



Crown Solicitor

Advice

Disclosure of Confidential Information by Psychologists in Court

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1. Summary of advice

- 1.1 Please note this is a summary of the central issues and conclusions in my advice. Other relevant or significant matters may be contained in the advice, which should be read in full.
- 1.2 I consider in my advice whether psychologist witnesses who are asked a question in legal proceedings relating to communications made to them in confidence by their clients may successfully object to answering the question. I consider the possible application of common law privileges, public interest immunity (at common law and under section 130 of the *Evidence Act 1995*), the “professional confidential relationship privilege” established by Part 3.10, Division 1A of the *Evidence Act 1995* (NSW), and the “sexual assault communications privilege” established by Part 3.10, Division 1B of the *Evidence Act* (NSW) and Part 7 of the *Criminal Procedure Act 1986*.
- 1.3 The common law does not recognise any privilege protecting the disclosure of communications between psychologists and their clients.
- 1.4 There may be limited circumstances in which a claim of statutory or common law public interest immunity could be made in relation to evidence by psychologists of their clients’ confidential communications. The claim must relate to matters of state or protect a governmental function. Confidences made by clients to psychologists relating to their experiences of sexual assault will not generally be protected by public interest immunity. Although psychologist witnesses have the right to make a claim of public interest immunity on their own behalf, claims of public interest immunity are almost invariably made by the State.
- 1.5 Psychologists may in many circumstances be able to claim that the professional confidential relationship privilege should prevent confidential information provided by their clients from being given in evidence. This privilege is established by Part 3.10, Division 1A of the *Evidence Act 1995* (NSW), and applies to proceedings in “NSW courts”. The privilege requires the court to exclude evidence of a “protected confidence” if satisfied that the harm that would or might be caused to a “protected confider” by the disclosure of the evidence outweighs the desirability of the evidence being given. The court may be less likely to uphold the claim where the evidence is of substantial probative value and importance to the proceedings or is adduced by the defendant in a criminal proceeding.
- 1.6 The sexual assault communications privilege, established by Part 3.10, Division 1B of the *Evidence Act* (NSW) and by Part 7 of the *Criminal Procedure Act 1986*, substantially restricts the circumstances in which a “counselling communication” made by, to or about a victim or alleged victim of a sexual assault offence may be given in evidence in criminal proceedings before a “NSW court”. The privilege

imposes a far more demanding test before evidence of a protected confidence will be admitted in criminal proceedings than that established by the professional confidential relationship privilege. The sexual assault communications privilege is, however, only available in civil proceedings in very limited circumstances.

- 1.7 The opportunities for psychologist witnesses to prevent the disclosure of evidence of confidential communications made to them in proceedings in which the Commonwealth *Evidence Act* applies are extremely limited. The only possible basis is likely to be a claim of statutory public interest immunity under section 130 of the Commonwealth *Evidence Act*.

2. Advice sought

- 2.1 Your letter of 16 April 2002 requests my advice on the disclosure of confidential information by psychologists when giving evidence in court.
- 2.2 You state that the issue of confidentiality in a therapeutic relationship is of major importance and significance in building trust between the psychologist and client, and that you are often contacted for advice in relation to issues of psychologist-client confidentiality. You request advice “regarding the rules of the court which may apply to witnesses giving evidence, specifically where witnesses are required to answer questions as put to them”.

3. Background

- 3.1 [Withheld]
- 3.2 [Withheld]
- 3.3 Mr Tom Chisholm of my Office had the benefit of a discussion with Ms Amanda McEacharn, the Acting Secretary of your organisation, on 30 May 2002. Ms McEacharn invited me to put further questions to the Board to be considered at its next meeting.

- 3.4 Following my questions as to the scope of the advice sought in my letter of 31 May 2002, you confirmed by letter dated 6 June 2002 that the advice sought was quite broad and would cover all types of proceedings in which psychologists may be required to give evidence. The advice should also refer to the issue of sexual assault confidences.
- 3.5 You also confirmed that you did not require any further advice on the example provided in your letter of 16 April 2002. You also referred me to the *Code of Ethics* of the Australian Psychological Society and to your *Code of Ethical Conduct*.
- 3.6 I note that, although your letter of 16 April 2002 refers to advice on the disclosure of confidential information in “court”, your letter of 6 June 2002 states that the advice should refer to all types of proceedings in which psychologists may be required to give evidence. Since I expect that psychologists may be required to give evidence before tribunals and other non-judicial bodies, my advice relates to all legal proceedings, and is not limited to proceedings before a “court”. It is, however, restricted to legal proceedings held in the State of New South Wales.
- 3.7 I also note that you state in your letter of 16 April 2002, in referring to your findings in relation to the example of the Apprehended Violence Order proceeding, there may have been another way in which the question to the psychologist “could have been asked”. In the circumstances to which you refer the psychologist herself was the applicant in the proceedings, and was asked the question by her own solicitor. In those circumstances, it would clearly be a matter for the psychologist to instruct her legal representative in regard to the questions which she is to be asked in court.
- 3.8 I would expect, however, that in most proceedings in which psychologists are required to give evidence they would not be parties to the proceedings, but would be called to give evidence by one of the parties, and would expect to be cross-examined by the other party. In these circumstances, the ability of psychologists to influence the questions that they are asked would be, at best, extremely limited.
- 3.9 This advice will therefore address the circumstances where psychologists, in the course of giving evidence in proceedings, are asked questions which appear to require them to disclose information provided to them in confidence by a client or former client. I will consider the circumstances in which the psychologist may have a legal basis to object to answering such a question.
- 3.10 I will not be able to consider in this advice the possible circumstances in which persons other than witnesses are able to object to the giving of evidence. In certain circumstances, for example, it is possible that information provided by or to a psychologist for the purposes of litigation may attract legal professional privilege: see

s. 119 of the *Evidence Act*.¹ A claim for privilege, however, may only be made by a “client” or the lawyer of a client. (A “client” is defined in s. 117(1) of the Act.) Unless the psychologist happens to be the client, any objection on the grounds of legal professional privilege could not be made by the psychologist.²

- 3.11 It is also beyond the scope of this advice to consider issues of confidentiality in relation to psychologists acting under particular statutory authority, such as court-appointed counsellors or experts.
- 3.12 As you note, the subject of the present advice is broad in nature. The purpose of this advice is therefore to outline the relevant legal principles and statutory provisions relevant to the disclosure of confidential client information by psychologists in giving evidence in proceedings. It is plainly not possible to consider the myriad of circumstances in which psychologists may wish to raise objections on the basis of client confidentiality. I do attempt, however, to outline in broad terms the general types of circumstances in which claims of confidentiality may be successful.
- 3.13 I also note that the statutory provisions considered in this advice, particularly in relation to the sexual assault communications provisions, have been substantially amended over the recent years. Further amendments and legal developments are likely in future, and this should be borne in mind when considering this advice. The advice is current as at today's date.

4. Advice

Competent Witnesses Can be Compelled to Give Evidence

- 4.1 Subject to certain limited exceptions, a person who is competent to give evidence about a fact can be compelled to give that evidence: sections 12 and Parts 2.1 of the *Evidence Act 1995* (Cth) and the *Evidence Act 1995* (NSW). Witnesses must answer all questions put to them unless excused, or unless the refusal to answer is based upon a privilege or exemption conferred by law.³

¹ These circumstances may arise where psychologists are retained as expert witnesses or to prepare a report for the purposes of litigation. For a discussion of the circumstances in which legal professional privilege may be claimed in relation to communications with experts retained for the purposes of litigation see Mendelow, P, “Expert Evidence: Legal Professional Privilege and Experts’ Reports” (2001) 75 *Australian Law Journal* 258.

² In those circumstances, however, it would be appropriate for the psychologist to put the person who may wish to assert the claim on notice that the person may wish to attend court to assert the claim, indicate to the judge or tribunal member the psychologist's concern that a claim of privilege may arise, and ask that an opportunity be provided for the “owner” of the document to be contacted to ascertain if he or she wishes to make the claim.

³ See Heydon, J, *Cross on Evidence, Sixth Australian Edition*, 2000, Butterworths, Sydney; [130001], p. 318. A witness may, of course, be directed not to give certain evidence or to answer certain questions if that evidence is determined not to be admissible. It is plainly beyond the scope of this advice to consider the circumstances in which evidence of psychologists may or not be admissible. This advice assumes that the

- 4.2 A witness who refuses to give such evidence is prima facie guilty of contempt of the court or tribunal.⁴
- 4.3 The common law does not recognise as a defence to a charge of contempt for the refusal to give evidence a claim that giving evidence would breach a professional ethical obligation of confidence.⁵

The Common Law and the Evidence Acts

Overview

- 4.4 This advice will consider three principal sources of law which relate to the giving of evidence by witnesses in legal proceedings in New South Wales. Those sources are the common law, the *Evidence Act 1995* (NSW) and the *Evidence Act 1995* (Commonwealth).
- 4.5 The *Evidence Acts* of New South Wales and the Commonwealth were, at the time of their enactment in 1995, virtually identical.⁶ In 1997, however, the *Evidence Amendment (Confidential Communications) Act 1997* (NSW) introduced Divisions 1A and 1B into Part 3.10 of the NSW *Evidence Act*. These Divisions established respectively a “professional confidential relationship privilege” and a “sexual assault communications privilege”. No equivalent amendments have been made to the Commonwealth *Evidence Act*.
- 4.6 I therefore first consider the scope of the coverage of the Commonwealth and New South Wales *Evidence Acts*.

Evidence Act 1995 (New South Wales)

- 4.7 The *Evidence Act* (NSW) applies to all proceedings in a “NSW court”: s. 4(1).
- 4.8 A “NSW court” is defined as: (Part 1 of the Dictionary to the Act)

“(a) the Supreme Court, or
(b) any other court created by Parliament,
(including such a court exercising federal jurisdiction) and includes any person or body (other than a court) that, in exercising a function under the law of the State, is required to apply the laws of evidence.”

(‘Parliament’ refers to the NSW Parliament; see s. 21(1) of the *Interpretation Act 1987*.)

evidence which psychologists are required to provide is – apart from the statutory provisions and legal principles relating to confidentiality – otherwise admissible in the proceedings.

⁴ *Registrar Court of Appeal (NSW) v Craven* (1994) 126 ALR 668 at 684 per Kirby P; *Smith v The Queen* (1991) 25 NSWLR 1 at 9 per Kirby P.

⁵ See, for example, *Independent Commission Against Corruption v Cornwall* (1993) 38 NSWLR 207; 116 ALR 97.

⁶ See Odgers, S, *Uniform Evidence Law*, 5th ed., 2002, Lawbook Co., Sydney, [1.1.1], p. liii.

A “NSW court” is therefore defined very broadly to include any person or body other than a court that, in exercising a function under State law, is required to apply the laws of evidence.

- 4.9 Statutes establishing a number of non-judicial bodies specifically provide that those bodies are not bound by the laws of evidence. (See, for example, s. 163(1)(b) of the *Industrial Relations Act 1996*, in relation to the Industrial Relations Commission of New South Wales,⁷ and s. 73(2) of the *Administrative Decisions Tribunal Act 1997* in relation to the Administrative Decisions Tribunal of New South Wales.) Such bodies are therefore not bound by the *Evidence Act*. On the other hand, it does not follow that such bodies *may not* make an evidentiary ruling consistent with the rules of evidence reflected in the *Evidence Act*.⁸
- 4.10 Public interest immunity⁹ is a fundamental principle of common law, and bodies are obliged to apply it whether or not the rules of evidence apply.¹⁰ The professional confidential relationship privilege and the sexual assault communications privileges established by Part 3.10, Divisions 1A and 1B of the NSW *Evidence Act*, however, have no precedent at common law. The extent to which a body not bound to apply the rules of evidence may have regard to these privileges is uncertain.¹¹
- 4.11 Other statutes provide that bodies hearing proceedings are not bound by the laws of evidence, but have a discretion to apply the laws of evidence to proceedings or to

⁷ The Commission in Court Session, however, is required to apply the rules of evidence; s. 163(2) of the *Industrial Relations Act 1996*.

⁸ The Industrial Relations Commission, for example, pursuant to section 163(1) of the *Industrial Relations Act 1996*, “is not bound by the rules of evidence and may inform itself on any matter in any way that it considers to be just” and, is to exercise its functions according to “equity, good conscience and the substantial merits of the case”. The Commission has held that “this does not mean that the admission of evidence is unrestrained”, and that the Commission would retain the discretion to refuse to admit hearsay material, containing evidence prejudicial to a party which cannot be tested by cross-examination and which has obvious potential to cause serious disadvantage to that party. See *Van Huisstede v Commissioner of Police* (2000) 98 IR 57 at 96 [160] per Walton J, Vice-President.

⁹ Public interest immunity applies to prevent the adducing of evidence if the public interest in preventing the disclosure of information relating to matters of state or to a governmental function outweighs the public interest in adducing the evidence. See further below at [4.27]-[4.70].

¹⁰ See *Epeabaka v Minister for Immigration and Multicultural Affairs* (1997) 150 ALR 397 at 408-409; Odgers at [1.1.600] at pp. 20-21.

¹¹ In *R v A and B* [1999] NSWADTAP 2 the Appeal Panel of the Administrative Decisions Tribunal considered an appeal from a decision granting access to inspect the applicant’s detailed medical records produced under subpoena. The applicant’s complaint alleged sexual harassment contrary to the *Anti-Discrimination Act 1977*. The Panel held (at [36], [38]) that the Tribunal was not strictly bound to apply the rules of evidence (s 73 of *Administrative Decisions Tribunal Act 1997*), and that the *Evidence Act* did not apply in any case to documents produced under subpoena. The Panel held, nonetheless, that the Tribunal was entitled “to have general regard to the factors enumerated in the [sexual assault communications and professional confidential relationship privilege] privileges”, and that it would expect that “care would be taken to ensure that the important protections conferred by evidentiary privileges, such as those in issue in this case, are maintained”. (At [36] and [38].)

certain parts of the proceedings.¹² Psychologist who wish to make a claim of privilege under the *Evidence Act* in such a proceeding might therefore first be required to satisfy the body that it should apply the *Evidence Act* to the claim or objection that the psychologist intends to make.

Evidence Act 1995 (Commonwealth)

- 4.12 The *Evidence Act 1995 (Cth)* applies in relation to all proceedings in a federal court or an Australian Capital Territory court: s. 4(1). A “federal court” is also defined broadly, as: (Dictionary, Part 1)

“(a) the High Court; or

(b) any other court created by the Parliament (other than the Supreme Court of a Territory);

and includes a person or body (other than a court or magistrate of a State or Territory) that, in performing a function or exercising a power under a law of the Commonwealth, is required to apply the laws of evidence.”

- 4.13 The Commonwealth *Evidence Act* therefore effectively applies to proceedings in the High Court, Federal Court, Family Court, other federal courts, ACT courts, and to Commonwealth tribunals required to apply the laws of evidence.¹³

The Relationship between the Common Law and the *Evidence Acts*

- 4.14 The *Evidence Act* generally applies to the adducing¹⁴ of evidence in a proceeding, and not to “ancillary” procedures such as interrogatories, discovery and the production and inspection of documents under subpoena, which are still governed by the common law.¹⁵ The rules of certain courts, however, may incorporate by reference the provisions of the *Evidence Act* so that they effectively apply to ancillary procedures.¹⁶

¹² See, for example, section 93(3) of the *Children and Young Person (Care and Protection) Act 1998*, which provides that:

“(3) The Children's Court is not bound by the rules of evidence unless, in relation to particular proceedings or particular parts of proceedings before it, the Children's Court determines that the rules of evidence, or such of those rules as are specified by the Children's Court, are to apply to those proceedings or parts.”

