of a complainant's statement to a counsellor that she was assaulted not only by the accused, but also by 'little green men from Mars'.[16]

A common criticism of the privilege, encountered by the author, is that it would prevent disclosure of a counselling note revealing that the complaint of sexual assault was a 'recovered memory', which arose after hypnotherapy. However, these cases do not occur often and in nearly all of them there is other evidence of hypnotherapy having led to a recovered memory. Where the counselling note is the only record of the hypnotherapy, the judge reading the subpoenaed notes in order to determine objections to disclosure should be alert to identify such material and seek submissions from the holder of the records as to why the note should not be produced.

In response to the Bar Association submission, the then attorney general, the Hon. Jeff Shaw QC MLC, said:

> While I am not minded to alter the legislation on the basis of hypothetical examples, I would, of course, be happy to consider further amendments should significant issues arise once the operation of the Act has been tested by the courts.[17]

The quantitative policy question posed in the Bar Association submission was, how many innocent defendants unjustly convicted are too many to justify the proposed legislation?[18] The competing quantitative policy question might be: how many tens of thousands of innocent sexual assault victims deterred from reporting the crimes committed against them or from maintaining their complaints, or traumatically humiliated in court, are sufficient to justify the legislation?

Furthermore, how many more men, women and children are sexually assaulted by perpetrators whose earlier victims did not make or maintain their complaints because they felt that they could not cope with attempts to destroy them in criminal proceedings?

In *O'Connor v R*, Major J concluded:

> What constitutes a fair trial takes into account not only the perspective of the accused, but the practical limits of the system of justice and the lawful interests of others involved in the process, like complainants and the agencies which assist them in dealing with the trauma they may have suffered. Perfection in justice is as chimeric as perfection in any other social agency. What the law demands is not perfect justice, but fundamentally fair justice.[19]

In New South Wales, the question may be whether the statutory balancing exercise (discussed below) meets this standard.

Further policy considerations are elucidated in the legislative rationale of SACP, which is set out below.

Rationale of SACP

The rationale of SACP is enunciated in the second reading speech of the then attorney general of NSW The Hon. Jeff Shaw QC MLC in relation to the *Evidence Amendment (Confidential*

Communications) Act 1997, which introduced the original Division 1B of the *Evidence Act 1995* (NSW) (EA) containing the original version of the privilege. The attorney general said:

> It goes without saying that a person who has suffered the grave trauma of sexual assault will often be assisted in recovery by seeking counselling. The counselling relationship, built on confidentiality, privacy and trust, enables a victim to explore major issues concerning her sense of safety, privacy and self-esteem. The knowledge that details of a victim's conversations with her therapist may be used against her in subsequent criminal proceedings can inhibit the counselling process and undermine its efficacy. One counsellor has said:
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> > When I have told clients that the counselling notes of our session may be subpoenaed, I have had experience of clients leaving counselling, and in another case a client deliberately censored herself in discussing issues in counselling.
>
> Knowing that a perpetrator has had access to counselling files can further traumatise victims and increase their sense of powerlessness. One victim said:
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> > My files were subpoenaed. It wasn't the court seeing them, the judge and the lawyers, that worried me so much because I knew that they could only support my case if I was given a chance to speak about them. What made me feel really upset was that my stepfather, who had raped me, would see them. He was lying about not having done it and I could just imagine him going through my personal records. It was like having him invade my life again.
>
> ...
>
> I received more than 80 submissions in relation to that discussion paper and considerable support was received for the proposal outlined. However, a majority of the submissions argued in favour of an additional specialised privilege for sexual assault counselling communications.
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> ...
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> The arguments in favour of a specialised privilege which I have found particularly persuasive include the following.
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> Firstly, it was argued that [professional confidential relationship privilege in Division 1A of Part 3.10 of the EA] would fail to provide sufficient protection to such communications. ...
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> Secondly, the primary purpose of counselling is not investigative, it is therapeutic. ... As part of the counselling process, the complainant is encouraged to release emotions and talk unhindered, and yet the complainant has no legal right to review the notes to see whether they are an accurate reflection of his/her version of the events. Nevertheless, these notes can be used to claim that the complainant has made prior inconsistent statements and has feelings of shame and guilt which are consistent with a motive to lie.
>
> Thirdly, it was argued that the failure to accord counselling records a privilege has had the following consequences:
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> - some victims choose not to obtain counselling;
> - some obtain counselling but are guarded about what they reveal;
> - some victims refuse to report the crime or be a witness for the prosecution;
> - some counsellors do not take notes;
> - some counsellors take notes which are cryptic and cannot be understood by others; and
> - some counsellors refuse to hand over the notes and are charged with contempt.
>
> These are undesirable outcomes. When a victim refuses to initiate court proceedings or undergo counselling, or to the extent to which the openness of the counselling relationship is constrained, both the interests of the victim and the interests of the community in general are harmed.
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> Fourthly, many of the submissions suggested that defence counsel are increasingly using subpoenas for the production of counselling records as a weapon to intimidate the complainant. This is not a justifiable use of the laws of evidence.
>
> Finally, a common concern expressed in the submissions related to the fact that being a victim of sexual assault can be a humiliating and/or terrifying experience. It was argued that allowing the accused and defence counsel to have access to all the victims thoughts, feelings, insecurities and the recounting of painful past experiences as revealed in counselling sessions may exacerbate this trauma.
>
> In the light of these arguments, I propose in the legislation to supplement [professional confidential relationship privilege] with a more specific privilege.[20]

