This is the authors final peer reviewed version of the item published as:


Copyright: 2002, Thomson Legal & Regulatory Ltd.
Danuta Mendelson – Judicial responses to the protected confidential communications legislation in Australia

The article examines the background, aims and scope of recent legislation enacted in New South Wales, Victoria and South Australia to protect from disclosure in court of "confidential communications" generated in the context of counselling persons who allege that they were victims of sexual offences. In drafting the "confidential communications" legislation, the legislators undertook a difficult task of balancing the public interest in therapeutic confidentiality that would encourage victims of sexual assaults to report these offences and seek psychological and psychiatric care on the one hand, and the public interest in fairness of the trial, which may be prejudiced by exclusion of evidence pertinent to the forensic process on the other. In South Australia this task was fulfilled with greater success than in New South Wales and Victoria.

Introduction

In 1998-1999 New South Wales, Victoria and South Australia enacted legislation protecting "confidential communications", generated in the context of counselling persons who allege that they were victims of sexual offences, from disclosure in legal proceedings. The respective statutes received support from the Opposition parties in both Chambers of each of the State Parliaments. During the parliamentary debates it was noted, however, that there were many submissions arguing that the interests of complainants, and the counselling process, ought to be subjugated to an accused person's right to a fair trial. For example, the Criminal Law Committee of the Law Society of South Australia submitted that concerns about victims of sexual assaults avoiding counselling, help or psychiatric care for fear that clinical notes containing their innermost feelings and thoughts would become subject to disclosure during trial were "at best, speculative and probably illusory".

Parliamentary debates on this issue exemplify the tension that exists between two competing public interests: the public interest in the fairness of the trial, which may be prejudiced by exclusion of evidence pertinent to the forensic process, and the public interest in preserving therapeutic confidentiality. This article examines the most important aspects of protected confidential communications legislation and the response of the judiciary to it, as evidenced through the cases. To date, there have been a number of cases in New South Wales and Victoria directly relating to the statutory sexual assault communications privilege. In South Australia, the Court of Appeal discussed in depth the statutory public interest immunity protecting certain communications made by sexual assault victims (modelled on but different from the common law public interest immunity).
Balancing of public interests

Evidence, provided in court by both sides to the litigation in support of their respective pleas and allegations, lies at the heart of the adversarial system. Principles that exclude material pertinent to the forensic process are based upon social values that have objectives external to and different from those which underlie common law notions of adversarial legal proceedings. With the notable exceptions of legal professional privilege and the privilege against self-incrimination, most exclusionary rules of evidence are creatures of statute.

Many judges are convinced that parties must have access to all documents relating to the case in order for justice to be done. They reason that exclusionary rules, which allow withholding of evidence that may be relevant, probative and trustworthy, with potential to advance the just resolution of disputes, work against the public interest of the truth-seeking function of the court. Hence the observation of the High Court of Australia in *Grant v Downs* that since "privilege … detracts from the fairness of the trial by denying a party access to relevant documents", the public interest requires that withholding of material relevant to litigation should be rigidly confined within narrow limits.

The argument based on the public interest in fairness of the trial is weighty but not compelling. Not all material relevant to litigation, in the sense that it "increases or diminishes the probability of the existence" of the facts in issue, is admitted in trial. For example, relevant material in the form of hearsay, similar fact, and opinion tends to be routinely excluded from trial on the grounds that it might "hinder rather than facilitate, the pursuit of truth". To be credible, the rhetoric of "truth-seeking", "pursuit of truth" and "a fair trial" has to include a reference to the values of contemporary society, which may or may not regard as "fair" a trial whereby a finding of liability or guilt is accompanied by forensically inflicted severe emotional trauma on the victim.

Indeed, at least since the 19th century, some judges have questioned the methodology of truth-seeking through insistence on disclosure of confidential communications. Thus, referring to the legal professional privilege, Knight Bruce VC observed in 1846:

> The discovery and vindication and establishment of truth are main purposes certainly of the existence of Courts of Justice; still, for the obtaining of these objects, which, however valuable and important, cannot be usefully pursued without moderation, cannot be either usefully or creditably pursued unfairly or gained by unfair means, not every channel is or ought to be open to them. The practical inefficacy of torture is not, I suppose, the most weighty objection to that mode of examination … Truth, like all other good things, may be loved unwise – may be pursued too keenly – may cost too much.

The above argument can equally apply to other confidential communications. Indeed, in 1828 the legislature of New York enacted a patients' privilege, which provided protection to information gained by medical practitioners in the course of their professional relationship with patients. The legislation forbade licensed medical practitioners to "disclose any information which [they] may have
acquired in attending any patient, in a professional character, and which information was necessary to enable them to prescribe or act for the patient.

The statutory privilege of medical confidentiality was enacted for public interest policy reasons, namely, that doctors need full knowledge of facts in order to provide appropriate treatment. Such full disclosure may not be forthcoming if medical practitioners are compelled to disclose confidential information in court. American legislators also noted the long-standing ethical tradition of the medical duty of confidentiality, which meant that during the struggle between legal duty [to disclose] on the one hand, and professional honour on the other, the latter, aided by a strong sense of injustice and inhumanity of the rule, will, in most cases, furnish a temptation to the perversion or concealment of truth, too strong for human resistance.