¹³ Odgers [1.1.600], p. 20.

¹⁴ The “adducing” of evidence refers to evidence which is sought to be given, tendered or brought before the court.

¹⁵ See *Esso Australia Resources Limited v Commissioner of Taxation of the Commonwealth of Australia* (1999) 201 CLR 49 at 55 [3] per Gleeson CJ, Gaudron and Gummow JJ, at 73 [64] per McHugh J, and at 100 [149] per Callinan J.

¹⁶ The rules of the Supreme Court and the District Court incorporate by reference the provisions of the *Evidence Act*, including those establishing the professional confidential relationship privilege and the sexual assault communications privilege, to interrogatories, discovery and inspection of documents, and to subpoenas. See *Supreme Court Rules 1970* Parts 23, 24, 36 and 75; *District Court Rules 1973* Parts 22, 22A, and 29. See *Mok v New South Wales Crime Commission* [2002] NSWCA 53 at [21] per Mason P, Stein JA and Mathews AJA agreeing. See also the discussion in Odgers (in the context of legal professional privilege) at [1.3.10360], pp. 351-352.

As this advice is concerned with the giving of oral evidence by witnesses in court proceedings, there is no need to consider further the application of public interest immunity or the statutory confidential relationship privilege and sexual assault communications privileges to “ancillary procedures” such as the production of documents under subpoena.¹⁷

- 4.15 It is also not necessary to consider the extent to which the common law of evidence may be used in interpreting provisions of the NSW and Commonwealth Evidence Acts (‘the Evidence Act’).¹⁸ The professional confidential relationship and sexual assault communications privileges established by the *Evidence Amendment (Confidential Communications) Act 1997* (NSW) have no precedent at common law and must therefore clearly be interpreted solely according to their terms.
- 4.16 On the other hand the interpretation of s. 130 of the Evidence Acts as discussed below,¹⁹ depends substantially on common law authorities relating to public interest immunity.

Common Law Privileges

No Psychotherapist-Client Privilege at Common Law

- 4.17 The common law does not recognise any privilege protecting the disclosure of communications between doctors or psychotherapists and their clients: see *R v Young* (1999) 46 NSWLR 681 (‘*Young*’) at 699 [89] per Spigelman CJ, citing authorities from 1776 to the present.
- 4.18 In *Young*, Spigelman CJ accepted (at 698-699 [85]) that the position of the common law in Australia with respect to the recognition of new categories of privilege was correctly stated by Dixon J in *McGuinness v Attorney-General (Vic)* (1940) 63 CLR 73 at 102-103 in the following terms:

“... the law was faced at a comparatively early stage of the growth of the rules of evidence with the question how to resolve the inevitable conflict between a necessity of discovering the truth in the interests of justice on the one hand and on the other the obligation of secrecy or confidence which an individual called upon to testify may in good faith have undertaken to a party or other person. *Except in a few relations* where paramount considerations of general policy appeared to require that there should be a special privilege, such as husband and wife,

Part 36 rule 13 of the *Supreme Court Rules* also applies the professional confidential relationship privilege and the sexual assault communications privilege to questions put to persons in the course of an examination of a person. (See Part 27 of the Rules in relation to the examination procedure in the Supreme Court.)

¹⁷ I note that the sexual assault communications privilege provisions in criminal proceedings also apply to the production of evidence under subpoena or by any other procedure; see *Criminal Procedure Act 1986* sections 149(1) and 150.

¹⁸ See the discussion in Odgers at [1.140], pp. lv – lvii.

¹⁹ At [4.63]-[4.64].

attorney and client, communications between jurors, the counsels of the Crown and State secrets, and by statute, physician and patient and priest and penitent, *an inflexible rule was established that no obligation of honour, no duties of non-disclosure arising from the nature of a pursuit or calling, could stand in the way of the imperative necessity of revealing the truth in the witness box.* Claims have been made from time to time for the protection of confidences to trustees, agents, bankers, and clerks, amongst others, and they have all been rejected." (Emphasis added.)

- 4.19 It may be noted, however, that recent decisions in the United States and Canada have recognised a privilege relating to communications between psychotherapists and patients. In *Jaffee v Redmond* 518 US 1 (1996) the United States Supreme Court, by majority, accepted a strong privilege protecting confidential communications between a psychotherapist and patient. The majority rejected a "balancing component" of the privilege, holding that: (at 17)

"Making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interests in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege."

- 4.20 In *M v Ryan* (1997) 143 DLR (4th) 1, in a case concerning access to a psychiatrist's notes relating to a sexual relationship between the plaintiff and the defendant (the plaintiff's former psychiatrist), the majority of the Supreme Court of Canada rejected the "all-or-nothing" approach in *Jaffee* (at 13 [34]). The Court recognised a case-by-case privilege, requiring balancing the interest of protecting the communications from disclosure against the interest in getting at the truth and correctly disposing of the litigation. (See especially at 14 [37]).²⁰
- 4.21 In *R v Young* (1999) 46 NSWLR 681, the Court of Criminal Appeal determined that the provisions of Part 3.10, Division 1B of the *Evidence Act* (NSW) relating to the exclusion of evidence of sexual assault communications applied only to the adducing of evidence at the hearing, and did not apply to 'ancillary' procedures such as the production of documents on subpoena.²¹ The Court also found that the common law did not recognise a privilege relating to sexual assault counselling communications. The Court further found, by majority, that the sexual assault counselling communications were not protected by the principles of public interest immunity.²²

²⁰ These cases are discussed in Stuesser, L (1997) "Recognising psychotherapist-patient privilege" 71 *Australian Law Journal* 495.

²¹ These provisions, and the subsequent amendments enacted as a consequence of the decision in *Young*, are considered below at [4.117] – [4.192], especially at [4.119]-[4.123].

²² The Court of Criminal Appeal in *Young* was comprised of five judges. Spigelman CJ found that the common law did not recognise a sexual assault communications privilege (at 696-704 [72]-[122]), and that the claim for public interest immunity to protect the confidentiality of the communications was misplaced (at 693-696 [53]-[71]). James J also rejected the proposition that the Court should recognise a common law privilege for sexual assault communications (at 741-747, especially at 747 [345]). His Honour agreed

- 4.22 Spigelman CJ (with whom Abadee and Barr JJ agreed), in considering the claim for a common law privilege protecting sexual assault communications, rejected the Canadian approach adopted in *M v Ryan*. His Honour stated (at 700 [91]) that an intermediate appellate court “should be slow to develop a new category of privilege” and that it was not open to adopt the Canadian approach in *Ryan*. His Honour held (at 700 [98]) that the Court “should not recognise a new category of privilege unless it represents a definite principle which the community as a whole has plainly adopted, for a significantly lengthy period to suggest permanence”. Spigelman CJ determined (at 701 [102]) that such a stage had not yet been reached in relation to sexual assault counselling records.
- 4.23 It is also significant that the majority of the Court rejected the submission that the legislative changes relating to the protection of sexual assault communications - if they did not strictly apply in the present circumstances - should be recognised as influencing or exerting a “gravitational pull” upon the common law. The majority found that the fact that Parliament had enacted specific legislative reforms meant that it was less appropriate for the common law to develop in areas outside the scope of those statutory provisions. Spigelman CJ stated (at 702 [105]) that “[w]here parliament has shown itself prepared to intervene, the courts should be slow to rectify a perceived social ill”.²³
- 4.24 James J also held that there was only one common law in Australia, and that it was therefore not legitimate to rely upon legislative reforms in New South Wales as a basis for changing the common law of Australia. (At 748 [350], and at 746 [337] and at 746-747 [341]).²⁴

Summary of Common Law

- 4.25 The common law at the present time does not recognise any privilege relating to communications between doctors or psychologists and their clients. The common law also does not recognise any privilege relating to communications between victims of sexual assault and their counsellors or professional therapists.

generally with the reasons of Spigelman CJ, Abadee and Barr JJ in rejecting the creation of a new category of public interest immunity relating to sexual assault communications (at 748 [349]). Abadee and Barr JJ agreed generally with the reasoning of both Spigelman CJ and James J, subject to additional comments on the inappropriateness of upholding the public interest immunity claim (at 721-723 [217]-[231]). Beazley JA dissented, upholding the claim of public interest immunity in relation to the sexual assault counselling communications.

²³ See also at 696 [70], 702 [107] per Spigelman CJ, at 723 [229] per Abadee and Barr JJ, and at 744 – 747 [331] – [345], especially at 747 [345] per James J. See also *Esso Australia Resources Limited v Commissioner of Taxation of the Commonwealth of Australia* (1999) 201 CLR 49 at 89-90 [105] per Kirby J.

²⁴ See also *Esso Australia Resources Limited v Commissioner of Taxation of the Commonwealth of Australia* (1999) 201 CLR 49 at 61-63 [23]-[28], especially at 61-62 [23] per Gleeson CJ, Gaudron and Gummow JJ; at 83 [91] per Kirby J.

- 4.26 I now turn to consider the circumstances in which a claim may be made that information should not be adduced into evidence on the grounds of public interest immunity.

Public Interest Immunity

Public Interest Immunity at Common Law

What is public interest immunity?

- 4.27 The general principles of public interest immunity were expressed by Gibbs ACJ in *Sankey v. Whitlam* (1978) 142 CLR 1 at 38-39 in the following terms:²⁵

“The general rule is that the court will not order the production of a document, although relevant and otherwise admissible, if it would be injurious to the public interest to disclose it. However the public interest has two aspects which may conflict. They were described by Lord Reid in *Conway v Rimmer* ([1968] AC 910 at 940), as follows:

‘There is the public interest that harm shall not be done to the nation or the public service by disclosure of certain documents, and there is the public interest that the administration of justice shall not be frustrated by the withholding of documents which must be produced if justice is to be done.’

... The court must decide which aspect of the public interest predominates, or in other words whether the public interest which requires that the document should not be produced outweighs the public interest that a court of justice in performing its functions should not be denied access to relevant evidence. In some cases, therefore, the court must weigh the one competing aspect of the public interest against the other, and decide where the balance lies. In other cases, however, as Lord Reid said in *Conway v Rimmer* (at 94), ‘the nature of the injury which would or might be done to the nation or the public service is of so grave a character that no interest, public or private, can be allowed to prevail over it’. In such cases once the court has decided that ‘to order production of the document in evidence would put the interest of the State in jeopardy’, it must decline to order production.”

- 4.28 A claim of public interest immunity arises where disclosure of the proposed evidence would be injurious to the ‘public interest’. A person claiming public interest immunity must therefore show that:
1. there is a ‘public interest’ which he or she is seeking to protect, and
 2. the public interest in prohibiting disclosure outweighs the public interest in allowing disclosure

²⁵ This passage was quoted with approval by Wilson and Dawson JJ in *Alister v. The Queen* (1984) 154 CLR 404 at 434.

When can Public Interest Immunity be Claimed?

- 4.29 Public interest immunity applies to prevent the adducing of oral evidence by witnesses as well as to prevent the disclosure of documents by subpoena or other process.²⁶
- 4.30 Public interest immunity is not confined to judicial or quasi-judicial proceedings.²⁷ A claim for public interest immunity may therefore be made not only in court proceedings (whether at ancillary stages or during the substantive proceedings) but also in proceedings before a tribunal or other non-judicial body.
- 4.31 Public interest immunity may only be excluded by statute if provision is made in clear terms.²⁸

“Public Interest”

- 4.32 There are certain categories of ‘public interest’ recognised by the courts, including:
- (a) cabinet and other high level government communications directed to the formulation of governmental policy;²⁹
 - (b) national security, international affairs and inter-state relations;³⁰
 - (c) the identity of police informers;³¹
 - (d) the identity of informers to child welfare bodies;³²
 - (e) confidential police methodology;³³
 - (f) information relating to an ongoing investigation;³⁴
 - (g) information provided to professional disciplinary bodies.³⁵

²⁶ See *Sankey v. Whitlam* (1978) 142 CLR 1 at 38 per Gibbs ACJ, and also *Cross on Evidence* at [27040], citing *Duncan v Cambell, Laird & Co* [1942] AC 624 at 643, and *Smallwood v Sparling* [1982] 2 SCR 686 at 704-706.

²⁷ See *Jacobsen v Rogers* (1995) 182 CLR 572 at 589 per Mason CJ, Deane, Dawson, Toohey and Gaudron JJ.

²⁸ See for example s. 27 of the *Police Integrity Commission Act 1996*.

²⁹ *Sankey v Whitlam*; *The Commonwealth v Northern Land Council* (1993) 176 CLR 604; *Lanyon Pty Ltd v The Commonwealth* (1974) 129 CLR 650.

³⁰ *Alister v The Queen* (1984) 154 CLR 404; *Asiatic Petroleum Co Ltd v Anglo-Persian Oil Co Ltd* [1916] 1 KB 822; *Duncan v Cammell, Laird & Co Ltd* [1942] AC 624.

³¹ *Cain v Glass (No.2)* (1985) 3 NSWLR 230; *Attorney General v Kaddour* [2001] NSWCCA 456; *R v Fandakis* [2002] NSWCCA 5.

³² *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171.

³³ *Young v Quin* (1985) 4 FCR 483.

³⁴ *Beneficial Finance Corporation Ltd v Commissioner of the AFP* (1991) 52 A Crim R 423.

³⁵ *Borg v Barnes* (1987) 10 NSWLR 734; *Law Institute (Vic) v Irving* [1990] VR 429; *Finch v Grieve* (1991) 22 NSWLR 578; *Goldberg v Ng* (1994) 33 NSWLR 639.

4.33 The categories of public interest immunity are, however, not necessarily closed.³⁶

Confidentiality and the Public Interest

4.34 An intention or undertaking that information will be treated as confidential is not sufficient to support a claim for public interest immunity. The general principle, expressed by Gibbs ACJ in *Sankey v Whitlam* (1978) 142 CLR 1 at 42-43, is that:³⁷

“Confidentiality is not a separate head of privilege, but may be a material consideration to bear in mind when privilege is claimed on the ground of public interest”.

4.35 In *Young* the majority of the Court of the Criminal Appeal refused to recognise a claim for public interest immunity over sexual assault counselling notes of the Sexual Assault Service (part of the NSW Department of Health) which had been subpoenaed by the accused in a criminal trial. The Sexual Assault Service had argued that the disclosure of the notes would harm the public interest in the provision of sexual assault counselling services by governmental health services. It argued that victims of sexual assault may no longer seek out those services and would therefore go untreated, and that it may discourage other victims from reporting sexual assaults.

4.36 Spigelman CJ rejected the proposition that public interest immunity could be treated: (at 693 [55])

“as if it were a “residual category” of circumstances in which courts limit access to information on the basis of weighing the public interest in disclosure against any factor that can be described as a “public interest”.”