Legislative turbulence

In *R v Young*[21] a five-judge bench of the CCA held that the SACP, then in Division 1B of Part 3.10 of the EA, could be claimed only at the adduction of evidence stage and not at the earlier stage, when documents are produced upon subpoena.[22] In effect, that decision negated the purposes of the privilege.

> The essence of privacy, however, is that once invaded, it can seldom be regained. For this reason, it is all the more important for reasonable expectations of privacy to be protected at the point of disclosure.[23]

R v Young was reversed by the *Criminal Procedure Amendment (Sexual Assault Communications Privilege) Act* 1999 (the Amendment Act). That Act inserted a new Part 13 (ss57-69) into the *Criminal Procedure Act* 1986, and also amended other statutes.

The Amendment Act attempted to strengthen SACP in criminal proceedings by the broadening of several important definitions and by other provisions which were intended to prevent it being negated. The privilege now expressly and irrefutably applies to the production of documents upon subpoena.

The strengthened privilege was introduced by the attorney general, who made his second reading speech in relation to the Amendment Act on 20 October 1999.[24] The legislation received no opposition in Parliament and had a speedy passage. It was supported by the Opposition, the Australian Democrats, the Greens and the Hon. R. Jones MLC. It commenced on 5 November 1999.

Subsequently, the *Crimes Legislation Amendment (Sentencing) Act* 1999 (Schedule 2 [43]-[47]) re-numbered Part 13 of the CPA as Part 7 and ss57-69 as ss147-159.

The provisions of Part 7 are discussed below. The decision of the CCA in *R v Norman Lee* on 18 October 2000 is then considered.

Criminal proceedings

SACP (against disclosure of 'protected confidences') is available primarily in 'criminal proceedings', which are defined to include apprehended violence proceedings: s147(1). In those proceedings, the court must conduct the balancing exercise discussed below. Care of children proceedings

are not included in the definition of 'criminal proceedings'.

In committal proceedings and bail proceedings (defined as 'preliminary criminal proceedings') there is an absolute privilege against production of documents or adduction of evidence revealing protected confidences: s149.

Protected confidences

SACP may be claimed to prevent production of a document recording a protected confidence (s150(1)) or the adducing of evidence disclosing a protected confidence (s150(4)).

A protected confidence is a 'counselling communication' that is made *by, to or about* a victim or alleged victim of a sexual assault offence: s148(1). (For brevity in this article, such victims are referred to as either 'alleged victims' or 'complainants'.)

Such a communication is a protected confidence, even if it was made *before* the relevant alleged sexual assault and even if the communication was *not* made in connection with the alleged sexual assault or any condition arising from it: s148(2).

A communication may be made in confidence even if it is made in the presence of a third party if the third party is present to facilitate communication, or to otherwise further the counselling process: s148(3). The example of such a third party, given by the attorney general in his second reading speech in relation to the Amendment Act, is the non-abusive parent of a child sexual assault victim.[25]

Counselling communications

It is relatively common for counselling sessions to be attended by the non-offending parent of a child complainant, another care giver, or a sibling of the complainant. Those persons often make intimate, personal observations about the complainant.[26]

The attorney general, in his second reading speech in relation to the Amendment Act[27], said that potential access by defendants to the views of others involved in the process of sexual assault counselling will result in the therapeutic basis for the counselling being undermined in just the same way as if the alleged victim's own ruminations were accessible.