By 1881, 20 United States jurisdictions enacted provisions similar to the New York statute. Presumably persuaded by public policy arguments similar to those put forward by law-makers in the United States, in 1857 the Parliament of Victoria amended the Evidence Act to provide for the patient's statutory privilege of confidentiality in civil proceedings. Tasmania and the Northern Territory are the two other Australian jurisdictions that have enacted a statutory privilege in civil proceedings. In New Zealand, ss 32 and 33 of the Evidence Amendment Act (No 2) 1980 (NZ), together with s 35 (which gives a court a discretion in any proceedings before it to excuse a witness from giving evidence in breach of confidence), comprehensively codify the "doctor-and-patient" privilege.

In jurisdictions that do not recognise the limited patient's privilege of medical confidentiality, it has been argued that withholding medical evidence communicated in confidence infringes the defendant's right to mount an effective defence against the allegations raised against him or her, by having access to materials that might cast doubt on the truthfulness, integrity or accuracy of the plaintiff. However, even those jurisdictions accept that medical evidence can be withheld from the court under legal professional privilege in criminal cases, if the accused who has retained a medical practitioner for the purpose of forming an opinion about his or her medical condition, decides that the opinion should not be used in the forthcoming trial.

The asymmetry of common law rights within the evidentiary process, which dates back to the 16th century, was justified when defendants laboured under procedural and social disadvantages. However, there is little justification for the preferential treatment of defendants today. In civil cases involving personal injury litigation, defendants through their insurance companies generally command much greater economic resources than injured plaintiffs, and in criminal cases, the forensic might of the Crown has been greatly diminished by funding cutbacks from the state.

Confidential communications legislation

In the second part of the 20th century, professionals working with victims of sexual assaults raised a concern that fear of embarrassment, humiliation and distress resulting from engagement in the court process discouraged...
victims from reporting sexual offences perpetrated against them and from seeking psychiatric or psychological care. Even in jurisdictions which adopted it, the procedural and jurisdictional scope of the patients' evidentiary privilege was considered too narrow to alleviate the problem. In the final quarter of the 20th century, all 50 States of the United States and the District of Columbia enacted an evidentiary medical and psychotherapist-patient privilege providing for varying degrees of statutory protection from disclosure in litigation for communications between the victims of sexual assault and their counsellors.

At federal level in 1996, in *Jaffee v Redmond*, the Supreme Court of the United States determined that confidential communications between a licensed psychotherapist (including a licensed social worker in the course of psychotherapy) and his or her patients in the course of diagnosis or treatment are protected from court-compelled disclosure. The protection extends to both production in discovery and questioning as to the contents of specified confidential communications in a deposition.

In 1997, the Canadian Parliament amended the *Criminal Code 1985 (Can)* to restrict the granting of access to confidential records held by third parties requiring the court to weigh the competing public interests before ordering that records be produced to the court. The checklist of eight factors governing the production to the court included such considerations as whether the likely relevance of the undisclosed evidence has been demonstrated (11 factors); whether its production was "necessary in the interests of justice"; and whether the disclosure would have a "salutary and deleterious" effect on the rights of either the accused or the complainant. That same year, the Supreme Court of Canada in *M(A) v Ryan* acknowledged a privilege in the case of a psychiatrist providing sexual assault counselling. The court ordered limited disclosure "to the extent necessary for proper disposition of litigation" involving production of documents "potentially relevant to questions of causation and damages".

In Australia, the content of the legislation restricting or excluding certain kinds of otherwise compellable evidence from legal proceedings was informed by two factors. The first was the perception that victims of sexual offences may neither report the attacks, nor seek help to overcome their consequences, unless there is some assurance of confidentiality in relation to communications which form part of a therapeutic process. The legislatures therefore decided that the public interest in upholding the confidentiality of a therapeutic relationship regarding sexual assault should prevail over the public interest in the unimpeded "truth-seeking" forensic process. While recognising the exclusionary rule of sexual assault confidential communications in the context of the forensic process, the wording of each statute varies, and with it the nature and the scope of the exclusion.

Secondly, the confidential communications legislation was a response to the practice by defence counsel in cases involving allegations of sexual

(2002) 10 JLM 49 at 53

offences to issue subpoenas to obtain access to the counselling records or treatment records of the complainant with the aim of searching for inconsistencies in the early reports by the victim. This material, when adduced in court to highlight discrepancies
in complainants' versions of what they said had happened to them, would often be used to humiliate and undermine the witness's credibility on the witness stand. This practice was rampant even though, as the then Attorney-General for Victoria pointed out, clinical notes of counsellors are not records of facts but a professional interpretation within the context of the counselling process of the patient's emotional responses to what had occurred. Judges would often grant access to files in order "to facilitate little more than a fishing expedition for the defence". Hence, the form of legislation was supposed to be shaped by the mischief it had intended to cure, namely, the failure by the judiciary to follow proper processes regarding objections to the subpoena itself and the production of the documents referred to in the subpoena. Each of the three jurisdictions has adopted a different approach to imposing statutory restraints on judicial discretion.

The general thrust of confidential communications statutes is similar, insofar as they all extend statutory protection to both civil and criminal proceedings. At the same time, each of the three legislatures has adopted a distinct approach to the definition and implementation of the protective measures. In particular, procedural mechanisms for admissibility or exclusion of protected communications have a different jurisprudential basis in relation to judicial discretion. Elegantly drafted South Australian provisions are based on the public interest immunity principle, and provide the most comprehensive protection. In Victoria, the legislature opted for a statutory privilege. New South Wales has two rather convoluted statutes governing the sexual assault communications privilege, the Evidence Act 1995 (NSW) and the Criminal Procedure Act 1986 (NSW), both of which provide different kinds of limited protection from admissibility of protected confidences.