His Honour emphasised instead that public interest immunity is “concerned with, and the terminology should be confined to, the conduct of *governmental* functions”. (At 693 [54], emphasis added.) His Honour also stated that, citing Stephen J in *Sankey v Whitlam* at 56, public interest immunity arises because of “the need to safeguard the proper functioning of *the executive arm of government and of the public service*”. (At 693-694 [57]; emphasis added by Spigelman CJ.)

4.37 Spigelman CJ found that the business of the Health Department’s Sexual Assault Service was the provision of sexual assault counselling services to individuals. This function “is not governmental in character, even if it is supplied by a public institution”. (At 695 [65])

4.38 Spigelman CJ therefore found that the claim that allowing the counselling notes to be produced would be detrimental to the public interest because it would discourage sexual assault victims from receiving appropriate rehabilitation could not properly be

³⁶ See *Australian National Airlines Commission v Commonwealth* (1975) 132 CLR 582 at 591 per Mason J.

³⁷ See also *Director-General of the Department of Fair Trading v Vasey Housing Association NSW* [2002] NSWCA 320, especially at [71] per Giles JA.

made under the head of public interest immunity. His Honour addressed these public interest arguments in considering the claim for a new category of common law privilege. (At 695 [66], and see at 702 – 704 [108]-[123].)

- 4.39 It is significant to note that Spigelman CJ considered in this regard (at 695 [68]) that the Court had not been provided in a systematic way with a comprehensive and balanced body of evidence and additional material on the subject, and was not therefore in a position to develop the common law “with the requisite degree of confidence”. In considering whether public policy supported the creation of a new category of privilege, his Honour set a high standard for the nature of the materials which would be required to be tendered to the Court before it could recognise a new public policy: (at 703 [115]-[116])

“At the least, the Court would expect a systematic review of expert literature on the significance of confidentiality in the counselling relationship. The Court would also expect a review of an expert body of opinion establishing why sexual counselling services ought to be treated differently from other counselling services. In the seminal case before the United States Supreme Court, both the American Psychiatric Association and the American Psychological Association set out relevant studies in their amici curiae briefs filed with the Court. (See *Jaffee v Redmond* at 345 footnote 9).

The Court would need to be satisfied that the material presented to the Court represented the full range of expert opinion on the relevant matters and that, where there were divergences in that expert opinion, the differences had been properly tested. The Court would also need to be satisfied that the materials before the Court covered the full range of relevant matters, and was not confined to the narrow specialisations immediately relevant, in order to overcome the possibility of special pleading that sometimes arises from a mixture of self-interest and obliviousness to considerations external to the specific field of expertise.”

- 4.40 I would expect that these comments would also apply to an application for the recognition of a new category of public interest immunity. I also note, however, that these comments were made in the context of a hearing before a Full Bench of five members of the Court of Criminal Appeal, and where two of the parties were represented by separate government legal teams. These high standards may not necessarily be expected in other contexts.
- 4.41 His Honour went on to say that: (at 703 [121])

“It is plain that there is a considerable body of additional material that can be put before the Court. For example, the assertion that the susceptibility of communications with counsellors to exposure in legal proceedings will make it less likely for victims to obtain professional assistance, is an empirical statement capable of investigation. There are

studies which suggest that no such consequence occurs to any significant degree. (See Shuman & Weiner “The Privilege Study: An Empirical Examination of the Psychotherapist-Patient Privilege” (1982) 60 *North Carolina Law Review* 893; Weiner & Shuman “Privilege - a Comparative Study” (1984) 12 *Journal of Psychiatry and Law* 373; Schuman, Weiner and Pinard “The Privilege Study (PtIII): Psychotherapist-Patient Communications in Canada” (1986) 9 *International Journal of Law & Psychiatry* 393).”³⁸

- 4.42 James J stated (at 748 [349]) that he agreed generally with the reasons of Spigelman CJ and of Abadee and Barr JJ for concluding that the Court should not create a new category of public interest immunity relating to confidential sexual assault communications. His Honour also noted (at 748 [350]) that there was only one common law in Australia, and that it was therefore not legitimate to rely upon legislative reforms in New South Wales as a basis for changing the common law of Australia.
- 4.43 Abadee and Barr JJ agreed generally with the reasons of Spigelman CJ and James J. Their Honours further commented that in their view: (at 721 [218])
- “the Court should be slow to expand the categories of public interest immunity, particularly in the area of criminal law. There are dangers in doing so in cases involving the public interest in the proper administration of criminal justice.”
- 4.44 The Court of Appeal in *Mok v New South Wales Crime Commission* [2002] NSWCA 53 recently considered a claim of public interest immunity in relation to a subpoena requiring the production of medical records held by prison authorities. The medical records were held by the Victorian Department of Human Resources, and related to the psychiatric condition of a witness whilst he was in custody.
- 4.45 The Court held that the matter should have been determined pursuant to Part 3.10, Division 1A (ss 126A-126F) – which establishes the “professional confidential relationship privilege” - and s 130 of the *Evidence Act 1995* (NSW), and not on the basis of common law public interest immunity. (At [33], see also at [21], [23]-[24], [26].) The Court of Appeal therefore set aside the order upholding the claim of public interest immunity, and remitted the matter to be determined by a single judge of the Supreme Court.
- 4.46 The Court, however, made a number of comments which, whilst perhaps strictly *dicta*, are of significance to the principles of public interest immunity relating to medical and psychological communications.

³⁸ The research on this issue is also reviewed in detail by the Australian Law Reform Commission; see ALRC 26, Vol 1, paragraphs 923 to 929.

4.47 Mason P, with whom Stein J and Mathews JA agreed, noted the holding in *Young* that public interest immunity is concerned only with the conduct of governmental functions. Mason P stated that: (at [19])

“I must say, with the profoundest respect to their Honours in the majority, that I have difficulty in appreciating the basis for any such governmental function restriction. Nevertheless, I would be bound to follow this considered statement of principle in any case that arose concerning the common law of public interest immunity. This said, *D v National Society for the Prevention of Cruelty to Children* [1978] AC 170 demonstrates, at the very least, that the notion of governmental function is very broad in nature (see also the professional discipline cases cited in *Young* at 694-695).”

(It is not clear to me, with respect, why the Court of Appeal considered itself bound by a finding of the Court of Criminal Appeal with which it appeared to disapprove.)

4.48 The Court considered in some detail the decision of Cummins J of the Supreme Court of Victoria in *Clifford v Victorian Institute of Forensic Mental Health* [1999] VSC 359. That case concerned a public interest immunity claim over materials obtained from the Mont Park Psychiatric Hospital in Victoria pursuant to a search warrant issued at the request of the Police. The Police believed that the materials would reveal admissions made by a person accused of murder to psychiatric doctors that he had killed the deceased. The accused had, whilst in prison, been certified as mentally ill under s. 16(3)(b) of the *Mental Health Act 1986* (Vic), and been coercively transferred to the psychiatric hospital. The medical records were obtained as the result of coercive medical examinations pursuant to s. 29 of the *Corrections Act 1986* (Vic).

4.49 Cummins J upheld the claim of public interest immunity. His Honour found (at [25]) that that it was significantly in the public interest that the effective operation of the therapeutic and protective regime established by the *Mental Health Act* and related legislation for the benefit of both the prisoner and the community be preserved. His Honour distinguished *Young*, holding (at [30]) that there was clearly a governmental function due to the need to preserve the effective operation of the statutory scheme, and that there was ample evidence of the adverse effects of disclosure.

4.50 The Court in *Mok* stated that: (at [29])

“I incline to the view that the common law of Australia would uphold a claim of public interest immunity in the factual situation addressed in *Clifford*, including (in particular) any clearly established situation involving compulsion to submit to medical tests under s29 of the *Corrections Act 1986* Vic or any interstate counterpart. But *Clifford* involved a unique concatenation of facts (see para[26] of the extract from the judgment of Cummins J set out above) and the situation is (to me) much less clear once one moves away from them.”

- 4.51 The Court held (at [30]) that, “[t]o the extent that the common law insists upon the presence of a governmental interest”, that interest was present in relation to both the medical and psychiatric assessments of a prisoner upon reception into the prison system and for medical tests directed by the principal medical officer.
- 4.52 In the case of the voluntary, ongoing medical treatment of a serving prisoner or of psychiatric assessments initiated by the prisoner, however, the public interest was not nearly so clear. The Court stated that: (at [31]-[32])

“Medical confidences involving non-incarcerated patients do not form a class of public interest immunity (see *Young* at 699 [89]) and it is difficult to see why the patient's status as a prisoner should alter this in the general run of cases.

There may be particular situations where such a claim would be attracted, but it is not clear why it should be attracted in relation to every or even most aspects of prison medical treatment. It is easy to conceive of situations where the public interest in upholding the claim is so tenuous as to be non-existent (for example, criminal proceedings against an assailant who assaulted a fellow prisoner). *Young* explains the caution that should attend the discovery of new categories of public interest immunity.”

Who May Claim Public Interest Immunity?

- 4.53 A claim of public interest immunity may be made by any person, or by the Court on its own motion.³⁹
- 4.54 It is important to note, however, that a person claiming public interest immunity must demonstrate that the claim relates to a ‘governmental function’ or to matters of state. Claims of public interest immunity are therefore almost invariably made by the State itself, or by one its agencies or representatives. The opportunities for claims of public interest immunity not made by the State are very limited.
- 4.55 I would expect that in almost all cases in which a claim of public interest immunity may be made in relation to evidence of psychologists the claim should be made by the State. If a psychologist is asked, for example, to disclose information provided whilst conducting a compulsory assessment of an inmate for the Department of Corrective Services, a claim for public interest immunity should be made by the Commissioner of Corrective Services.
- 4.56 Psychologists who believe that the State may wish to raise a claim of public interest immunity over evidence that they might be required to give should contact a legal officer of the relevant government department or authority. Alternatively, the psychologist could contact this Office.

³⁹ See, for example, *Sankey v Whitlam* (1978) 142 CLR 1 at 43-44 per Gibbs ACJ, at 68 per Stephen J, and at 100 per Mason J.

- 4.57 Psychologists who believe that the State may wish to raise a claim of public interest immunity in relation to a question they are asked in court should draw this to the court's attention, and, if appropriate, seek an adjournment to allow the State the opportunity to consider whether to make the claim.⁴⁰

Statutory Public Interest Immunity in New South Wales and the Commonwealth

Section 130 of the Evidence Act

- 4.58 The principles of public interest immunity are recognised in section 130 of the Evidence Acts of both New South Wales and the Commonwealth. Section 130 of the Evidence Acts gives the court the discretion to direct that information or documents of matters of state not be adduced into evidence. Section 130, which is identical in both the New South Wales and Commonwealth Acts, provides:

- “(1) If the public interest in admitting into evidence information or a document that relates to matters of state is outweighed by the public interest in preserving secrecy or confidentiality in relation to the information or document, the court may direct that the information or document not be adduced as evidence.
- (2) The court may give such a direction either on its own initiative or on the application of any person (whether or not the person is a party).
- (3) In deciding whether to give such a direction, the court may inform itself in any way it thinks fit.
- (4) Without limiting the circumstances in which information or a document may be taken for the purposes of subsection (1) to relate to matters of state, the information or document is taken for the purposes of that subsection to relate to matters of state if adducing it as evidence would:
 - (a) prejudice the security, defence or international relations of Australia, or
 - (b) damage relations between the Commonwealth and a State or between 2 or more States, or
 - (c) prejudice the prevention, investigation or prosecution of an offence, or
 - (d) prejudice the prevention or investigation of, or the conduct of proceedings for recovery of civil penalties brought with respect to, other contraventions of the law, or
 - (e) disclose, or enable a person to ascertain, the existence or identity of a confidential source of information relating

⁴⁰ See further below at [4.216]-[4.218].

- to the enforcement or administration of a law of the Commonwealth or a State, or
- (f) prejudice the proper functioning of the government of the Commonwealth or a State.
- (5) Without limiting the matters that the court may take into account for the purposes of subsection (1), it is to take into account the following matters:
- (a) the importance of the information or the document in the proceeding,
 - (b) if the proceeding is a criminal proceeding---whether the party seeking to adduce evidence of the information or document is a defendant or the prosecutor,
 - (c) the nature of the offence, cause of action or defence to which the information or document relates, and the nature of the subject matter of the proceeding,
 - (d) the likely effect of adducing evidence of the information or document, and the means available to limit its publication,
 - (e) whether the substance of the information or document has already been published,
 - (f) if the proceeding is a criminal proceeding and the party seeking to adduce evidence of the information or document is a defendant---whether the direction is to be made subject to the condition that the prosecution be stayed.
- (6) A reference in this section to a State includes a reference to a Territory.”

4.59 The proper approach to determining a claim in accordance with section 130 of the Evidence Act is set out clearly in the decision of the Court of Criminal Appeal in *Attorney General v Kaddour* [2001] NSWCCA 456.

4.60 The court must first determine whether section 130 is applicable to the evidence in question. The court must be satisfied, in accordance with section 130(1), that the information relates to “matters of state”. Section 130(4) defines a number of circumstances which will be taken to relate to “matters of state”, but the categories of “matters of state” are not closed or limited by section 130(4). (See *Kaddour* at [12] per Sully J, Spigelman CJ and Adams J agreeing.)

4.61 If section 130 applies, the court is required to apply the test in s. 130(1). Section 130(1) requires the court to consider whether the public interest in admitting into evidence information that relates to matters of state is *outweighed* by the public

interest in preserving secrecy or confidentiality in relation to the information.⁴¹ This subsection requires the court to:⁴²

“identify with precision, and then balance fairly and sensibly, the two competing public interests to which sub-section (1) makes reference.”

- 4.62 Section 130(5) sets out a non-exclusive list of factors that the court is to take into account in conducting the balancing exercise required by section 130(1). The Court of Criminal Appeal stated in *Kaddour* (at [14]) that the test in s. 130(1) is “amplified by, but not restricted by” s. 130(5).

Section 130 and the Common Law of Public Interest Immunity

- 4.63 The Australian Law Reform Commission, whose review of the laws of evidence in Australia led to the introduction of the Evidence Acts, explained that it proposed that this provision “interfere as little as possible with the common law as it has developed with respect to public interest privilege”.⁴³
- 4.64 The courts have also held that there does not appear to be any substantial difference between s. 130 and the common law principles of public interest immunity: see *State of New South Wales v Ryan* (1998) 101 LGERA 246.⁴⁴

Who May Apply for a Direction that Evidence Be Excluded Under Section 130?

- 4.65 Section 130(2) provides that a direction pursuant to s. 130 may be made on the court's own initiative, or on the application of any person, whether or not the person is a party to the proceedings. This is consistent with the common law.⁴⁵
- 4.66 Claims under section 130 of the *Evidence Act*, however, as with public interest immunity claims at common law, will almost invariably be made by the State rather than by an individual.⁴⁶

⁴¹ This is consistent with the balancing exercise required at common law. See above at [4.27]-[4.28].

⁴² *Kaddour* at [15]. See also at [19] and [21].

⁴³ ALRC 26, Vol 1, pars 864-866; cited in Odgers, S, *Uniform Evidence Law*, 5th ed., 2002, Lawbook Co., Sydney, at [1.3.13480], p. 419.