Therefore, the definition of 'counselling communication' has been expanded in s148(4) to incorporate all communications by, to or about the alleged victim made in confidence in the course of counselling, including those:

- by a counsellor to the alleged victim;
- by a counsellor about the alleged victim (for example, in a report: s147(2)(a));
- between counsellors; and
- between a counsellor and 'a person who is *present* to facilitate communication between the counselled person and the counsellor or to otherwise further the counselling process': s148(4)(c).

It would appear from the word 'present' in s148(4)(c) that an observation about a complainant made by the complainant's parent by telephone to a counsellor, in the absence of the complainant, would not be a counselling communication and would not be protected by SACP.

The central relationship giving rise to SACP must be one in which the counsellor is *counselling, giving therapy to or treating* the counselled person for *any* emotional *or* psychological condition: s148(4)(a).

The provisions of Part 7 noted so far appear to be in part a response to *obiter dicta* of the CCA in *R v N*[28] which suggested that communications during counselling by a school counsellor may not be protected by SACP.

The expanded definitions in ss147 and 148 also reflect the submission to the attorney general of the NSW Working Party on the Confidentiality of Counsellors' Notes (NSW WPCCN), August 1999.

The submission observed[29] that the majority of counsellors employed in sexual assault counselling services are social workers, not psychiatrists or psychologists. (Social workers were understood to be professionals who had completed the four-year university BSW degree or an equivalent.) The submission added that school counsellors often are called upon to counsel a child who has been sexually assaulted in a way that is analogous to the counselling the child would receive from a sexual assault counsellor; and that within hospitals and other psychiatric institutions appropriately qualified psychiatric nurses play an important therapeutic role in relation to the mental health of patients.

The balancing exercise

In criminal proceedings other than bail and committal proceedings, the balancing exercise applicable is the same as that which applied in the former Division 1B of Part 3.10 of the EA.

A document recording a protected confidence cannot be produced and evidence disclosing a protected confidence or the contents of a document recording a protected confidence cannot be adduced unless the court is satisfied that:

- the contents of the document or the evidence have *substantial* probative value;
- other evidence of the protected confidence is *not* available; and
- 'the public interest in preserving the confidentiality of protected confidences *and* protecting the principal protected confider from *harm* is *substantially* outweighed by the public interest in allowing inspection of the document [or admission of the tendered evidence]': s150(1), (4).

Of great significance is the requirement that there be a substantial outweighing, not (as in public interest immunity) a mere outweighing.

In carrying out the balancing exercise the court must take into account the likelihood, and the nature or extent, of the *harm* that would be caused to the alleged victim if the document is produced or the evidence adduced: s150(2), (5). As in the former

Division 1B, harm is defined 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)*: s147(1).

The court may inspect a subpoenaed or tendered document to determine any question arising under Part 7: ss150(1)(a), 156.

Notice

It has been common in the past for private mental health practitioners (and occasionally agencies of the Department of Health) to produce counselling records without any objection and without informing the complainant that details of his or her innermost thoughts, feelings and insecurities are being disclosed to the defence. Notice provisions have been introduced to give complainants an opportunity to be consulted and to exercise their rights in relation to such proposed disclosures.

A party requiring production of a document recording a protected confidence for inspection must give reasonable notice that production has been sought to each other party and the protected confider (a person who made a protected confidence): s151(1). Similarly, evidence of a protected confidence is not to be adduced unless such notice is given: s151(2).

Such notice must advise the protected confider of the date on which the document is to be produced or the hearing day of proceedings in which evidence of a protected confidence is to be adduced and that he or she may, with the leave of the court, appear in the proceedings: s151(3).

It is sufficient compliance with the requirement to give such notice to a principal protected confider (the alleged victim) if reasonable notice is given to the (*Justices Act 1902* (NSW)) informant and the informant gives, or uses his/her best endeavours to give, a copy of the notice to the principal protected confider within a reasonable time after the informant receives the notice: s151(4).

The court may give leave to dispense with the notice requirements where the protected confider is not a principal protected confider: s151(5).

Ancillary orders

Section 154 empowers a court to limit the harm likely to be caused by the disclosure of a protected confidence by such measures as hearing evidence in camera, non-publication orders and orders suppressing 'protected identity information' (the contact details of a 'protected confider').

It is submitted that the statutory scheme of Part 7 is that there must be a balancing exercise and that s154 does not enable a court to disregard and not apply the provisions of s150.