Victoria

Procedural scope of the legislation

The Victorian Parliament cast the legislation in terms of a "confidential communications privilege". Under the privilege, evidence in the form of "protected communications" is excluded in a "legal proceeding" unless the court grants leave to adduce it, and the party seeking to have it adduced has given notice of its intention. The meaning of the phrase "evidence is not to be adduced in a legal proceeding", which opens s 32C, was examined in Atlas v DPP. In this case, the plaintiff, who faced allegations of nine counts of indecent assault contrary to s 68(3A) of the Crimes Act 1958 (Vic) against J, had issued a subpoena to the Royal Melbourne Hospital, Melbourne Clinic (a psychiatric facility) and the Larundel Psychiatric Hospital to produce documents described as "medical file containing all medical reports, records, file notes and documents relating to (J)". The primary judge, Holt J, granted an order refusing the inspection of the documents. On appeal, Bongiorno J quashed Holt J's order, and ruled that the words in s 32C did not encompass the production of documents on subpoena because, according to his Honour:

the phrase "adduced in a legal proceeding" is completely inapt to describe the production of documents to a court in response to a subpoena for production or, for that matter, the production of documents to a party for inspection following discovery (including pre-action or preliminary discovery, and significantly, third party discovery). Such documents are not necessarily brought forward for consideration by the tribunal of fact for the purpose
described above. They are brought forward because of a legally enforceable command directed to the person in whose possession they are to produce them so that they can then be dealt with as directed by the court (or, in the case of discovery, by the rules)

(2002) 10 JLM 49 at 54

of court) in accordance with known legal principles, and subject to known legal safeguards. In other words, according to Bongiorno J, the s 32C privilege does not prevent the accused person's lawyers from obtaining documents containing confidential communications by way of subpoena. What it does is to prevent their use directly within the court proceedings. It would have been preferable for the legislators to state in so many words that the exclusion was intended to cover pre-trial discovery and production.

Limits on judicial discretion

Under Victorian provisions, there is a negative presumption that evidence of protected communications will be excluded in a legal proceeding unless the court specifically grants leave to adduce it in whole or in part, and the party seeking to have it adduced has given notice of its intention. The legislation directs that "the court must not grant the leave to adduce protected evidence unless it is satisfied, on the balance of probabilities", of the probative value of the evidence sought to be adduced, and that "the public interest in preserving the confidentiality of confidential communications and protecting a protected confider from harm is substantially outweighed by the public interest in admitting, into evidence, evidence of substantial probative value".

In determining the public interest prerequisite the court must take into account "the likelihood, and the nature or extent, of harm that would be caused to the protected confider if the protected evidence is adduced". In Canada, for example, a risk of suicide by some of the complainants in response to a disclosure order was considered a factor to be taken into account in the balancing process under a similar provision. The court must state reasons for its determination, and, where the leave to adduce evidence is refused, this fact must not be referred to in the presence of the jury, if any. In Atlas v DPP, Bongiorno J stated:

The principle that all evidence should be available (subject to its meeting the statutory criteria set out in the new Victorian provisions where they apply) to enable the Court to discover the truth in the course of a trial is not inconsistent with the purpose of the amending legislation if it is given the scope I have allowed it.

Yet, under at least one interpretation of the far from clear judgment in Atlas, the public interest test has to be applied by the judge only when the defence seeks to use confidential communication material in evidence. The judge is not required to apply this test when a defence lawyer asks the court for access to confidential communications under subpoena. If this interpretation of Bongiorno J's ruling is right, a major purpose of the legislation is defeated, for, while disallowing the use of the actual confidential documents as evidence, it permits the defence to use information obtained from the documents "in less direct ways, such as when deciding
what questions to ask the complainant in cross-examination”. This is precisely the practice which the Attorney-General for Victoria, in her Second Reading Speech, labelled as akin to "fishing expeditions".

**The nature of protected communications**

The Victorian legislation extends protection to communications, oral or written, made in confidence to "a registered medical practitioner or counsellor in the course of the relationship of medical practitioner and patient or counsellor and client, as the case requires". Whereas "medical practitioner" is defined as a person registered under the *Medical Practice Act 1994* (Vic), the qualifications of a "counsellor" are not specified. Since the term "treatment" is also left undefined under the Act, a "counsellor" can be a registered psychologist, a self-styled psychotherapist or, for that matter, a faith healer. Moreover, in both Victoria and New South Wales the privilege attaches to communications made in confidence between the prescribed parties "whether before or after the acts constituting the offence occurred or are alleged to have occurred", that is, to quote the Victorian Law Reform Commission, "regardless of whether the counselling relationship had any connection with the offence".

Since in Victoria and New South Wales, protected information is in the nature of a privilege, it can be adduced with the consent of the "protected confider". Victorian provisions specify that if the child-confider is under 14 years of age, the consent may be obtained from "any person whom the court regards as being an appropriate person to give that consent".