⁴⁴ In *Mok v New South Wales Crime Commission* [2002] NSWCA 53, however, the Court held that a claim resisting the production of psychiatric medical records held by prison authorities had not been properly argued because the submissions at first instance and appeal addressed only common law public interest immunity rather than s. 130 and the professional confidential relationship privilege provisions in ss. 126A-126F of the *Evidence Act* (NSW). It is not clear whether this finding was based on an assumption that there was a significant difference between s. 130 and the common law, or whether the Court was primarily influenced by the failure to address the professional confidential relationship privilege provisions.

⁴⁵ See above at [4.53].

⁴⁶ See above at [4.54] - [4.55].

Section 132 of the Evidence Act

- 4.67 Section 132 provides that if it appears to the court that a witness or party may have grounds for making an application or objection under Part 3.10 of the *Evidence Act*, the court must satisfy itself that the witness or party is aware of that provision:

“132. Court to inform of rights to make applications and objections

If it appears to the court that a witness or a party may have grounds for making an application or objection under a provision of this Part, the court must satisfy itself (if there is a jury, in the absence of the jury) that the witness or party is aware of the effect of that provision.”

Part 3.10 of the *Evidence Act* relates to ‘privileges’, and includes s. 130, legal professional privilege, and, in New South Wales, the professional confidential relationship and sexual assault communication privileges.

- 4.68 It is therefore clear that a psychologist who is called as a witness has the legal standing or right to make an application or objection on the basis of a privilege as set out in Part 3.10 of the *Evidence Act*.
- 4.69 Section 132 of the Act would also appear likely to assist psychologist witnesses who perceive that they may have a basis to object to being required to answer a question, but are unsure of the legal basis for the objection. I believe that psychologists in this situation would be entitled to indicate to the court that they believe they may have a right to object to being required to answer the question, and to ask the court, pursuant to s. 132, to explain, or at least point to, the provisions of the Act that might apply to such an objection.⁴⁷ A court may also give a direction under s. 130 on its own initiative (s. 130(2)), and so a witness making such an indication to the court may also have the effect of inviting the court to consider the possible claim for itself.

Summary - Common Law and Statutory Claims of Public Interest Immunity available to Psychologists

- 4.70 It is difficult to consider in the abstract the possible circumstances in which psychologists may have a basis to make a claim of public interest immunity or under s. 130 of the *Evidence Act*. I consider, however, that the following general conclusions may be drawn, in relation to both s. 130 and common law public interest immunity:
1. Public interest immunity will prevent the disclosure of information relating to matters of state, or to governmental functions, if the public interest in admitting the information into evidence is outweighed by the public interest in preserving secrecy or confidentiality in relation to the information.⁴⁸

⁴⁷ It would, of course, be preferable for a psychologist without legal representation to inform him or herself before the hearing of the relevant provisions if he or she considers it possible that there may be a basis to object to the giving of certain evidence.

⁴⁸ At [4.27]-[4.28], [4.58]-[4.62].

2. Claims that psychologists have professional obligations to protect their clients' confidences, and that members of the public may be less likely to attend psychologists for therapy if their private communications are liable to be revealed in court, will not be sufficient to establish a claim of public interest immunity.⁴⁹
3. Confidences made by clients to psychologists relating to their experiences of sexual assault will not generally be protected by public interest immunity.⁵⁰
4. Confidences made by clients to psychologists which come within one of the recognised categories of public interest immunity may attract the protection of public interest immunity.⁵¹
5. The mere fact that a psychologist may be performing professional services for a government department or statutory authority will not be sufficient to establish a governmental interest or a claim for public interest immunity.⁵²
6. A claim for public interest immunity may have greater prospects of success if the psychologist was performing professional services as part of a government program or legislative scheme, and it can be demonstrated that the preservation of confidentiality is important or necessary for the effective operation of that program or scheme.⁵³
7. The courts will be slow to recognise claims for the creation of additional categories of public interest immunity.⁵⁴
8. To establish a claim in a new category of public interest immunity may require:
 - (a) a demonstration that the exclusion of the evidence would protect a 'governmental function' or relates to matters of state; and
 - (b) the presentation to the court of a range of materials, including applicable sociological and psychological research.⁵⁵
9. Although a psychologist witness has the right to make a claim of public interest immunity on his or her own behalf, claims of public interest immunity are almost invariably made by the State.⁵⁶

⁴⁹ At [4.34]-[4.43].

⁵⁰ At [4.35]- [4.43].

⁵¹ At [4.32].

⁵² At [4.44]-[4.52].

⁵³ At [4.49]-[4.52].

⁵⁴ At [4.43], [4.52].

⁵⁵ At [4.36]-[4.37], [4.39]-[4.40].

⁵⁶ At [4.53]-[4.57], [4.65]-[4.66].

10. Section 132 of the *Evidence Act* requires that a court satisfy itself that a witness who may have grounds for making an application or objection under Part 3.10 of the Act (which includes s. 130) is aware of that provision. Psychologists who believe they may have a possible basis for objection may therefore be entitled to ask the court to ensure that they are made aware of the effect of s. 130.⁵⁷

Statutory Privileges

New South Wales Evidence Act Privileges

Introduction

- 4.71 The *Evidence Amendment (Confidential Communications) Act* 1997 No. 122, which commenced on 1 January 1998, introduced major amendments to the law of evidence in New South Wales relating to the confidentiality of certain communications.⁵⁸ The Act inserted into Part 3.10 of the Evidence Act Division 1A – establishing a “Professional confidential relationship privilege” – and Division 1B, establishing a “Sexual assault communications privilege”.
- 4.72 The origins of the reforms lie with a discussion paper issued by the Attorney General’s Department in June 1996 entitled “Protecting Confidential Communications from Disclosure in Court”. The Introduction to the Paper noted that the issue of granting privilege to communications received in the context of a special relationship of confidence had been the subject of considerable attention in recent years from the media, the public, the judiciary, law reform commissions and parliamentarians. It noted in particular a case attracting media attention where a rape crisis counsellor spent four hours in the police lock-up after initially refusing to comply with a subpoena to produce notes of confidential communications with a client in a sexual assault case.⁵⁹
- 4.73 The discussion paper reviewed the common law, recommendations of law reform commissions, and statutory provisions in other jurisdictions. The discussion paper stated that the common law “has no answers to the problem of confidentiality of certain communications, and where courts perceive evidence as relevant it is required to be disclosed”.⁶⁰
- 4.74 The discussion paper did not recommend a separate privilege for sexual assault communications. In his Second Reading Speech on the Bill, however, the Attorney

⁵⁷ At [4.67]-[4.69].

⁵⁸ This Act is outlined clearly in Sarfaty, V, “The New Confidential Communications Privilege” (1998) 10 (4) *Judicial Officers’ Bulletin* 25.

⁵⁹ Attorney General’s Department of New South Wales, *Protecting Confidential Communications from Disclosure in Court Proceedings, 1996*, Discussion Paper, June 1996, p. 5, paras 1.1-1.2.

⁶⁰ *Ibid* at p. 5, para 1.3.

General the Hon. J. Shaw stated that he found the arguments for a specific and stricter privilege for sexual assault communications persuasive.⁶¹

The Professional Confidential Relationship Privilege

Introduction

4.75 The professional confidential relationship privilege is established by Part 3.10 Division 1A of the *Evidence Act* (NSW). The principal provision, section 126B, prevents the adducing of evidence of a “protected confidence” in a proceeding⁶² where the court is satisfied that the harm likely to be caused to a “protected confider” if the evidence is adduced outweighs the desirability of the evidence being given.

4.76 I first consider the meaning of the term a “protected confidence”, and then consider the circumstances in which evidence of a protected confidence will be excluded.

What is a “protected confidence”?

4.77 A “protected confidence” is defined in s. 126A(1) as:

“a communication made by a person in confidence to another person (in this Division called the **"confidant"**):

(a) in the course of a relationship in which the confidant was acting in a professional capacity, and

(b) when the confidant was under an express or implied obligation not to disclose its contents, whether or not the obligation arises under law or can be inferred from the nature of the relationship between the person and the confidant.”

4.78 A “protected confidence” must therefore be made:

(a) “in confidence”;

(b) in the course of a relationship in which the confidant was acting “in a professional capacity”; and

(c) when the confidant was under an “express or implied obligation” not to disclose the contents of the communication.

4.79 A “protected confider” is defined as “a person who made a protected confidence”; s. 126A(1).

⁶¹ *Evidence Amendment (Confidential Communications) Act 1997* No. 122, Second Reading Speech, Hon. J. Shaw, Legislative Council, 28 May 1997, Hansard pp. 9290-9291.

⁶² These provisions do not apply to ancillary procedures such as the production or inspection of documents under subpoena, unless they are held to apply by particular rules of court; see above at [4.14].

4.80 The Second Reading Speech of the *Evidence Amendment (Confidential Communications) Act 1997* makes it plain that these provisions were intended to have a broad operation. The Attorney General stated that:⁶³

“This protection will extend to a wide range of confidential communications and may include confidences imparted to doctors and other health professionals, journalists, social workers and in other relationships where confidentiality is an integral element.”

4.81 It is clear that these provisions may apply to the relationship between psychologist and client.⁶⁴

4.82 I think it is also clear that a psychologist would be likely to be regarded as being under an “express or implied obligation” not to disclose the contents of the communication made to him or her by a patient during the course of a consultation or treatment. The *Code of Ethics* of the Australian Psychological Society and your *Code of Ethical Conduct* could be cited in support of the professional obligations of confidentiality of psychologists.

4.83 It should be noted, however, that it is the communication itself, in the particular circumstances in which it is made, which must be made in confidence - whilst the confidant is acting in a professional capacity and whilst the confidant is under an express or implied obligation not to disclose the contents of that confidence. If there is doubt whether these conditions are satisfied it may not be sufficient to submit that communications made to psychologists generally satisfy these conditions.

4.84 The precise scope of the terms “acting in a professional capacity” has been described as uncertain.⁶⁵ Questions may arise, for example, where psychologists receive communications from persons in circumstances other than a professional consultation or treatment. Even if the communication was made in confidence and the psychologist regards himself or herself as under an obligation to keep the communication confidential, it would still need to be established that the psychologist was acting in a professional capacity at the time.

When is evidence of a protected confidence to be excluded?

4.85 Section 126B(1) provides that:

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

(a) a protected confidence, or

(b) the contents of a document recording a protected confidence, or

⁶³ *Evidence Amendment (Confidential Communications) Act 1997* No. 122, Second Reading Speech, Hon. J. Shaw, Legislative Council, Hansard, 28 May 1997, Hansard p. 9290.

⁶⁴ See Odgers at [1.3.11900], p. 387.

⁶⁵ Odgers at [1.3.11900], p. 387.

(c) protected identity information.”⁶⁶

4.86 “Protected identity information” is defined as information “about, or enabling a person to ascertain, the identity of the person who made a protected confidence”: s. 126A(1).

4.87 Section 126B(2) and (3) provides that:

“(2) The court may give such a direction:

(a) on its own initiative, or

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

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

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

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

4.88 “Harm” is defined broadly to include “actual physical bodily harm, financial loss, stress or shock, damage to reputation or emotional or psychological harm (such as shame, humiliation and fear)”: s. 126A(1)(a).

4.89 Section 126B(4) provides that:

“(4) Without limiting the matters that the court may take into account for the purposes of this section, it is to take into account the following matters:

(a) the probative value of the evidence in the proceeding,

(b) the importance of the evidence in the proceeding,

(c) the nature and gravity of the relevant offence, cause of action or defence and the nature of the subject matter of the proceeding,

(d) the availability of any other evidence concerning the matters to which the protected confidence or protected identity information relates,

(e) the likely effect of adducing evidence of the protected confidence or protected identity information, including the likelihood of harm, and the nature and extent of harm that would be caused to the protected confider,

⁶⁶ In *R v Young* (1999) 46 NSWLR 681, the Court of Criminal Appeal determined that the provisions of Part 3.10, Division 1B of the *Evidence Act* (NSW) as they were then, relating to the exclusion of evidence of sexual assault communications, applied only to the adducing of evidence at the hearing, and did not apply to ‘ancillary’ procedures such as the production of documents on subpoena. The provisions establishing the “professional confidential relationship privilege” privilege, in contrast to those establishing the “sexual assault communications privilege” have not been amended in response to the decision in *Young*. The phrase “adduced in a proceeding” in section 126B(1) therefore presumably does not apply to ancillary procedures. Psychologists are, however, highly unlikely to be called to give evidence as part of an ancillary procedure.

- (f) the means (including any ancillary orders that may be made under section 126E) available to the court to limit the harm or extent of the harm that is likely to be caused if evidence of the protected confidence or the protected identity information is disclosed,
- (g) if the proceeding is a criminal proceeding---whether the party seeking to adduce evidence of the protected confidence or protected identity information is a defendant or the prosecutor,
- (h) whether the substance of the protected confidence or the protected identity information has already been disclosed by the protected confider or any other person.”

Balancing the Harm to the Protected Confider against the Desirability of the Evidence Being Given

- 4.90 The court must give a direction under s. 126B(3) that the evidence not be adduced if it is satisfied that it is likely that harm would or might be caused to a protected confider if the evidence is adduced, and that the nature and extent of the harm *outweighs* the desirability of the evidence being given.
- 4.91 This subsection requires the court to balance the harm that would or might be caused to a protected confider against the desirability of the evidence being given. It is not necessary to establish actual harm – it may be enough to establish that it is likely that harm might be caused, even indirectly, to a protected confider, if the evidence is not excluded. “Harm” is defined broadly and inclusively.⁶⁷
- 4.92 This subsection requires the court to consider only the harm that would or might be caused by the disclosure to a protected confider. The court may not therefore consider under this subsection harm that may be caused to the confidant, to other potential confidants, or to the community.⁶⁸
- 4.93 In considering whether the potential harm of disclosure outweighs the “desirability of the evidence being given” the court will have regard to the factors listed in s. 126B(4). The probative value of the evidence and the importance of the evidence in the proceeding are likely to be particularly significant.⁶⁹
- 4.94 The court may also take into account other factors not listed in s. 126B(4) in considering the whether the potential harm of disclosure outweighs the desirability of the evidence being given.

⁶⁷ See above at [4.88].

⁶⁸ Odgers [1.3.11980], p. 391. It may be noted, however, that Odgers also considers that it is possible that the use of the term “a protected confider” rather than “the protected confider” was intended to refer to protected confiders generally rather than to the particular protected confider. (Ibid.)

⁶⁹ Odgers [1.3.12000], p. 392, citing as an example *Marsden v Amalgamated Television Services Pty Ltd* [1999] NSWSC 1155 at [15] per Levine J.

- 4.95 If the court is satisfied that the potential harm of disclosure outweighs the desirability of the evidence being given, it has no discretion and must give a direction that the evidence not be adduced; s. 126B(3).

Section 126B(1) - An Unguided Discretion?