Consent

The facts of *R v Young* also have given rise to tougher requirements for establishing consent by a principal protected confider to production or adduction of a protected confidence. Such consent is not effective unless it is given by the principal protected confider in writing and it expressly relates to the production of a document or adducing of evidence that is privileged under Part 7 of the CPA: s152(2).

Thus, it is insufficient for a principal protected confider to state orally in court 'on the record' that s/he so consents. Consent in writing is required.

Prohibition on Production of VCT Files

The submission of the NSW WPCCN said[30]:

> Private medical practitioners and the Victims Compensation Tribunal frequently produce [counselling notes and other medical or psychological records] without any objection and without informing the complainant that their intimate and personal details have been disclosed to the defence.

In his second reading speech in relation to the Amendment Act[31], attorney general Shaw said:

> It has become apparent that it is relatively common for defence counsel in sexual assault matters to seek access to material used in an application for victims compensation. This material may include information arising from a counselling relationship. A cognate amendment to the Victims Compensation Act seeks to categorically close this avenue of investigation.

Thus, schedule 2 of the Amendment Act attempted to introduce absolute prohibitions on requirements to produce documents in VCT files in any criminal proceedings (other than a prosecution of a complainant).

It did so by adding s84(2) to s84(1) of the *Victims Support and Rehabilitation Act 1996* and by, in effect, adding s25(2) to s25(1) of the *Victims Compensation Act 1987*. The resultant sections were not entirely clear. Their meaning has been contested in *R v Kremmer*, which was heard by the NSW Court of Criminal Appeal on 28 August 2000, on which day the court reserved its judgment.[32]

During the hearing, senior counsel for the Victims Compensation Tribunal, Mr Ian Temby QC, told the court that the tribunal receives about two subpoenas 'of this sort' per week.

R v Norman Lee

In this case, the subpoenaed records comprised 73 pages of notes of communications about the problems of a complainant of sexual assault. The communications took place between the complainant and a 'youth support worker', and other officers, of the Sydney City Mission. Such workers did not themselves give, but instead arranged referrals of the complainant for, counselling, therapy or treatment.

It is not surprising that the CCA held that the subpoenaed communications did not fall within s148(4)(a).

However, Heydon JA, with whom Mason P and Wood CJ at CL agreed, construed s148(4) in ways which in turn may be construed to prevent the applicability of the privilege to communications with such qualified mental health professionals as social workers, school counsellors and psychiatric nurses.

Section 148(4) relevantly provides:

'In this section:

counselling communication means a communication:

(a) made in confidence by a person (the *counselled*

person) to another person (the *counsellor*) in the course of a relationship in which the counsellor is counselling, giving therapy to or treating the counselled person for any emotional or psychological condition, or

(b) made in confidence to or about the counselled person by the counsellor in the course of that relationship, or ...'

'Any emotional or psychological condition'

In *R v Norman Lee*[33], Heydon JA said:

> [It] seems to me that the meaning of `counselling, giving therapy to or treating the counselled person for any emotional or psychological condition' must depend significantly on the meaning of `any emotional or psychological condition'. An emotional condition is a state of consciousness turning on emotions like pleasure, pain, desire, aversion, surprise, hope, joy, sorrow, fear or hate (as distinct from cognitive and volitional states of consciousness) which reveals or reflects *some defect or illness or disease or abnormality*. Similarly, a psychological condition refers to a particular condition of health - a state of health *which is poor or abnormal or diseased or otherwise defective from the emotional or psychological point of view.* Psychology is the science of mind and of mental states and processes; a psychological condition is a state of mind in which there is *some defect or illness or disease or abnormality in the victim's mental states and processes.*

'Some defect or illness or disease or abnormality', on one view, is reminiscent of the *McNaghton*[34] definition of insanity ('... such a defect of reason, from disease of the mind, ...').

The passage from *R v Norman Lee,* extracted above, may give considerable force to a submission on behalf of an accused person who has subpoenaed counselling records that, as required to make out nervous shock at common law, s148(4)(a) requires that a recognisable psychiatric illness be established - for which one needs a diagnosis of such a condition. Yet most sexual assault counsellors (who are qualified, experienced social workers) do not make or record such diagnoses, and it is impracticable and too expensive to obtain a diagnosis from a psychiatrist or clinical psychologist years after the records have been made.