**South Australia**

**The scope of the public interest immunity**

In South Australia, communications relating to a victim or alleged victim of a sexual offence, "if made in a therapeutic context", are protected from disclosure in legal proceedings by public interest immunity. Unlike a privilege, the parties to the proceedings cannot waive public interest immunity. Indeed, s 67E(3) of the *Evidence Act 1929* (SA) provides that communications protected by public interest immunity cannot be waived by the counsellor or therapist; a party to the protected communication; or the victim or alleged victim of the sexual offence or the guardian of the victim or alleged victim.

Moreover, by virtue of s 67F(1) of the *Evidence Act 1929* (SA), evidence considered to be part of protected communications "is entirely inadmissible in committal proceedings", and "is not liable to discovery or any other form of pre-trial disclosure", which means that a party who has custody of protected communications is not liable to produce that evidence in answer to a subpoena. According to the Supreme Court of South Australia, in *Question of Law Reserved*, by limiting the right to discovery of documents, the legislators have granted the makers of protected communications substantive as well as procedural statutory rights.
In *Question of Law Reserved*, the accused, who was charged with sexual abuse of six children, issued subpoenas requiring production from three hospitals in Adelaide of, amongst other things, clinical records of communications made in a therapeutic context by the children-complainants. The trial judge delivered a ruling in which he declined to inspect these documents, dismissed the application, and declined to allow the accused's counsel to inspect. Subsequently, he reserved for the consideration of the Court of Appeal several questions of law, including the issue of whether the right to statutory immunity had retrospective operation. While determining that it does not, Debelle and Lander JJ (Nyland J agreed with Lander J) analysed in depth the new legislative scheme.

Lander J stressed that the public interest immunity, which attaches to protected communications, operates against all persons, including counsel and legal practitioners. His Honour noted that the policy of the legislation is to protect therapeutic communications relating to sexual assaults "from coming to the attention of anyone else apart from the parties to the communication". Such evidence "cannot be admitted in other legal proceedings unless the court gives leave to a party to the proceedings to adduce the evidence; and its admission is consistent with any limitations or restrictions fixed by the court". Pursuant to s 67F(2), a party has the right to apply to adduce evidence of the protected communication, but only if the applicant can satisfy the court that there is a legitimate forensic purpose for seeking leave to adduce the evidence and there is an arguable case that the evidence would materially assist the applicant in the presentation of the applicant's case. Counsel are not permitted to inspect the evidence before the court makes any determination under s 67F(2).

**Judicial discretion**

Debelle J noted that it is unclear whether "a judge may inspect the documents for the purpose of determining whether the documents are in truth protected communications". Lander J stated, however, that "ordinarily the court could be satisfied upon evidence given either in affidavit or orally" whether the evidence was a protected communication. In rare cases of "any real doubt that the evidence came within a protected communication under s 67D then the court could … inspect the evidence for that purpose". In a further limitation of the court's discretion, s 67F(7) specifies:

> [T]he court is not to grant leave to adduce evidence of a protected communication unless satisfied that the public interest in preserving the confidentiality of protected communications is outweighed, in the circumstances of the case, by the public interest in preventing a miscarriage of justice that might arise from suppression of relevant evidence.

Lander J commented:

> [T]he scheme of the Act will preclude some accused persons from ever becoming aware of protected communications which might be relevant to the accused's defence. But that, in my opinion, is the clear intent of the legislation.
The nature of protected communications

In South Australia, the ambit of protection under "public interest immunity" only applies to communications made for the specific purpose of assessment of "the nature and severity of the trauma suffered by the victim or alleged victim, or consequent psychiatric, psychological or emotional harm", or "in or in the course of psychiatric or psychological therapy". Consequently, communications made before the alleged offence had occurred are not covered. Moreover, there is no reference to medical practitioners; rather, the designated confidants are counsellors or therapists involved in the assessment of "psychiatric, psychological or emotional harm" or therapy for these conditions. Section 67D defines "counsellor or therapist" as "a person whose profession or work consists of, or includes, providing psychiatric or psychological therapy to victims of trauma (and includes a person who works voluntarily in that field)". At least with regard to psychiatric therapy or counselling, s 67D will need to be interpreted in the light of s 30 of the Medical Practitioners Act 1983 (SA), which provides that unless registered on the appropriate register or registers, it is illegal to hold oneself or another person out as a medical specialist.

New South Wales

Professional confidential relationship privilege and sexual assault communications privilege

The Evidence Act 1995 (NSW) distinguishes between professional confidential relationship privilege (Div 1A), which aims to protect the integrity of such relationships, and the sexual assault communications privilege (Div 1B). For the purposes of both Divisions, protected communications are those made by a person in confidence to another person (called the confidant) "in the course of a relationship in which the confidant was acting in a professional capacity", and "when the confidant was under an express or implied obligation not to disclose its contents". This will be so, "whether or not the obligation arises under law or can be inferred from the nature of the relationship between the person and the confidant". The legislation thus encompasses therapeutic relationships, although, given that the definition of "harm" includes any "actual physical bodily harm, financial loss, stress, shock, damage to reputation and emotional or psychological harm (such as shame, humiliation or fear)" just about any professional person in the community can come within the rubric of a "confidant".