- 4.96 Section 126B(1) appears to provide the court with a discretion (the court “may direct”) to exclude certain evidence. Section 126B(3), on the other hand, requires the court (the court “must give a direction”) to give a direction to exclude certain evidence if satisfied that the nature and extent of the harm outweighs the desirability of the evidence being given.
- 4.97 Odgers states that, even if no direction is required under the balancing test in s. 126B(3), s. 126B(1) appears to provide that the court retains “an unguided discretion” to direct that evidence be excluded.⁷⁰ The apparent discretion in s. 126B(1) is “unguided” because, in contrast to s. 126B(3), the provision does not establish any test or requirement setting out the basis for the exercise of the discretion.
- 4.98 Odgers also notes, however, that it appears the intention of the drafter of the legislation was that there would be only a single discretion, to be exercised if the nature and extent of the harm which would or might be caused to a protected confider if the evidence were adduced outweighs the desirability of the evidence being given.⁷¹
- 4.99 I am not certain that s. 126B(1) does in fact provide the court with a separate unguided discretion. Section 9(1) of the *Interpretation Act 1987* provides that the word “may”, if used (as it is in s. 126B(1)) to confer a power, indicates that the power may be exercised, or not, “at discretion”. The *Interpretation Act*, however, does not apply in so far as the contrary intention appears in the relevant Act; s. 5(2). In my view there is a good basis to conclude that s. 126B does provide a contrary intention to the general principle that the word “may” is used to confer a discretionary power.⁷²
- 4.100 Even if section 126B(1) does establish an “unguided discretion”, however, it is in my view unlikely that a court would apply that discretion if it found that the balancing test in s. 126B(3) was not satisfied.

Criminal Proceedings

- 4.101 The professional confidential relationship privilege established in Division 1A applies to both civil and criminal proceedings. The criminal nature of the proceedings,

⁷⁰ Odgers [1.3.11940], p. 390.

⁷¹ Odgers [1.3.11940], pp. 389-390.

⁷² In my view the intention of s. 126B(1) is to state the *nature* of the direction, rather than to dictate the circumstances in which it is to be exercised. Section 126B(3) sets out the test to determine whether the direction established in s. 126B(1) - “such a direction” - is to be made. There is no other indication in s. 126B to suggest that there are two different approaches to be applied to determine whether to make a direction, or (as Odgers points out) in the Second Reading Speech.

however, may be a significant matter to be taken into account by the court in determining whether to exclude evidence of a protected confidence pursuant to s 126B(1) or 126B(3).

- 4.102 Section 126B(4)(g) requires the court to consider, in criminal proceedings, whether the party seeking to adduce evidence of the protected confidence or protected identity information is the defendant or the prosecutor. If the evidence is led by the defendant, this will be likely to be an important persuasive factor against the court excluding the evidence.⁷³ The nature and gravity of the charge will also be significant; s. 126B(4)(c).

Limiting the Harm of Disclosure

- 4.103 The court may take action to limit the possibility or extent of harm likely to be caused by disclosure of a protected confidence or protected identity information. Section 126E provides that:

“126E. Ancillary orders

Without limiting any action the court may take to limit the possible harm, or extent of the harm, likely to be caused by the disclosure of evidence of a protected confidence or protected identity information, the court may:

- (a) order that all or part of the evidence be heard in camera, and
- (b) make such orders relating to the suppression of publication of all or part of the evidence given before the court as, in its opinion, are necessary to protect the safety and welfare of the protected confider.”

- 4.104 The court may therefore order that the evidence be heard in a closed court (“in camera”), or suppress the publication of evidence if the court considers this necessary to protect the safety and welfare of the protected confider.
- 4.105 In considering whether to exclude the evidence, the court may take into account the means available to it to limit the harm likely to be caused if the evidence is disclosed; s 126B(4)(f).

Who can make a claim?

- 4.106 The protected confider or the confidant – whether or not either is a party to the proceedings - may apply for a direction to exclude evidence of a protected confidence or protected identity information; s 126B(2). Psychologists required to give evidence of a protected confidence made to them therefore have the right to make the application in the course of giving evidence.
- 4.107 The court may also give such a direction on its own initiative; s. 126B(2)(a).

⁷³ Odgers [1.3.12060], p. 393.

4.108 In addition, if it appears to the court that a witness (or party) may have grounds for making an application under a provision of this part of the Act, the court must satisfy itself that the witness or party is aware of the effect of that provision; s. 132.⁷⁴

When will the professional confidential relationship privilege be lost?

Consent

4.109 The privilege will be lost if the protected confider consents to evidence of the protected confidence being given. Section 126C provides:

“126C. Loss of professional confidential relationship privilege: consent

This Division does not prevent the adducing of evidence given with the consent of the protected confider concerned.”

4.110 The meaning of the term consent is not defined.

4.111 This section does not strictly impose a legal obligation on psychologists, concerned that they may be required to give evidence of their clients' protected confidences, to contact the clients and ask whether or not they consent. I suggest, however, that it would be appropriate for a psychologist who considers it might be necessary to make an application under the professional confidential relationship privilege provisions, in the absence of exceptional circumstances, to contact the client to determine whether or not he or she consents to the evidence being given. If the client does not consent, the psychologist should ascertain, in an appropriate manner, the harm that would or might be caused by the disclosure.

4.112 I consider that a court would, in the absence of exceptional circumstances, be unlikely to accept an application from a psychologist to exclude evidence of protected confidences unless the psychologist could demonstrate that the protected confider did not consent to the psychologist revealing that information in court.

4.113 The question of whether a psychologist who does not intend to make an application to exclude evidence of protected confidences is obliged to contact his or her client is a matter of professional ethics upon which I do not comment.

Misconduct

4.114 The privilege will also be lost where the communication was made or documentation prepared in the furtherance of the commission of a fraud or an offence, or the commission of an act that renders a person liable to a civil penalty.⁷⁵ Section 126D provides:

⁷⁴ The effect of this provision on psychologist witnesses is discussed further above at [4.67]-[4.69].

⁷⁵ The scope of the phrase “the commission of an act that renders a person liable to a civil penalty” is considered by Odgers at [1.3.12280], p. 399.

“126D. Loss of professional confidential relationship privilege: misconduct

(1) This Division does not prevent the adducing of evidence of a communication made or the contents of a document prepared in the furtherance of the commission of a fraud or an offence or the commission of an act that renders a person liable to a civil penalty.

(2) For the purposes of this section, if the commission of the fraud, offence or act is a fact in issue and there are reasonable grounds for finding that:

(a) the fraud, offence or act was committed, and

(b) a communication was made or document prepared in furtherance of the commission of the fraud, offence or act,

the court may find that the communication was so made or document so prepared.”

When does this Division not Apply?

4.115 Section 126F provides that:

“126F. Application of Division

(1) This Division does not apply in relation to a proceeding the hearing of which began before the commencement of this Division.

(2) This Division applies in relation to a protected confidence within the meaning of this Division whether made before or after the commencement of this Division.

(3) This Division does not apply in relation to a protected confidence within the meaning of Division 1B or Part 13 of the *Criminal Procedure Act 1986*.

(4) The court may give a direction under this Division in respect of a protected confidence or protected identity information whether or not the protected confidence or protected identity information is privileged under another section of this Part or would be so privileged except for a limitation or restriction imposed by that section.”

4.116 Subsection 126F(3) provides that the Division does not apply in relation to a “protected confidence” within the meaning of the provisions in either of the two Acts establishing the “sexual assault communications privilege”- Division 1B of the *Evidence Act* and Part 7⁷⁶ of the *Criminal Procedure Act 1986*. The consequences of s. 126F(3), in view of the very limited circumstances in which the sexual assault communications privilege is available in civil proceedings, are considered further below at [4.186]-[4.188].

⁷⁶ Section 126F(3) in fact refers to Part 13 of the *Criminal Procedure Act*. This is clearly a misprint as there is no longer a Part 13 in the current Act. (The provisions in the current Part 7 were transferred from Part 13 by the *Crimes Legislation Amendment (Sentencing) Act 1999* No. 94.)

Summary of Professional Confidential Relationship Privilege

1. The privilege is available only in proceedings in “NSW courts”.⁷⁷
2. A communication made in confidence to a psychologist during the course of a professional consultation will be likely to be classified as a “protected confidence”.⁷⁸
3. The court is required to exclude evidence of a protected confidence if satisfied that it is likely that harm would or might be caused to a protected confider if the evidence is adduced, and that the nature and extent of the harm *outweighs* the desirability of the evidence being given.⁷⁹
4. In considering whether to exclude evidence of a protected confidence the court will consider the factors set out in s. 126B(4). The court may be less likely to uphold the claim where the evidence is:
 - (a) of substantial probative value and importance to the proceedings; or
 - (b) led by the defendant in a criminal proceeding.⁸⁰
5. A psychologist required to give evidence of a protected confidence has the right to apply to have the evidence excluded.⁸¹
6. The court may take other actions to limit the possibility of harm to the protected confider.⁸²
7. The privilege may be lost as the result of consent or of misconduct.⁸³
8. The privilege does not apply in relation to a “protected confidence” within the meaning of the provisions in either of the two Acts establishing the “sexual assault communications privilege”- Division 1B of the Act and Part 7 of the *Criminal Procedure Act 1986*.⁸⁴

⁷⁷ At [4.7]-[4.11].

⁷⁸ At [4.77]-[4.84].

⁷⁹ At [4.87].

⁸⁰ At [4.89], [4.93], [4.101]-[4.102].

⁸¹ At [4.106].

⁸² At [4.103]-[4.105].

⁸³ At [4.109]-[4.114].

⁸⁴ At [4.115]-[4.116].

The Sexual Assault Communications Privilege

Introduction

- 4.117 The “sexual assault communications privilege” is presently established by Chapter 3, Part 3.10, Division 1B of the *Evidence Act* (NSW), and by Part 7 of the *Criminal Procedure Act 1986*.
- 4.118 The privilege substantially restricts the circumstances in which a “counselling communication” made by, to or about a victim or alleged victim of a sexual assault offence – defined as a “protected confidence” – may be adduced in evidence in criminal proceedings. The privilege imposes a far more demanding test before evidence of a protected confidence will be admitted than that established by the “professional confidential relationship privilege” in Chapter 3, Part 3.10, Division 1A of the *Evidence Act*.
- 4.119 The “sexual assault communications privilege” was originally established in Chapter 3, Part 3.10, Division 1B of the *Evidence Act 1995* (NSW) by the *Evidence Amendment (Confidential Communications) Act 1997* No 122. The privilege in Division 1B applied to both civil and criminal proceedings.
- 4.120 In *R v Young* (1999) 46 NSWLR 681 the Court of Criminal Appeal found that the provisions of Division 1B did not apply to the production of documents under subpoena, and applied only to the adducing of evidence at the hearing.⁸⁵
- 4.121 Parliament responded by enacting the *Criminal Procedure Amendment (Sexual Assault Communications Privilege) Act 1999* No 48 (“the amending Act”) to ensure that the sexual assault communications privilege applied to the production of documents under subpoena and at all stages of trial.
- 4.122 The amending Act transferred the provisions establishing the privilege from the *Evidence Act* to the *Criminal Procedure Act 1986*. In his second reading speech the Attorney General stated that this amendment was made “[b]ecause sexual assault communications privilege is primarily invoked in the course of criminal trials”.⁸⁶
- 4.123 The amending Act also modified Division 1B of the *Evidence Act* by very substantially limiting the circumstances in which the privilege could be claimed in civil proceedings.
- 4.124 I first consider the application of the sexual assault communications privilege in criminal proceedings.

⁸⁵ See above at [4.21].

⁸⁶ *Criminal Procedure Amendment (Sexual Assault Communications Privilege) Act 1999* No. 48, Second Reading Speech, Hon. J Shaw, Attorney General, 20 October 1999, Legislative Council, Hansard p. 1595.

The Sexual Assault Communications Privilege in Criminal Proceedings

Application of Part 7 of the *Criminal Procedure Act 1986*

- 4.125 The sexual assault communications privilege is established by Part 7 of the *Criminal Procedure Act*, and applies to both “criminal proceedings” and to “preliminary criminal proceedings”, as set out below.
- 4.126 The Part applies, subject to the above, whether the “protected confidence” was made before or after the commencement of the Part; s 158(3).⁸⁷

What is a “protected confidence”?

A counselling communication made by, to or about a victim of sexual assault

- 4.127 A “protected confidence” is defined in section 148(1) of the *Criminal Procedure Act*.⁸⁸

“148. What is a protected confidence?”

(1) In this Part:

"protected confidence" means a counselling communication that is made by, to or about a victim or alleged victim of a sexual assault offence.”

- 4.128 A “counselling communication” is defined in section 148(4):⁸⁹

(4) In this section:

“"counselling communication" means a communication:

(a) made in confidence by a person (the "counselled person") to another person (the "counsellor") who is counselling the person in relation to any harm the person may have suffered, or

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

(c) 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, or

⁸⁷ The Part does not apply to criminal proceedings the hearing of which began before the commencement of the Part on 5 November 1999; s 158(1) of the *Criminal Procedure Act*. Those hearings are still governed by Division 1B of Part 3.10 of the *Evidence Act*, as in force immediately before the commencement of Part 7 of the *Criminal Procedure Act*. In those hearings, therefore, the sexual assault communications privilege may, in accordance with the decision in *R v Young* (1999) 46 NSWLR 681, only be claimed in respect of evidence adduced at the hearing.

⁸⁸ A “sexual assault offence” is defined as an offence to which Part 4, Division 6 of the *Criminal Procedure Act* applies, or an offence prescribed by the regulations for the purposes of this definition; s. 147(1). Section 117 in that Division outlines the offences for which that Division applies.

⁸⁹ Note that this provision has been recently amended; see further below at [4.134]-[4.141].

(d) made in confidence by or to the counsellor, by or to another counsellor or by or to a person who is counselling, or has at any time counselled, the person.”

4.129 Section 148(3) provides that a communication may be made “in confidence” even if made in the presence of another person present to assist with the counselling process:

“(3) For the purposes of this section, 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.”

4.130 Section 148(2) provides that:

“(2) A counselling communication is a protected confidence for the purposes of this Part even if it:

(a) was made before the acts constituting the relevant sexual assault offence occurred or are alleged to have occurred, or

(b) was not made in connection with a sexual assault offence or alleged sexual assault offence or any condition arising from a sexual assault offence or alleged sexual assault offence.”

4.131 It is important to note the width of these provisions. A “counselling communication” pursuant to s. 148(4) may be made not only by the counselled person, but also by a “parent, carer or other supportive person” present to facilitate or further the counselling process, or by another person who is counselling or has ever counselled the person. A “counselling communication” may include communications made *by* (as well as to) the counsellor, and extends to communications made by the counsellor “in confidence .. about the counselled person” apparently to any other person.⁹⁰

4.132 A “counselling communication”, in accordance with s. 148(2), need not even be made “in connection with the alleged sexual assault or any condition arising from the alleged sexual assault”. On its face it would appear to include communications made by a victim or alleged victim of sexual assault that may be unrelated to the offences or alleged offences. A person who has made an allegation of sexual assault, on this view, would be entitled to claim the benefit of the sexual assault communications privilege for all communications made to his or her counsellor or psychologist, whilst a person making no such allegations would have to rely on the lesser level of protection afforded by the professional confidential relationship privilege available under Part 3.10 Division 1A of the *Evidence Act* (NSW).

“Counselling”

4.133 The meaning of the term “counselling” in s. 148(4) is clarified by section 148(5), which provides that:

⁹⁰ Section 148(4)(c). This provision may include, for example, professional reports made in confidence by psychologists to their peers.

“(5) For the purposes of this section, a person **"counsels"** another person if:

(a) the person has undertaken training or study or has experience that is relevant to the process of counselling persons who have suffered harm, and

(b) the person:

(i) listens to and gives verbal or other support or encouragement to the other person, or

(ii) advises, gives therapy to or treats the other person, whether or not for fee or reward.”