Moreover, many survivors of sexual assault do not develop a recognisable psychiatric illness but simply experience normal (not 'abnormal') reactions, such as shame, humiliation and fear which, under s147(1), amount to 'harm'. The author understands that those involved in formulating the present legislation considered that s147(1) 'harm' would amount to '*any emotional* condition' if not 'any psychological condition'.[35] It is now arguable that an 'emotional condition' has been equated with a 'psychological condition' and that 'harm' cannot be weighed in the balancing exercises prescribed by s150(1)(b)(iii) and (4)(c) unless the gateway of s148(4) is passed through by proof of a recognisable psychiatric illness (and, as discussed below, the occurrence of 'counselling').

'Counselling'

In *R v Norman Lee*[36] Heydon JA enunciated the following in relation to counselling:

> Therapy is the curative medical or psychiatric treatment of diseases, disorders and defects and is administered by a therapist, being a person trained to give therapy by physical, psychological or psychiatric methods. To treat an emotional or psychological condition is to deal with it by examination, diagnosis, application of remedies, care and otherwise in order to relieve or cure it. While `counselling' can have quite wide meanings, and the argument propounded on behalf of the complainant appealed to them, in this context the word means advising with a view to relieving or curing an emotional or psychological condition from which the counselled person is suffering. In this sense a counsellor must possess some substantial skill acquired by training or experience. Accordingly, the expression `counselling, giving therapy to or treating the counselled person for any emotional or psychological condition' refers to *the provision of expert advice and procedures by persons skilled, by training or experience, in the treatment of mental or emotional disease or trouble.* The expression does not include persons who merely seek to assist others suffering from an emotional or psychological condition. A confidante or friend or relative does not, by reason of those circumstances alone, fall within s148(4)(a).

One would not cavil with the last two sentences of this passage, but what of the rest?

The apparently narrow construction of 'counselling' does not sit well with the empathic, reactive listening and drawing out of innermost thoughts, feelings and insecurities, and the subtle guiding of the counselled person towards identifying options and making choices, which often constitute sexual assault counselling. Do such processes constitute 'the provision of expert advice'?

As it now may be held that they do not, sexual assault counsellors may feel that they need to give some prescriptive advice in each counselling session (inappropriate and ineffective as that may be in a particular case) in order to trigger the legislation. Otherwise, there would appear to be significant potential for defence counsel to persuade courts at first instance to restrict the ambit of the privilege to an extent more limited than that actually intended by the Attorney General and the legislature.

Reaction to *R v Norman Lee*

The Women's Legal Resources Centre at North Lidcombe regularly advises sexual assault counsellors whose records have been subpoenaed. In late November 2000, it advised the author:

- It is alerting counsellors who receive subpoenas to *R v Norman Lee*. Most of those counsellors appear in court to resist subpoenas without legal representation.
- The counsellors are being advised of ways to distinguish *R v Norman Lee* or, alternatively, fit within it.
- Most counsellors are exasperated with the continuing uncertainty as to the effectiveness of the legislation and increasingly are tending not to make counselling notes.
- A significant proportion of complainants are not undergoing counselling when advised of the renewed uncertainty as to whether the records of their counselling may be disclosed.
- When so advised, other women are undergoing counselling but not pressing charges.
- Reflecting that exasperation and those difficulties, the Women's Legal Resources Centre has foreshadowed to the Attorney General's Department submissions that not only do the definitions in ss147 and 148 need augmentation but also that an absolute privilege should be introduced at the subpoena stage.

- The Attorney General's Department has advised the centre that Parliament will not resume until April 2001.

It is likely that, unless another decision of the CCA reformulates the ex tempore interpretations enunciated in *R v Norman Lee*, several months of perplexing interlocutory disputes in trial courts lie ahead.

Civil Proceedings

The original Division 1B of Part 3.10 of the EA was repealed by schedule 2 of the Amendment Act and a replacement Division 1B (ss126G - 1261) was inserted. The replacement Division 1B applies to civil proceedings.

It is evident from the new s126H(2) that sexual assault communications privilege is available in civil proceedings only where there have already been criminal proceedings on the same facts *and* a sexual assault communications privilege claim has been made *and* that claim has been successful. Those prerequisites did not apply to civil proceedings in the original Division 1B.

In contrast with apprehended violence proceedings, care of children proceedings are not included in the definition of 'criminal proceedings'. Thus 'care' cases are civil proceedings, in which the privilege is available only in the narrow range of circumstances permitted by s126H.