Confusion regarding the nature and application of statutory professional confidential relationship privilege was illustrated in Mok v New South Wales Crime Commission. In this case, the New South Wales Crime Commission brought civil proceedings against Mok under the Criminal Assets Recovery Act 1990 (NSW). Section 6 of the Act provides for confiscation of property if the Supreme Court finds it to be more probable than not that the person has engaged in "serious crime-related activity". Mok wished to subpoena medical records of a man called Cheung who, whilst in prison in Victoria, sought treatment for psychiatric illnesses. Cheung was to give evidence in the confiscation proceedings against Mok. Sully J set aside the subpoena on the ground of public interest immunity as argued by the Victorian Department of Human
Services (which has custody and control of prisoners' medical records). On appeal, Mason P set aside Sully J's order, noting that arguments regarding the common law public interest immunity and the case of *R v Young* (discussed below) did not address the true issues in this case. His Honour remitted the matter to be considered under professional confidential relationship privilege contained in Div 1 of the *Evidence Act 1995* in the first instance, and s 130 (exclusion of evidence of matters of state) in the second.75

**Procedural scope of the legislation**

Whereas in South Australia and Victoria the mischief of the misuse of judicial discretion has probably been cured, in New South Wales by virtue of s 126B(1) of the *Evidence Act 1995*, "the court may direct" that evidence of protected confidences not be adduced in a proceeding. In other words, under the *Evidence Act 1995* (NSW), the evidence is to be adduced, unless the court decided otherwise. Under s 126B protection of confidences covered by professional confidential relationship privilege and sexual assault communications privilege applied to a "proceeding".

The question whether this term should be interpreted as including production of documents on subpoena was discussed by the New South Wales Court of Criminal appeal in *R v Young*.76 In this case, the defendant, who was charged with sexual assault and indecent assault on the complainant, subpoenaed her clinical notes, records and files from a sexual assault service attached to the Tamworth Base Hospital, and from her psychiatrist. On appeal, the holdings of the District Court, that the sexual assault communications privilege applied derivatively to the production of the documents77 and that confidential sexual assault communications attracted public interest immunity under s 130 of the *Evidence Act 1995*, were reversed. The Court of Criminal Appeal distinguished disclosure of communications by way of ancillary process such as subpoena from adducing of evidence in a courtroom in the course of a hearing.78 The majority refused to extend the meaning of the words "adduced in a proceeding"79 to "embrace production [of documents] pursuant to a subpoena".80

**Judicial discretion**

The justices were less than impressed with the drafting of the statutory privilege provisions, and in an appendix to the judgment, drafted their own model version of what the legislation should state.81 Subsequent to *R v Young*, the Parliament of New South Wales set out to rectify drafting faults in the original statute. In his Second Reading Speech on the Criminal Procedure Amendment (Sexual Assault Communications Privilege) Bill,82 the Attorney General for New South Wales declared that:

"the Government [had] always intended that the sexual assault communications privilege should be capable of application in appropriate cases at all stages of the trial process".83

(2002) 10 JLM 49 at 58

The *Criminal Procedure Act 1986* (NSW), Pt 7, now provides that "a person who objects to production of a document recording a protected confidence on the ground that it is privileged cannot be required (whether by subpoena or any other procedure)
to produce the document for inspection by a party" in any criminal proceedings unless the document is first produced for inspection by the court for the purposes of ruling on the objection. In order to grant leave, the court has to be satisfied (whether on inspection of the document or at some later stage in the proceedings) that the document has "substantial probative value", and that "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". In relation to criminal proceedings, the balancing of the public interests provision is now essentially the same in all three jurisdictions. However, in Victoria it is only applied at the actual proceedings stage, in New South Wales the judge is required to consider the balance of interests in relation to pre-trial criminal proceedings, whereas in South Australia the balancing requirement operates in civil discovery or in any other form of pre-trial disclosure procedure, as well as in committal proceedings.

Victoria and New South Wales employ the "substantial probative value" test. With regard to this test, James J in *R v Young* pointed out:

"Probative value" and "substantial probative value" are concepts which are appropriate to evidence which is being adduced but much less appropriate to the contents of a document which has been subpoenaed. A document which has been subpoenaed may be of substantial forensic value to a party who issued the subpoena, for example by indicating a line of enquiry, even though it is inadmissible and therefore, presumably, has no "probative value".

The problem with the wording of the test was addressed by South Australian legislators, who drafted s 67F(2) of the *Evidence Act 1929* (SA), to provide: 

[O]n an application for leave to adduce evidence of a protected communication, the judge may make a preliminary examination of the relevant evidence if satisfied that the applicant has a legitimate forensic purpose for seeking leave to adduce the evidence.

In *Question of Law Reserved*, the accused person's counsel argued that leave to inspect the counselling files should be granted on the grounds that they may contain material which would cast doubt on the truthfulness or accuracy of the prosecution witnesses whose evidence was largely uncorroborated, and the accuracy of whose memories might have been affected by the counselling. The Supreme Court of South Australia found that those grounds "could not have satisfied the Court that there was a legitimate forensic purpose for seeking leave to adduce the evidence".

**Application of the privilege in civil and criminal proceedings**

The Bill to overcome the decision of *R v Young* also amended the *Evidence Act 1995* (NSW), by virtue of which the sexual assault communications privilege applies in "a civil proceeding in which substantially the same acts are in issue as the acts that were in issue in relation to a criminal proceeding". Therefore, "[I]f evidence was found to be privileged in a criminal proceeding under Pt 13 of the *Criminal Procedure Act 1986* (NSW), the evidence may not be adduced in a civil proceeding." Though motivated by the best of intentions, these statutory requirements might have the effect of entrenching the old common law rule known as the "felonious tort rule", whereby a plaintiff who has been a victim of a criminal offence committed by the defendant is
precluded from obtaining compensation in civil courts "unless the defendant [had] been prosecuted or a reasonable excuse [had] been shewn for his not having been prosecuted". Victoria and Tasmania have abolished this rule, and in *Williams v Spautz*, Deane J observed that modern courts tend to treat this common law rule as "archaic".