4.134 This definition of “counsels” in s. 148(5) was introduced recently by the *Criminal Procedure (Sexual Assault Communications) Act 2002* No. 13, in response to the decision of the Court of Criminal Appeal in *R v Lee* (2000) 50 NSWLR 289. The amending Act commenced on 22 July 2002, and applies to protected confidences made before or after that date.⁹¹

4.135 At the time of the decision in *Lee* section 148(4) of the Act provided that:

““*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

(c) 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, or

(d) made in confidence by or to the counsellor, by or to another counsellor or by or to a person who is counselling or otherwise treating, or has counselled or otherwise treated, the counselled person at any time for any emotional or psychological condition of the person.”

4.136 The Court stated in *Lee* that the expression “counselling, giving therapy to or treating the counselled person for any emotional or psychological condition” in section 148(4)(a) referred 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 did not include persons such as friends and confidantes “who

⁹¹ See Schedule 2, clause 25 of the *Criminal Procedure Act*. The Amending Act does not apply to criminal proceedings the hearing of which began before its commencement; see below at [4.137].

merely seek to assist others suffering from an emotional or psychological condition” without the required training or expertise (at 296 [23]).⁹²

- 4.137 The amendments to s. 148(4) and the introduction of s. 148(5) do not apply to criminal proceedings the hearing of which began before the commencement of the *Criminal Procedure (Sexual Assault Communications) Act 2002* on 22 July 2002. Section 148(4) applies in such proceedings, as it provided at the time of the decision in *Lee*.⁹³
- 4.138 I think there would be little doubt that a psychologist would be regarded, in accordance with the interpretation of s. 148(4) as it was at the time of the decision in *Lee*, as a person “skilled, by training or experience, in the treatment of mental or emotional disease or trouble”.
- 4.139 There would also be little doubt that a psychologist would be regarded as a person who has “undertaken training or study or has experience that is relevant to the process of counselling persons who have suffered harm” in accordance with s. 148(5) in criminal proceedings to which that subsection applies.
- 4.140 I also note that the definition of “counselling communication” in section 148(4) which applied prior to the commencement of the *Criminal Procedure (Sexual Assault Communications) Act 2002* required that the communication be made *in the course of a relationship* in which the counsellor is counselling, giving therapy or treating the counselled person for any emotional or psychological condition. The new section 148(5), however, applies to a person - who has undertaken the relevant training or study or has the relevant experience pursuant to s. 148(5)(a) - who merely “listens to and gives verbal or other support or encouragement”, as well as to a person who “advises, gives therapy to or treats the other person”.
- 4.141 A psychologist could, pursuant to s. 148(5), be found to have engaged in “counselling” where he or she listened to or gave support or encouragement to a victim or alleged victim of a sexual assault offence, whether or not in the course of a professional consultation or whilst providing treatment to a client.

When may Evidence of a Protected Confidence be Given?

Preliminary Criminal Proceedings

- 4.142 Section 149(2) of the *Criminal Procedure Act* provides that:

“(2) Evidence is not to be adduced in any preliminary criminal proceedings if it would disclose:

(a) a protected confidence, or

⁹² The decision in *Lee* is discussed (and criticised) in Bartley, G, “Sexual assault communications privilege under siege”, *Bar News* Summer 2000/2001 at pp. 10-11.

⁹³ Schedule 2, clause 25, *Criminal Procedure Act*.

(b) the contents of a document recording a protected confidence.”

4.143 There is no provision providing the court with power to grant leave to allow such evidence to be given in certain circumstances.⁹⁴ The provision has been described as creating an “absolute prohibition”.⁹⁵

4.144 The phrase “preliminary criminal proceeding” is defined in section 147(1) of the *Criminal Procedure Act*:

““preliminary criminal proceedings” means any of the following:

(a) committal proceedings,

(b) proceedings relating to bail (including proceedings during the trial or sentencing of a person),

whether or not in relation to a sexual assault offence.”

4.145 If psychologists are required to make a claim of sexual assault communications privilege in a preliminary criminal proceeding they should take the steps set out below for the making of such claims.⁹⁶ Since the court appears to have no power to grant leave to admit evidence of a protected confidence in preliminary criminal proceedings, however, there would be no need to identify in detail the harm that would be caused by the disclosure of the protected confidence.

Criminal Proceedings – Leave of the Court Required

4.146 Section 150(3)⁹⁷ of the *Criminal Procedure Act* provides that:

“(3) Evidence is not to be adduced in any criminal proceedings if it would disclose:

(a) a protected confidence, or

(b) the contents of a document recording a protected confidence,

unless the court gives leave to adduce the evidence.”⁹⁸

4.147 The criminal proceedings need not relate to the alleged sexual assault offence.⁹⁹

“Criminal proceedings” are defined in section 147(1) as meaning:¹⁰⁰

⁹⁴ Compare the situation in relation to evidence of a protected confidence given in a [non-preliminary] “criminal proceeding”; see s. 150(3) and at [4.146]-[4.158].

⁹⁵ Odgers, S, *Uniform Evidence Law*, 5th ed., 2002, Lawbook Co., Sydney, Appendix E, [2.5.320], p. 636.

⁹⁶ At [4.219]-[4.227].

⁹⁷ Subsections 150(1) and 150(2) relates to the production of documents not to the adducing of oral evidence and are therefore outside the scope of this advice.

⁹⁸ A reference to a “document recording a protected confidence”: (s. 147(2))

“(a) is a reference to any part of the document that records a protected confidence or any report, observation, opinion, advice, recommendation or other matter that relates to the protected confidence made by a protected confider, and

(b) includes a reference to any copy, reproduction or duplicate of that part of the document.”

⁹⁹ This is also the case for “preliminary criminal proceedings”; see above at [4.144].

“(a) proceedings relating to the trial or sentencing of a person for an offence (whether or not a sexual assault offence), other than preliminary criminal proceedings, or

(b) proceedings relating to an order under Part 15A (Apprehended violence) of the *Crimes Act 1900*.”

4.148 The court¹⁰¹ must not grant leave under section 150(3) to adduce evidence that discloses a protected confidence in “criminal proceedings” (as opposed to “preliminary criminal proceedings”),¹⁰² unless the court is satisfied that the tests established in section 150(4) are met. Section 150(4) provides that:

“(4) The court must not give leave to adduce evidence that discloses a protected confidence or the contents of a document recording a protected confidence unless the court is satisfied that:

(a) the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have substantial probative value, and

(b) other evidence of the protected confidence or the contents of the document recording the protected confidence is not available, and

(c) 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 admitting into evidence information or the contents of a document of substantial probative value.”

4.149 The court must not grant leave unless *all* of the three conditions in s. 150(4) are satisfied.

4.150 The phrase “substantial probative value” in s. 150(4)(a) is not defined in the *Criminal Procedure Act*. The phrase “probative value” is, however, defined in the Dictionary to the *Evidence Act* as meaning:

¹⁰⁰ Bartley states that it appears to be an oversight or mistake that, by contrast with apprehended violence proceedings, care of children proceedings are not included in the definition of “criminal proceedings”; Bartley, G, *Sexual Assault Communications Privilege*, (2000), NSW Bar Association Criminal Law Section Seminar, 10 October 2000, p. 13. The Children’s Court has a discretion whether to apply the rules of evidence to these proceedings; s. 93(3) of the *Children and Young Persons (Care and Protection) Act 1998*. (See further above at [4.11].) If the *Evidence Act* is applied in these proceedings, the proceedings would be regarded as civil proceedings, and the privilege would only apply in the very limited circumstances permitted by Chapter 3, Part 3.10 Division 1B of the Act. (See further below at [4.181]-[4.185].)

¹⁰¹ The word “court” is defined in section 3 of the Act to mean:

“(a) the Supreme Court, the Court of Criminal Appeal, the Land and Environment Court, the Industrial Relations Commission, the District Court or a Local Court, or

(b) any other court that, or person who, exercises criminal jurisdiction,

but, subject to the *Children (Criminal Proceedings) Act 1987*, does not include the Children's Court or any other court that, or person who, exercises the functions of the Children's Court.”

¹⁰² For “preliminary criminal proceedings” see above at [4.142]-[4.145].

“**probative value**” of evidence means the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue.”

- 4.151 Odgers suggests that if this definition is applied to section 150(4) of the *Criminal Procedure Act*, evidence would have substantial probative value “when it could increase or decrease the probability of the existence of a fact in issue by a substantial amount”.¹⁰³
- 4.152 The meaning of the phrase “is not available” in section 150(4)(b) is not at all clear. Odgers suggests it would be very odd if inadmissible evidence held by one party could be regarded as “available”, and suggests that the phrase is best interpreted as meaning “available and admissible”.¹⁰⁴
- 4.153 Section 150(4)(c) refers to the public interest in protecting the “principal protected confider” from harm. A “principal protected confider” in section 150(4)(c) “means the victim or alleged victim of a sexual assault offence by, to or about whom a protected confidence is made”; section 147(1). A “protected confider”, in relation to a protected confidence, means: s. 147(1)
- “(a) the principal protected confider, or
(b) any other person who made the protected confidence.”
- 4.154 Section 150(4)(c) requires the court to consider not only the public interest in protecting the “principal protected confider” from harm, but also the more general public interest “in preserving the confidentiality of protected confidences”.¹⁰⁵
- 4.155 It is important to note that the balancing test in section 150(4)(c) requires that leave to admit the evidence will only be granted where the public interest in preserving the confidentiality of protected confidences and in protecting the principal protected confider from harm is *substantially* outweighed by the public interest in admitting evidence of substantial probative value. (Contrast the statutory public interest immunity test in s. 130 of the *Evidence Act*, where the evidence will be admitted if the public interest in admitting the evidence outweighs – but not necessarily substantially – the public interest in excluding it.)¹⁰⁶
- 4.156 In considering the public interest balancing test in section 150(4)(c) the court must take into account the likelihood, and the nature or extent, of harm that would be caused to the “principal protected confider” if the evidence of the protected confidence is given. Section 150(5) provides that:

¹⁰³ Odgers, Appendix E, [2.5.440], p. 639.

¹⁰⁴ Odgers, Appendix E, [2.5.460], p. 641.

¹⁰⁵ See Odgers, Appendix E, [2.5.500], p. 643.

¹⁰⁶ See Bartley, G, “Sexual assault communications privilege under siege”, *Bar News* Summer 2000/2001 at p. 9.

“(5) Without limiting the matters that the court may take into account for the purposes of subsection (4) (c), the court must take into account the likelihood, and the nature or extent, of harm that would be caused to the principal protected confider if the evidence that discloses the protected confidence or the contents of the document recording the protected confidence is adduced.”

4.157 Section 150(6) provides that the court must state its reasons for requiring production or giving or refusing to give leave under the section.

4.158 It is clear that these provisions impose a much more demanding test before evidence of a protected confidence will be admitted than that established by the “professional confidential relationship privilege” in Chapter 3, Part 3.10, Division 1A of the *Evidence Act*.¹⁰⁷

What Notice is Required to be Given?

4.159 Evidence disclosing a protected confidence or the contents of a protected confidence may not be adduced unless reasonable notice has been given to both the other parties to the proceedings and to the “protected confider”. Section 151(2) provides that:

“(2) Evidence disclosing a protected confidence or the contents of a document recording a protected confidence is not to be adduced in any criminal proceedings unless the party adducing the evidence has given reasonable notice in writing of the party's intention to adduce the evidence to:

(a) each other party, and

(b) if the protected confider is not a party---the protected confider.”

4.160 The term “reasonable notice” is not defined, although it would presumably be considered from the perspective of the party seeking to adduce the evidence.¹⁰⁸

4.161 Where the protected confider is not a party the notice must advise the protected confider of his or her right to appear, with the leave of the court, in the proceedings,¹⁰⁹ and of the day on which the proceedings are to be heard; s. 151(3)(a), (c).¹¹⁰

¹⁰⁷ For the test applied in relation to the “confidential relationship privilege” see above at [4.85]-[4.89].

¹⁰⁸ Odgers, Appendix E, [2.5.680] p. 647.

¹⁰⁹ See below at [4.178]-[4.180].

¹¹⁰ Section 151(4) provides that:

“(4) It is sufficient compliance with a requirement under subsection (1) (b) or (2) (b) to give notice to a protected confider who is not a party and who is the principal protected confider if the party gives reasonable notice that the party has sought production, or of the party's intention to adduce the evidence, to the informant and the informant gives, or uses the informant's best endeavours to give, a copy of the notice to the principal protected confider within a reasonable time after the informant receives the notice.”

4.162 Even if notice has not been given in accordance with subsection 151(2), the court retains a discretion to grant leave to admit the evidence in certain circumstances. Section 151(5) provides that:¹¹¹

“(5) Despite subsections (1) and (2), a document recording a protected confidence may, with the leave of the court, be required to be produced for inspection, or evidence disclosing a protected confidence or the contents of a document recording a protected confidence adduced, although notice has not been given to a protected confider who is not a party (not being the principal protected confider) as required by those subsections.”

4.163 The court only has a discretion in accordance with this subsection where the failure to provide notice was in relation to a protected confider (but not the principal protected confider) who is not a party to the proceedings. The court does not appear to have a discretion to allow the adducing of evidence if the notice provisions have not been complied with for a principal protected confider, or for a protected confider who is a party to the proceedings.¹¹²

4.164 These notice provisions do not impose any obligations upon psychologists required to give evidence as witnesses. Psychologists intending to make a claim that evidence of a protected confidence not be adduced, however, should be aware of these notice provisions, and should bring them to the court's attention if they consider that they may not have been complied with.

4.165 It may also, depending upon the circumstances, be appropriate for psychologists to bring these notice provisions to the court's attention even if they do not intend to make a claim (or are uncertain whether or not to make a claim) that evidence of a protected confidence not be adduced.

When may the Privilege be Lost?

Consent

4.166 This Part of the Act does not prevent the adducing of any evidence if the “principal protected confider” to whom the proceedings relate has consented to the adduction of the evidence. The consent must be in writing and expressly relate to the adduction of the evidence that is or would be privileged.¹¹³

¹¹¹ Subsection 151(1) relates to the production or inspection of documents recording a protected confidence, and is therefore not relevant to this advice.

¹¹² See Odgers, Appendix E, [2.5.680], p. 647.

¹¹³ Compare s. 126C of the *Evidence Act*, which does not specify that consent to the adducing of evidence in relation to the professional relationship privilege need be express or in writing.

4.167 Section 152 provides that:

“152. Effect of consent

(1) This Part does not prevent the production of any document recording a protected confidence or the adducing of evidence disclosing a protected confidence or the contents of a document recording a protected confidence, in, or in connection with, any proceedings, if the principal protected confider to whom the proceedings relate has consented to the production of the document or adducing of the evidence.

(2) Consent is not effective for the purposes of this section unless:

(a) the consent is given in writing, and

(b) the consent expressly relates to the production of a document or adducing of evidence that is privileged under this Part or would be so privileged except for a limitation or restriction imposed by this Part.”