Furthermore, in any civil proceedings the privilege is available only at the adduction stage. It is not available to resist production of documents upon subpoena: s126H(2) 'adduced'; *R v Young*.[37]

Preparation and conduct of an SACP claim

Practical advice on the preparation and conduct of an SACP claim, commencing with the initial stage of demonstrating a legitimate forensic purpose, is set out in a paper presented to the Criminal Law Section of the Bar Association on 10 October 2000 (and thus it pre-dates *R v Norman Lee*). The article can soon be found at the Bar Association's web site at www.nswbar.asn.au.

Conclusion

In two rounds of legislation, Parliament has attempted to implement a strong, broad, effective SACP. The CCA has interpreted each round restrictively. No doubt better legislation ultimately will result from this creative tension.

So far, however, the experience of SACP legislation has been that almost nothing is as it seems. In particular, the meaning of Part 7 and its ambit of operation now are not clear. The purposes of the legislation again may not have been achieved. Indeed, Part 7 may now be unworkable in many cases. In the interests of complainants, accused, courts and the public, another round of clarifying amendments is desirable in 2001.

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1 [2000] NSW CCA 444.
2 Eg, see *R v Young* (1999) 46 NSWLR 681 per Spigelman CJ (cf Beazley JA) and Odgers, *Uniform Evidence Law*, (4th ed), LBC 2000, pp. 505-518.
3 Ibid, *R v Young*, 699 [89]. However, see now professional confidential relationship privilege in Div 1A, Pt 3.10, *Evidence Act 1995* (NSW).
4 Parliament of New South Wales, Legislative Council, Standing Committee on Social Issues, *Sexual Violence: Addressing the Crime (Inquiry into the Incidence of Sexual Offences: Part II)* , 1996 at 25-26, cited in Cossins and Pilkington, 'Balancing the Scales: The Case for the Inadmissibility of Counselling Records in Sexual Assault Trials', 1996 UNSWLJ Vol 19(2), 222 at 260, fn 182.
5 Eg, ibid, Cossins and Pilkington, at 258-261.
6 *M(A) v Ryan* (1997) 143 D.L.R. (4th) 1 at 11(h)-12(a) per McLachlin J (La Forest, Sopinka, Cory, Iacobucci and Mayor JJ concurring).
7 Cossins and Pilkington, above n4 at 235-240.
8 (1995) 130 D.L.R. (4th) 235 at 288.
9 Liverani 'Confidential Communications', *Law Society Journal*, April 1998, 42.
10 *R v Young*, above n2 at 718 [199].
11 See also *R v Beharriell* (1995) 130 D.L.R. (4th) 422 [58].
12 New South Wales Bar Association, *Submissions on Criminal Procedure Amendment (Sexual Assault Communications Privilege) Bill* 1999, p.1.
13 Letter from Bar Association Acting President, Ruth McColl S.C. to NSW Attorney General Shaw QC MLC, 11 November 1999.
14 Above n12 at 5
15 Above n6 at 13f
16 Above n12 at 7
17 Letter from NSW Attorney General Jeff Shaw QC MLC to New South Wales Bar Association President, Ruth McColl S.C., 3 April 2000.
18 Above n12 at 11
19 *O'Connor v R* (1995) 130 D.L.R. (4th) 235 at 313 [193].
20 NSW Parliamentary Debates (Hansard), Legislative Council, 22 October 1997, pp. 1120-1121.
21 Above n2
22 See Butterworths' 1999 *Direct Link*, Vol 3 No. 12, DL 4, 7 and 1999 *Criminal Law News*, Vol 6 No 1, 55-60.
23 Above n19 at 290 [119]
24 NSW Parliamentary Debates (Hansard), Legislative Council, 20 October 1999, pp.1594-1596.
25 Ibid, p.1595.
26 Submission of the NSW Working Party on Confidentiality of Counsellors' Notes, August 1999, p.5. The submission was written for the working party by S. Blazey and A. Cossins.
27 Above n24 at 1595
28 Unreported, 21 July 1998, p.5.2.
29 Above n26 at 6-7
30 Above n26 at 1
31 Above n24 at 1596
32 The judgment had not been handed down as of the date of settling this article, 30 November 2000.
33 Above n1 [23]
34 *R v McNaghton* (1843) 8 ER 718.
35 From July to October 1999, the author was given near-contemporaneous accounts of dialogue between representatives of the NSW WPCCN and the Attorney General's policy advisers.
36 Above n1 [23]
37 Above n2