(2002) 10 JLM 49 at 59

*The nature of protected counselling communication privilege*

The Attorney General for New South Wales, in the course of his Second Reading Speech on the Criminal Procedure Amendment Bill, emphasised that the legislation should address yet another issue arising out of the *R v Young* decision, namely, a very narrow interpretation of what constitutes a protected counselling communication. He stated:

> [P]otential access by defendants to the views of others involved in the process of sexual assault counselling – such as the counsellor's responses to a protected confider, or observations or treatment details concerning a protected confider communicated between counsellors who are concerned with the same case – will result in the therapeutic basis for the counselling being undermined in just the same way as if the protected confider's own ruminations were accessible.

Consequently, the definition of "counselling communication" in the *Criminal Procedure Act 1986* (NSW) is defined in s 148(4)(a) as a communication made in confidence by the counselled person to 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. The term "counselling communication" also encompasses communications made in confidence to or about the counselled person by the counsellor in the course of that relationship, or made in confidence 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, as well as communications made in confidence by or to the counsellor by another counsellor or by a person who is or had counselled or otherwise treated the counselled person for any emotional or psychological condition of the person.

The nature of "protected confidences" and the ambit of "counselling communication" defined in s 148(4)(a) of the *Criminal Procedure Act 1986* (NSW) was examined in *R v Lee*, a case which involved the claim of sexual assault communication privilege in relation to a subpoena issued in proceedings in which the accused was charged with five counts of indecent assault on a person under the age of 16 years (the confidant) by a person in authority. The New South Wales Court of Criminal Appeal found that the relationship between the confidant and the social worker at Mission Australia to whom she spoke about the provision of temporary accommodation, and who arranged for her to have counselling with other persons, as well as listening to accounts of her visits to those other persons, amounted to the social worker "look[ing] after her in a general way, but not in a way which fell within s 148(4)(a)". The ruling of the trial judge that Mission Australia was not obliged to produce the documents for inspection thus was reversed.
In *R v Young*, *R v Lee* and *Atlas v DPP*, the judges were very critical of the admittedly sloppy drafting of the statutory privilege in their respective jurisdictions. They also cavilled the curtailment of discretionary powers regarding the inspection of documents and the shift in the procedural rights enjoyed by the parties. Thus, in *R v Lee*, Heydon J, speaking for the court, described as "an initial difficulty" the fact that:

the primary judge had nothing before him apart from the subpoena and the documents which the subpoena caught. Neither the Crown nor the defendant had access to those documents and the solicitor appearing for the complainant and the complainant had access to them only briefly. Counsel for the defendant did, in the argument before the primary judge, quote from the complainant's statement to the police on 24 July 1999, but no evidence was formally tendered.96

His Honour went on to state:

Plainly, the primary judge could not have proceeded as he did, given the lack of evidence before him, without inspecting the documents. This Court has had to adopt the same course. It is unsatisfactory but inevitable that the Court lacks (2002) 10 JLM 49 at 60

full assistance from counsel for the defendant in these circumstances.97

The justices of the New South Wales Court of Criminal Appeal chose to interpret the privilege provisions of the *Criminal Procedure Act 1986* (NSW) very narrowly. One of the reasons for the narrow reading of the privilege was provided by Wood CJ at CL in *R v Mailes*.98 Wood CJ referred to the principle that "legislation is presumed not to alter common law doctrines, or to invade common law rights, especially those of a person accused of crime".99 The concern for the rights of the accused echoes the following remarks of James J in *R v Young*, made in the context of common law public interest immunity:100

[T]here is only one common law in Australia and it is not legitimate to rely on the New South Wales Evidence Act as a basis for changing the common law by creating a new category of public interest immunity. Any new category of public interest immunity consisting of confidential sexual assault communications would operate especially, if not exclusively, in criminal proceedings so as to diminish the rights of criminal accused.

**Conclusion**

In the three Australian jurisdictions where the right of the accused to have access to material which could potentially be of assistance in defending a charge of sexual assault has been statutorily restricted, the judicial response to the changes has varied. While some judges support the statutory changes, others have found them wanting, or difficult to accept. In general, however, it is arguable that, in a democratic society, where values espoused by the wider community – as reflected in legislation – shift the common law procedural and substantive balance of rights between the parties through a recognition of an exclusionary privilege, it is incumbent upon the courts to be prepared to sacrifice, in some measure, their ability to inquire into all material facts.101
This said, it is a great pity that the Victorian and the New South Wales statutes have not been drafted with more focus and precision. In particular, to fulfil its function as a safeguard of confidentiality, the privilege should extend to all pre-trial discovery and production. Its ambit, however, should be confined to confidential communications that occur within a therapeutic relationship initiated following the sexual assault.

* MA, PhD, LLM. School of Law, Deakin University

Correspondence to: Dr Danuta Mendelson, School of Law, Deakin University Toorak Campus, 221 Burwood Highway, Burwood, Vic 3125, Australia.