4.168 The rationale for the fact that only the principal protected confider may consent can be seen in the Second Reading Speech, where the Attorney General stated that “[t]he principal protected confider – the alleged victim of the sexual assault – is the person for whom the maintenance of the privilege is most important”.¹¹⁴

Misconduct

4.169 This Part does not prevent the adducing of evidence of a communication made, or document prepared, in the furtherance of the commission of a fraud or an offence or the commission of an act that renders a person liable to a civil penalty.¹¹⁵ Section 153 provides that:

“153. Loss of sexual assault communications privilege: misconduct

(1) This Part does not prevent the adducing of evidence of a communication made, or the production or adducing of a document prepared, in the furtherance of the commission of a fraud or an offence or the commission of an act that renders a person liable to a civil penalty.

(2) For the purposes of this section, if the commission of the fraud, offence or act is a fact in issue and there are reasonable grounds for finding that:

(a) the fraud, offence or act was committed, and

(b) a communication was made or document prepared in furtherance of the commission of the fraud, offence or act,

the court may find that the communication was so made or document so prepared.”

¹¹⁴ *Criminal Procedure Amendment (Sexual Assault Communications Privilege) Act 1999* No. 48, Second Reading Speech, Hon. J. Shaw, Legislative Council, 10 July 1999, Hansard at p. 1596.

¹¹⁵ The scope of the term “civil penalty” is discussed in Odgers, Appendix E, [2.5.760] p. 648.

Ancillary Orders to Minimise the Harm of Disclosure

4.170 The court may make a range of ancillary orders to minimise the harm that may be caused by the disclosure of evidence of, or the contents of a document recording, a protected confidence. Section 154 provides that:

“154. Ancillary orders

(1) Without limiting any action the court may take to limit the possible harm, or extent of the harm, likely to be caused by the disclosure of evidence of, or the contents of a document recording, a protected confidence, the court may:

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

(b) make such orders relating to the production and inspection of the document as, in the opinion of the court, are necessary to protect the safety and welfare of any protected confider, and

(c) make such orders relating to the suppression of publication of all or part of the evidence given before the court as, in its opinion, are necessary to protect the safety and welfare of any protected confider, and

(d) make such orders relating to disclosure of protected identity information as, in the opinion of the court, are necessary to protect the safety and welfare of any protected confider.

(2) Nothing in this section limits the power of a court to make an order under section 106 or 119 of this Act or section 578A of the *Crimes Act 1900*.

(3) In this section:

"protected identity information" means information about, or enabling a person to ascertain, the private, business or official address, email address or telephone number of a protected confider.”

Who May Seek to Apply the Privilege?

4.171 Part 7 of the *Criminal Procedure Act* does not establish any particular mechanism for persons to apply, or object, to prevent evidence of sexual assault communications being adduced into evidence.¹¹⁶

4.172 Section 149(2) provides that evidence disclosing a protected confidence or the contents of a document recording a protected confidence “is not to be adduced” in any

¹¹⁶ Compare section 126B(2) of the *Evidence Act* in relation to the confidential relationship privilege. I also note that section 150(1) of the *Criminal Procedure Act* provides that a person “who objects to” the production of a *document* recording a protected confidence cannot be required to produce it unless the matters set out in the section are satisfied and complied with. There is no equivalent provision referring to a person who objects to the *adducing* of evidence of a protected confidence.

preliminary proceedings. Section 150(3) provides that evidence disclosing a protected confidence or the contents of a document recording a protected confidence “is not to be adduced” in any criminal proceedings unless the court gives leave.

4.173 It appears that the court is therefore obliged, at least in theory, to ensure that these provisions restricting the adduction of evidence of a protected confidence are complied with, whether or not any person makes a claim or objection that the evidence should not be adduced.¹¹⁷

4.174 The court is also obliged to satisfy itself that a witness or party is aware of the effect of the relevant provisions of the sexual assault communications privilege in Part 7 of the *Criminal Procedure Act*, if the court believes that the witness may have grounds for making an application or objection under that Part. Section 155 provides that:¹¹⁸

“155. Court to inform of rights to make applications and objections

If it appears to a court that a witness or a party may have grounds for making an application or objection under a provision of this Part, the court must satisfy itself (if there is a jury, in the absence of the jury) that the witness or party is aware of the effect of that provision.”

4.175 I think that in most circumstances the court would allow psychologist witnesses who wish to raise a claim or objection under the sexual assault communications privilege in relation to a question they have been asked¹¹⁹ the right to be heard on that issue. I would expect that in most circumstances the court would also allow a witness to be legally represented for the purposes of determining the objection.

4.176 The following points, in my view, support the proposition that a psychologist would have the right to be heard on such an issue:

1. Section 155 of the Act supports the view that Parliament intended that witnesses have the right to make an application or objection to the adducing of evidence on the basis of the sexual assault communications privilege.
2. The primary purpose of the sexual assault communications privilege provisions is to protect the confidentiality of victims or alleged victims of sexual assault.¹²⁰ It is

¹¹⁷ I note, however, Odgers' view that, since there is no specific provision to the effect that the court may, on its own initiative, order that evidence not be adduced, “presumably this would not occur”. (Appendix E, [2.5.640], p. 645.)

¹¹⁸ This provision is in identical form to section 132 of the *Evidence Act*, which applies to claims of professional confidential relationship privilege under Chapter 3, Part 3.10 Division 1B of the NSW Act, and to claims of “public interest immunity” under section 130 of the NSW and Commonwealth Acts. Section 132 also applies to the sexual assault communications privilege in civil proceedings, under Chapter 3, Part 3.10 Division 1B of the NSW Act – see further below at [4.181-4.185].

¹¹⁹ It is beyond the scope of this advice to consider whether psychologists may be granted the right to be heard to make an objection to other persons giving evidence of sexual assault communications.

¹²⁰ See generally the Second Reading Speech to the *Evidence Amendment (Confidential Communications) Act 1997* No. 122, Hon. J. Shaw, Attorney General, Legislative Council, 28 May 1997, Hansard pp. 9289-9291.

plainly not consistent with this legislative purpose that these victims be required personally to make a claim that the privilege be upheld. If these victims are required to specify in open court the harm that is likely to be caused to them by disclosure – particularly if it is disclosure to one of the parties that is likely to be particularly harmful – much of the harm which the sexual assault communications privilege is designed to protect may already have been done.

3. A psychologist who has counselled or treated the victim of sexual assault will, in most cases, be the person most likely to be of assistance to the court in being able to give evidence and make submissions on the harm that may be caused to the victim by disclosure. Psychologist witnesses are also likely to be the most appropriate persons to make a claim that privilege should be upheld, both to protect the interests of the sexual assault victim and also to preserve the confidentiality of the psychologist's professional services.
4. Section 159(1) provides that this Part of the Act “does not affect the operation of a principle or rule of the common law in relation to evidence in criminal proceedings, except so far as this Part provides otherwise expressly or by necessary intendment”. A psychologist asked to provide information as to his or her professional communications with a victim or alleged victim of sexual assault may have a sufficient interest, on common law principles, to be granted leave to appear in the proceedings.¹²¹

4.177 The question of whether other bodies, such as the employer of the psychologist or representative bodies such as your organisation, may be granted the right to appear in relation to a claim of sexual assault communications is more difficult.¹²² An alternative may be for the employer or representative body to provide assistance and legal representation to the psychologist, without needing to seek leave to appear in the organisation's own right.

4.178 I also note that section 150(7) provides that:

“(7) A protected confider who is not a party to proceedings may, with the leave of the court, appear in the proceedings.”

4.179 A “protected confider”, as set out above, is defined in s. 147(1):

“**“protected confider”**, in relation to a protected confidence, means:

¹²¹ An argument to this effect was made in *Regina v Dietz* (unreported, District Court of New South Wales, Belleair J, 02/21/0017, 29 October 2002), to support the claim by the South West Sydney Area Health Service, which had employed the counsellor, to be granted leave to appear.

¹²² In *Dietz*, the Court granted the South West Sydney Area Health Service leave to appear to argue a claim of sexual assault communications privilege over a range of materials, including notes of counselling sessions with the alleged victim of sexual assault made by employees of the Health Service. The Court granted the Area Health Service leave to appear as a “protected confider”, pursuant to section 150(7) of the *Criminal Procedure Act*.

- (a) the principal protected confider, or
- (b) any other person who made the protected confidence.”

4.180 A psychologist may in certain circumstances be regarded as a “protected confider”, on the basis that he or she is “any other person [other than the principal protected confider] who made the protected confidence”.¹²³ In these circumstances the psychologist, or perhaps even the psychologist’s employer during the relevant period, could apply to be granted leave, pursuant to section 150(7), as a protected confider to appear and make submissions in relation to the application of the sexual assault communications privilege.¹²⁴

The Sexual Assault Communications Privilege in Civil Proceedings

When does the Privilege Apply in Civil Proceedings?

4.181 As noted above,¹²⁵ an effect of the legislative response to the decision in *R v Young* (1999) 46 NSWLR 681 was to very substantially limit the circumstances in which the privilege could be claimed in civil proceedings. The provisions establishing the sexual assault communications privilege are now contained in Chapter 3, Part 3.10 Division 1B (sections 126G to 126I) of the *Evidence Act* (NSW).

4.182 Sections 126G to 126I of the *Evidence Act* provide that:

“126G. Definitions

In this Division:

"criminal proceeding" has the same meaning as criminal proceedings has in Part 7 of the *Criminal Procedure Act 1986*.

"principal protected confider" has the same meaning as it has in Part 7 of the *Criminal Procedure Act 1986*.

¹²³ See *Criminal Procedure Amendment (Sexual Assault Communications Privilege) Act 1999* No. 48, Second Reading Speech, Hon. J. Shaw, Attorney General, Legislative Council, 20 October 1999, Hansard p. 1596.

The definition of a “protected confidence” in s. 148(1) includes a “counselling communication” made *to* or *about* a victim or alleged victim of sexual assault. A psychologist could certainly be regarded as a “protected confider” in relation to counselling communications that he or she had made to or about a victim or alleged victim of sexual assault.

It should be noted, however, that for a person other than the principal protected confider to be regarded as a “protected confider” that person must have *made* the protected confidence. I would expect that in the majority of cases in which psychologists are called to give evidence they would be asked about what the victim or alleged victim of sexual assault told them, rather than what the psychologists said to or about the counselled person. I would expect that in these cases a psychologist would not be regarded as a protected confider in relation to evidence of protected confidences told to them by their clients.

In *Dietz*, however, the Court granted the South West Sydney Area Health Service, represented by this Office, leave to appear, pursuant to section 150(7) of the *Criminal Procedure Act*, on the basis that the Area Health Service was a “protected confider”.

¹²⁴ In *Dietz* the Court appeared to accept the argument made on behalf of the Area Health Service that it should be regarded as a “person” who made the protected confidence, on the basis that the Service was a body politic. The phrase “person”, unless there is a contrary intention in the Act, “includes an individual, a corporation and a body corporate or politic”; section 21(1) of the *Interpretation Act 1987*.

¹²⁵ At [4.119]-[4.123].

"protected confidence" has the same meaning as it has in Part 7 of the *Criminal Procedure Act 1986*.

"sexual assault offence" has the same meaning as it has in Part 7 of the *Criminal Procedure Act 1986*.

126H. Exclusion of evidence of protected sexual assault communications

(1) This section applies only 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.

(2) If evidence was found to be privileged in a criminal proceeding under Part 7 of the *Criminal Procedure Act 1986*, the evidence may not be adduced in a civil proceeding to which this section applies."

126I. Application of Division

(1) This Division does not apply in relation to a civil proceeding the hearing of which began before the commencement of this section.

(2) This Division applies, subject to subsection (1), in respect of a protected confidence whether made before or after the commencement of this section."

4.183 The effect of section 126H is that the sexual assault communications privilege will only apply in civil proceedings where:¹²⁶

- There were criminal proceedings¹²⁷ on the same facts;
- A sexual assault communications privilege claim was made in the criminal proceedings; and

The claim in the criminal proceedings was successful.

4.184 None of these restrictions applied to civil proceedings before the amendments in 1999.¹²⁸ I would expect that the number of civil proceedings in which all of these conditions applied would be very few.

4.185 The Division applies to a protected confidence made before or after the commencement of the section; s. 126I(2).

¹²⁶ Bartley, G, *Sexual Assault Communications Privilege*, (2000), NSW Bar Association Criminal Law Section Seminar, 10 October 2000, at p. 13.

¹²⁷ The phrase "criminal proceeding" in section 126H has the same meaning as in Part 7 of the *Criminal Procedure Act*. Section 147(1) of the *Criminal Procedure Act* provides that:

“**criminal proceedings**” means:

- (a) proceedings relating to the trial or sentencing of a person for an offence (whether or not a sexual assault offence), other than preliminary criminal proceedings, or
- (b) proceedings relating to an order under Part 15A (Apprehended violence) of the *Crimes Act 1900*.”

¹²⁸ Bartley at p. 13.

The Effects of the Limited Availability of the Sexual Assault Communications Privilege in Civil Proceedings

- 4.186 It is significant to note that section 126F(3)¹²⁹ of the *Evidence Act* appears to prohibit any attempt in civil proceedings to rely upon the professional confidential relationship privilege for a communication which is also a “protected confidence” within the meaning of the sexual assault communications privilege provisions. Section 126F(3) provides that Division 1A (establishing the professional confidential relationship privilege) does not apply in relation to a protected confidence within the meaning of Division 1B of the *Evidence Act* or Part 7¹³⁰ of the *Criminal Procedure Act*.
- 4.187 A “protected confidence” in Division 1B has the same meaning as in Part 7 of the *Criminal Procedure Act*; s. 126G. The effect of section 126F(3) therefore appears to be that if a claim that evidence of a “protected confidence” within the meaning of the sexual assault communications privilege provisions not be adduced in civil proceedings cannot be made out - in the extremely limited circumstances available in civil proceedings - a claim may not be made in the alternative to exclude that evidence on the basis that it is a “protected confidence” within the meaning of the professional confidential relationship privilege.
- 4.188 It also appears clear that in civil proceedings a claim of privilege over a “professional confidential relationship” communication – which is not also a “sexual assault” communication - has a much higher chance of success than a claim of privilege over a “sexual assault” communication.¹³¹
- 4.189 Both of these consequences seem contrary to Parliament’s intention that evidence of sexual assault communications be given a higher level of protection than that of professional confidential relationship communications.¹³² It may be arguable that section 126F(3) should be read down to avoid such apparently incongruous results.

Does the Privilege Grant the Court a Discretion?

- 4.190 If the conditions set out in s. 126H apply, s. 126H(2) provides that the evidence “may not be adduced”. This subsection does not specifically provide the court with the power to grant leave to admit the evidence. It is arguable, however, that the court in civil proceedings may maintain a discretion to admit evidence found to be privileged in the criminal proceedings in certain circumstances.¹³³

¹²⁹ See above at [4.115].

¹³⁰ The section in fact refers to Part 13 not Part 7 of the *Criminal Procedure Act*, but this is clearly a misprint. See footnote 76 above.

¹³¹ See above at [4.182]-[4.184].

¹³² See above at [4.74].