1 Evidence Act 1995 (NSW), ss 126A – 126F.
2 Evidence Act 1958 (Vic), ss 32B – 32G.
3 Evidence Act (Confidential Communications) Amendment Act 1999 (SA), incorporated into the Evidence Act 1929 (SA), ss 67D – 67F.
4 A series of public consultations in 1996 preceded the enactment of the legislation. They included a forum convened by the Victorian Community Council Against Violence to develop guidelines for legislative protection of counsellors' notes from improper use in sexual offence hearings; the New South Wales Attorney General's Department's Discussion Paper on Protecting Confidential Communications from Disclosure in Court Proceedings; and the request made by the Standing Committee of Attorneys-General to the Model Criminal Code Officers Committee to issue a discussion paper on the same subject.


7 Under the common law public interest privilege, documents or information relating to governmental function may have immunity from production where their disclosure would be against the public interest. The court, through a balancing process, has the duty to determine whether or not to order production. See Sankey v Whitlam (1978) 142 CLR 1; R v Young (1999) 46 NSWLR 681.

8 The role of the pleading is that "of a written identification and communication of the extent of the plaintiff's claim": Philips v Philips [1878] 4 QBD 127 at 139; Jamieson v The Queen (1993) 67 ALJR 793 at 794.

12 See also Gregory v The Queen (1983) 57 ALJR 629.
14 Odgers, n 13.
15 Pearse v Pearse [1846] 63 ER 950 at 957, quoted with approval by
Lord Macnaughten in Macintosh v Dun [1908] AC 390 at 401 and Isaac J in National Mutual Life Association of Australasia Ltd v Godrich (1910) 10 CLR 1 at 35.

16 2 NY Rev Stat Pt 3, Ch 7, § 73, at 406 (1828-1829).


18 Shuman, n 17.

19 Gartside v Connecticut Mutual Life Insurance Co 76 Mo 446 at 452 (1882) provides a chronological table of the 20 statutes.

20 Victoria, Legislative Assembly, Parliamentary Debates, 21 Jan 1857, p 323, only reports that "On clause 18 [Evidence Law Amendment Bill], on the question whether or not medical men should be exempted from divulging particulars entrusted to them by patients, the House divided, when the question was decided that they should not be compelled to divulge such statements": Victoria, Legislative Council, Parliamentary Debates, 28 April 1966, Vol 281, pp 3754-3755.

21 Evidence Act 1910 (Tas), s 96.

22 Evidence Act 1996 (NT), s 12.

23 Evidence Amendment Act (No 2) 1980 (NZ), s 32; Pallin v Department of Social Welfare [1983] NZLR 266.

24 R v Ward (1981) 3 A Crim R 171 at 190. In rare cases, the operation of the professional legal privilege may be curtailed by public safety considerations: see Smith v Jones [1999] 1 SCR 455; W v Egdell [1990] 1 All ER 835; Crozier (1990) 12 CrApp R (S) 206.


28 116 S Ct 1923 (1996). The court held that psychotherapist-patient privilege should be recognised under r 501 of the Federal Rules of Evidence, as part of United States federal common law.

29 The majority decided that the privilege should extend to licensed social workers in the psychotherapist-patient relationship, because such professionals performed a therapeutic function and were more accessible to lower-income clients: Jaffe v Redmond 116 S Ct 1923 at 1927 (1996). In a forceful dissent, Scalia J criticised the inclusion of licensed social workers in the psychotherapist-patient privilege, pointing out differences in training and function between licensed

30 Jaffee v Redmond 116 S Ct 1923 at 1927, 1931 (1996). In Re Grand Jury Proceedings (Gregory P Violette) 183 F 3d 71 (1st Cir 1999), the First Circuit held that psychotherapist-patient privilege encompasses a so-called "crime-fraud exception", whereby the party invoking the exception has to show that the patient was engaged in (or was planning) criminal or fraudulent activity when the psychotherapist-patient communications took place; and that the communications were intended by the patient to facilitate or conceal the criminal or fraudulent activity.

31 Criminal Code (Can), s 278.1 – 178.9 (1997, c 30, s 1; 1998, c 9, s 3); R v Mills [1999] 3 SCR 668.

32 [1997] 1 SCR 157; (1997) 143 DLR (4th) 1. The claimant was 17 years of age when she underwent psychiatric treatment with Dr Ryan, during which they had sexual relations. The claimant subsequently sought psychiatric treatment from Dr Parfitt, but had expressed concern regarding the confidentiality of communications between M and Dr Parfitt. Dr Parfitt assured her that everything possible would be done to ensure that all communications remained confidential.

33 Dr Ryan admitted having sexual intercourse with M, but denied that this was the cause of the problems for which she sought damages.

34 In the United States, all jurisdictions have extended legislative protection to psychotherapist-patient communications: Cantu, n 27.


36 Parliament of Victoria, Legislative Assembly, Hansard, 19 March 1998, p 547, Mrs Wade.


38 In South Australia they also extend to arbitration: Question of Law Reserved [2000] SASC 205 at [11] per Debelle J.

39 Evidence Act 1958 (Vic), s 32C.


41 [2001] VSC 209 at [38].

42 Evidence Act 1958 (Vic), s 32C. The disclosure to the party seeking leave to adduce may be made in any manner that the court thinks fit: Evidence Act 1958 (Vic), s 32D(3).

43 Evidence Act 1958 (Vic), s 32C(2). In general, the party seeking to have the evidence adduced has to give no less than 14 days’ notice of their intention. By virtue of s 32C(5), the relevant medical practitioners or counsellors and the protected confiders may, with the leave of the court, appear in the proceeding and make submissions whether or not notice has been given. Victorian judges do not have discretionary power to dispense with the privilege.
Evidence Act 1958 (Vic), s 32D(1)(c).
Evidence Act 1958 (Vic), s 32D(2).
Evidence Act 1958 (Vic), s 32D(4).
Evidence Act 1958 (Vic), s 32D(5).
[2001] VSC 209 at [57].
Victorian Law Reform Commission, n 26, p 145.
Evidence Act 1958 (Vic), s 32B (Definitions).
Victorian Law Reform Commission, n 26, p 144.
Evidence Act 1929 (SA); Evidence Act 1958 (Vic), s 32E1(a);
Evidence Act 1995 (NSW), s 126C.
Evidence Act 1929 (SA), s 67E.
Evidence Act 1929 (SA), s 67F(1)(a). This provision is in line with
the approach of the Model Criminal Code, Chapter 5: Sexual
Offences Against the Person Report (1999) drafted by the Model
Criminal Code Officers' Committee of the Standing Committee of
Attorneys-General.
Evidence Act 1929 (SA), s 67F(1)(c).
[2000] SASC 205. Debelle J referred to Commonwealth v Miller
(1910) 10 CLR 742 at 746 per Griffith CJ and at 754-755 per Isaacs
J, who held that discovery was a right within the meaning of s 64 of
the Judiciary Act 1903 (Cth).
Question of Law Reserved [2000] SASC 205 at [73] per Lander J.
[2000] SASC 205 at [64], [68] per Lander J.
Evidence Act 1929 (SA), s 67F(1)(b).
Question of Law Reserved [2000] SASC 205 at [18] per Debelle J.
[2000] SASC 205 at [74] per Lander J.
[2000] SASC 205 at [68] per Lander J.
Evidence Act 1929 (SA), s 67D.
Evidence Act 1929 (SA), s 67D.
The latter is also covered by the Criminal Procedure Act 1986
(NSW).
Evidence Act 1995 (NSW), s 126A(1).
Evidence Act 1995 (NSW), s 126A(1). The provision also introduces
the concept of "protected identity information", defined as
"information about, or enabling a person to ascertain, the identity of
the person who made a protected confidence".
Evidence Act 1995 (NSW), s 126A. Identical definition of "harm" is
contained in Evidence Act 1958 (Vic), s 32B.
[2002] NSWCA 53 at [21] per Mason P.
The subpoenaed files involved information acquired by prison
psychiatrists who assessed Cheung to enable them to treat him. They thus fell within the patient's statutory privilege of confidentiality under s 28(2) of the Evidence Act 1958 (Vic). However, although the s 28(2) privilege applies to civil actions and proceedings conducted in Victoria irrespective of where "the confidence arose" (National Mutual Life Association of Australasia Ltd v Godrich (1910) 10 CLR 1 at 38), it does not extend to proceedings conducted in other jurisdictions.

77 R v N [1998] NSWSC 281, in which the Court of Criminal Appeal determined that Div 1B applied derivatively to sexual assault communications, was held incorrect.
78 See also M v L [1999] 1 NZLR 747.
79 Evidence Act 1995 (NSW), ss 126G – 126H.
80 R v Young (1999) 46 NSWLR 681 at [37] per Spigelman CJ.
81 R v Young Replacement Final Draft of Additional Words to be Inserted in Div 1B.
82 An Act to amend the Criminal Procedure Act 1986 with respect to preservation of the confidentiality of counselling communications made by, to or in relation to victims and alleged victims of certain sexual assault offences; to make related amendments to the Evidence Act 1995 and to the Victims Compensation Act 1996; and for other purposes.
84 Criminal Procedure Act 1986 (NSW), s 150(1).
86 [2000] SASC 205 at [113] per Lander J.
87 Evidence Act 1995 (NSW), s 126H(1).
88 Supreme Court Act 1986 (Vic), s 41; Criminal Code Act 1924 (Tas), s 9(3).
91 Criminal Procedure Act 1986 (NSW), s 148(4)(a).
92 Criminal Procedure Act 1986 (NSW), s 148(4)(b) and (c).
93 Criminal Procedure Act 1986 (NSW), s 148(4)(d).
94 [2000] NSWCCA 444 per Mason P, Heydon JA and Wood CJ at CL.
95 [2000] NSWCCA 444 at [27].
97 [2000] NSWCCA 444 at [14].
98 [2001] NSWCCA 155 at [205], [206].
99 His Honour referred to R v Young (1999) 46 NSWLR 681 at 731; see also Gaudron J in R v Eastman; Eastman v The Queen (2000) 74 ALJR 915; and Radway v The Queen (1990) 169 CLR 515.
100 In Clifford v Victorian Institute of Forensic Mental Health [1999]
Cummins J upheld the claim for public interest immunity with regard to the confidentiality of a psychiatric hospital file believed to contain an admission made by a certified mentally ill accused person who had been detained in custody pending trial for murder. His Honour distinguished R v Young on the facts, and on the issue of governmental function within the common law public interest immunity. Cummins J's approach was approved of by Mason P in Mok v New South Wales Crime Commission [2002] NSWCA 53 at [29]. Mason P questioned the limitation imposed by the majority in R v Young with regard to the categories of governmental function to which the common law public interest immunity may apply.