¹³³ Section 126H(2) provides that the evidence “may not be adduced”. The circumstances in which the evidence is sought to be adduced in the civil proceedings may differ from the circumstances in which the claim was upheld in the criminal proceedings. It would appear anomalous if a court in a civil proceeding was obliged to prevent the adduction of evidence because a successful claim for the privilege was made in

Sexual Assault Communications Privilege – A Summary

- 4.191 The provisions establishing the sexual assault communications privilege have been substantially amended since being introduced in 1997. Further amendments can be expected.
- 4.192 The effect of the sexual assault communications privilege, at the present date, can be summarised as follows:
1. The sexual assault communications privilege limits the circumstances in which a “counselling communication” made by, to or about a victim or alleged victim of a sexual assault offence – defined as a “protected confidence” – may be adduced in evidence.¹³⁴
 2. The privilege is only available in civil proceedings in the following very limited circumstances.¹³⁵
 - There were criminal proceedings on the same facts;
 - A sexual assault communications privilege claim was made in the criminal proceedings; and
 - The claim in the criminal proceedings was successful.
 3. A “protected confidence” is defined as a “counselling communication” that is made by, to or about a victim or alleged victim of a sexual assault offence.¹³⁶
 4. The term “counselling communication” is defined broadly, and differs according to whether the hearing of the criminal proceedings began before or after 22 July 2002. In either case the term should include communications made by a person during a consultation with a psychologist, and communications made by the psychologist to or about the person.¹³⁷
 5. Evidence of a protected confidence or of the contents of a document recording a protected confidence is not to be adduced in committal or bail proceedings.¹³⁸

the criminal proceedings, despite the fact that the circumstances upon which the claim was upheld in the criminal proceedings no longer apply by the time of the civil proceedings. In addition, the word “may”, unless there is a contrary intention in the Act, is generally used to indicate a discretion. (See subsections 9(1) and 5(2) of the *Interpretation Act 1987*, although it may be arguable that s. 126H(2) does not provide the court with a “power” and that subsection 9(1) therefore does not apply.)

¹³⁴ See generally at [4.117]-[4.122].

¹³⁵ At [4.183].

¹³⁶ At [4.127]-[4.132].

¹³⁷ At [4.130]-[4.141].

¹³⁸ At [4.142]-[4.144].

6. Evidence of a protected confidence or of the contents of a document recording a protected confidence is not to be adduced in criminal proceedings unless the court gives leave.¹³⁹
7. The court must not give leave to admit the evidence unless it is satisfied that all of the following conditions are met:¹⁴⁰
 - The evidence is of substantial probative value;
 - Other evidence of the protected confidence is not available; and
 - The public interest in preserving the confidentiality of protected confidences and in protecting the alleged victim of the sexual assault from harm is *substantially outweighed* by the public interest in admitting the evidence.
8. Evidence of a protected confidence may not be adduced unless reasonable notice has been given to both the protected confider and to the parties. The court has a discretion, in certain circumstances, to waive the notice requirements if notice has not been given to a person – but not the alleged victim of the sexual assault - who made the protected confidence.¹⁴¹
9. The privilege will be lost if the alleged victim of the sexual assault has given express written consent to the evidence being adduced.¹⁴²
10. The privilege will also be lost where the communication was made in the furtherance of committing a fraud, an offence, or an act rendering a person liable to a civil penalty.¹⁴³
11. The court may make a range of ancillary orders to minimise the harm that may be caused by the disclosure of evidence of, or the contents of a document recording, a protected confidence.¹⁴⁴
12. The Act does not establish any mechanism for persons to apply to prevent evidence of sexual assault communications from being admitted into evidence. I would expect, however, that the court would allow psychologist witnesses who wish to raise a claim or objection under the sexual assault communications

¹³⁹ At [4.146]-[4.147].

¹⁴⁰ At [4.148]-[4.158].

¹⁴¹ At [4.159]-[4.165].

¹⁴² At [4.166]-[4.168].

¹⁴³ At [4.169].

¹⁴⁴ At [4.170].

privilege in relation to a question that they have been asked the right to be heard, and to be legally represented, on that issue.¹⁴⁵

Commonwealth *Evidence Act*

No Sexual Assault Communications and Professional Confidential Relationship Privilege

- 4.193 The Commonwealth *Evidence Act* does not establish any privileges equivalent to the sexual assault communications and professional confidential relationship privilege established in the New South Wales *Evidence Act* and *Criminal Procedure Act*.
- 4.194 As set out above,¹⁴⁶ the common law does not recognise any privilege which might apply to confidential information provided to psychologists.

Section 130 - Statutory Public Interest Immunity

- 4.195 As set out above,¹⁴⁷ the statutory enactment of the common law principles of public interest immunity is set out in section 130 of the Commonwealth *Evidence Act* in identical terms to that in the New South Wales *Evidence Act*.

The Commonwealth *Evidence Act* – A Summary

- 4.196 The opportunities for psychologists appearing as witnesses in proceedings under the Commonwealth *Evidence Act*¹⁴⁸ to prevent the disclosure of evidence of confidential communications made to them are extremely limited. The only basis is likely to be a claim of statutory public interest immunity under section 130 of the Commonwealth *Evidence Act*. As set out above,¹⁴⁹ however, it will be uncommon for a claim of public interest immunity to arise in relation to evidence given by psychologists, and, where it does, it will almost invariably be appropriate for the claim to be made by the State rather than by the psychologist.

Other Restrictions upon Admitting Certain Evidence

- 4.197 Although it is beyond the scope of this advice to consider the circumstances in which evidence of psychologist witnesses may not be admitted for reasons other than preserving the confidentiality of the psychologist-client relationship, I note that there are a number of statutory provisions which may apply to particular questions that psychologists witnesses are asked in court.
- 4.198 Section 29 of the *Children and Young Persons (Care and Protection) Act 1998*, for example, restricts the circumstances in which evidence may be given of the contents of

¹⁴⁵ At [4.171]-[4.180].

¹⁴⁶ At [4.17]-[4.25].

¹⁴⁷ At [4.58], [4.64].

¹⁴⁸ The Act applies to all proceedings in a “federal court” or an “Australian Capital Territory court”; see above at [4.12]-[4.13].

¹⁴⁹ See generally at [4.70].

a report, or of the identity of a person making a report, made to the Director-General of the Department of Community Services that a child is at risk of harm.¹⁵⁰ That section provides that:

“29. Protection of persons who make reports

(1) If, in relation to a child or young person or a class of children or young persons, a person makes a report in good faith to the Director-General or to a person who has the power or responsibility to protect the child or young person or the class of children or young persons:

(a) the making of the report does not constitute a breach of professional etiquette or ethics or a departure from accepted standards of professional conduct, and

(b) no liability for defamation is incurred because of the report, and

(c) the making of the report does not constitute a ground for civil proceedings for malicious prosecution or for conspiracy, and

(d) the report, or evidence of its contents, is not admissible in any proceedings (other than care proceedings in the Children's Court, or any appeal arising from those care proceedings), and

(e) a person cannot be compelled in any proceedings to produce the report or a copy of or extract from it or to disclose or give evidence of any of its contents, and

(f) the identity of the person who made the report, or information from which the identity of that person could be deduced, must not be disclosed by any person, except with:

(i) the consent of the person who made the report, or

(ii) the leave of a court or other body before which proceedings relating to the report are conducted,

and, unless that consent or leave is granted, a party or witness in any such proceedings must not be asked, and, if asked, cannot be required to answer, any question that cannot be answered without disclosing the identity or leading to the identification of that person.

(1A) A certificate purporting to be signed by the Director-General that a document relating to a child or young person or a class of children or young persons is a report to which this section applies is admissible in any proceedings and, in the absence of evidence to the contrary, is proof that the document is such a report.

(2) A court or other body cannot grant leave under subsection (1) (f) (ii) unless the court or other body is satisfied that the evidence is of critical importance in the proceedings and that failure to admit it would prejudice the proper administration of justice.

(3) A court or other body that grants leave under subsection (1) (f) (ii):

¹⁵⁰ See generally Chapter 3, Part 2 of the *Children and Young Persons (Care and Protection) Act 1998*.

- (a) must state the reasons why leave is granted, and
- (b) must ensure that the holder of the report is informed that evidence as to the identity of the person who made the report, or from which the identity of that person could be deduced, has been disclosed.
- (4) Subsection (1) (f) does not prevent the disclosure of information from which the identity of a person may be deduced if the prohibition on the disclosure of that information would prevent the proper investigation of the report.
- (5) A report to which this section applies is taken to be an exempt document for the purposes of the *Freedom of Information Act 1989*.
- (6) In this section:
 - "court" includes a court exercising federal jurisdiction.
 - "report" includes a report under sections 24, 25, 27 and 122.”

Practical Guide to Preparing Claims

Introduction

- 4.199 In this part I attempt to set out some matters which may assist psychologists in preparing claims or objections to protect the confidentiality of information provided to them during the course of their consultations.
- 4.200 As set out in this advice, there are a number of different legal bases upon which psychologists may be able to rely to attempt to protect their claims of confidentiality. The primary focus in preparing materials in support of any claim must be to meet the particular legal requirements upon which the claim is based. My observations in this part should be read with this in mind.
- 4.201 I also note that most of the authorities and examples to which I refer in this part relate to attempts to resist the production of documents under subpoena, rather than to resist the adducing of oral evidence by witnesses. One obvious difference is that with oral evidence the witness may not know ahead of time exactly what he or she will be asked, and it may therefore be difficult to determine how to prepare for the claim or objection.¹⁵¹
- 4.202 Psychologists intending to make a claim of professional confidential relationship or sexual assault communications privilege should, as set out below,¹⁵² prepare an affidavit, and perhaps a further confidential affidavit, outlining the harm that will be caused to the protected confider by the disclosure of the evidence. It will generally be prudent for psychologists to prepare these affidavits on the assumption that they will

¹⁵¹ I would expect that in most circumstances – particularly where the psychologist is concerned at questions that may be asked in cross-examination – it will not be appropriate or possible for the psychologist to ascertain before the hearing the scope of the questions likely to be asked.

¹⁵² At [4.219]-[4.228].

be asked questions requiring them to disclose *all* of the information to which they would object.¹⁵³

Claims in the Absence of Available Evidence

- 4.203 It is of course preferable that psychologists who consider it likely they may be asked questions to which they might object prepare evidence in support of their objection before the hearing. There may be instances, however, when a psychologist is unable to prepare such material in advance.
- 4.204 The usual procedure in relation to claims of public interest immunity made on behalf of the State, as set out below,¹⁵⁴ is to rely upon affidavit evidence sworn by a very senior government official. This procedure, however, is not necessarily required by section 130 of the *Evidence Act* or by the common law. Whilst a claim made on behalf of the State may not be refused merely because affidavit evidence is unavailable, a claim may still be accepted in the absence of affidavit evidence. (See *R v Fandakis* [2002] NSWCCA 5 at [42].)
- 4.205 As set out above, the provisions establishing the sexual assault communications privilege and the confidential relationship privilege do not establish any required form in which an objection or application must be made. There may well be circumstances in which a claim or objection will be upheld in the absence of affidavit or other evidence. (Examples might include sexual assault communications privilege claims in preliminary criminal proceedings¹⁵⁵ or where the notice provisions have not been complied with.¹⁵⁶)
- 4.206 In most circumstances, however, and particularly where the court is required to conduct a balancing exercise in determining whether to admit the evidence, a psychologists should prepare material in support of their application or objection.
- 4.207 Psychologists who consider they may have a basis to claim public interest immunity, professional confidential relationship privilege or sexual assault communications privilege, should not fail to raise the claim merely because they are unprepared or have no supporting evidence available. In those circumstances psychologists or their legal representatives should indicate to the court that they wish to make the claim or objection. If the court is not prepared to accept or allow the claim in the absence of supporting evidence, psychologists should consider applying for an adjournment to allow them the opportunity to prepare evidence to substantiate the claim.

¹⁵³ If psychologists are not in fact required to disclose all of this information, they could indicate to the court that they had prepared the materials on the basis that they would be asked additional questions. They could also, if necessary, indicate to the court that they do not wish to rely upon parts of their prepared materials which may not be applicable.

¹⁵⁴ At [4.216]-[4.218].

¹⁵⁵ See above at [4.142]-[4.145].

¹⁵⁶ See above at [4.159]-[4.165].

Adjournments to Prepare Claims

- 4.208 It is well established that when a person representing the executive government objects to a question claiming public interest immunity (either at common law or pursuant to section 130 of the *Evidence Act*) and seeks an adjournment to prepare evidence in support of the claim, the court is required to grant the adjournment. (See, for example, *R v Fandakis* [2002] NSWCCA 5 at [42]-[44].)
- 4.209 I think it is likely that the court would also be obliged to grant an adjournment to a person not representing the State claiming public interest immunity, in the rare circumstances in which it would be appropriate for such a claim to be made by an individual.¹⁵⁷
- 4.210 It is not clear whether the court would accept that an adjournment should necessarily be granted to allow a person the opportunity to prepare a claim of professional confidential relationship privilege or sexual assault communications privilege. The principles applying to public interest immunity have been developed in order to protect the special interests of the state and of the executive government, and may not apply in other contexts.
- 4.211 On the other hand, there may be merit in an argument that the sexual assault communications privilege, in particular, is designed to protect both the interests of victims of sexual assault and the public interest more generally, and that an adjournment should be granted to ensure that these interests are not harmed. I would expect that an argument to this effect would be more likely to succeed if the court was satisfied that the claim could not have been reasonably foreseen (and therefore could not have been prepared in advance).
- 4.212 It is also well established that, where a court refuses a claim of public interest immunity and the person who made the claim indicates an intention to appeal the refusal, the court is obliged to defer the enforcement of its ruling to enable the person who made the public interest immunity claim the opportunity to appeal. (See *R v Fandakis* [2002] NSWCCA 5, at [45]-[47].)
- 4.213 It is not clear whether this principle would necessarily apply to claims of professional confidential relationship privilege or sexual assault communications privilege. In the case of an objection raised during oral evidence, however, there would be a powerful argument that if a stay or adjournment is not granted to allow the ruling to be appealed the utility of the appeal would be lost as there would be no opportunity to remedy the harm caused by the disclosure once it has been made.¹⁵⁸

¹⁵⁷ See above at [4.53]-[4.57], [4.65]-[4.66].

¹⁵⁸ See *Fandakis* at [45].

Other Measures to Minimise the Harm of Disclosure

- 4.214 Psychologists who make an unsuccessful claim that evidence not be adduced should consider the possibility of requesting that the court take other measures, such as closing the court to the public or making suppression orders, to limit the harm of disclosure. There are specific provision for the making of such ancillary orders to limit the harm to the protected confider in the case of the sexual assault communications privilege in criminal proceedings.¹⁵⁹
- 4.215 There may also be provisions in the legislation establishing the court or tribunal providing it with power to make such ancillary orders. If there are no provisions it may, in certain circumstances, be arguable that the court or tribunal has an implied power to make such orders.

Public Interest Immunity Claims on Behalf of the State

- 4.216 There is an established procedure for making public interest immunity claims on behalf of the State of New South Wales. Possible claims are referred to this Office for consideration, and then to the Crown Advocate for final approval.¹⁶⁰ Claims are supported by an affidavit, and, if appropriate, a further confidential affidavit,¹⁶¹ sworn by a senior government official.
- 4.217 As set out above,¹⁶² public interest immunity claims are almost invariably made by the State, and it will rarely be appropriate for a psychologist witness to make such a claim on his or her own behalf.
- 4.218 A psychologist who believes that the State may wish to raise a claim of public interest immunity over evidence that he or she might be required to give should contact a legal officer of the relevant government department or authority. A psychologist could also, particularly in urgent circumstances, contact this Office. Psychologists who believe that the State may wish to raise a claim of public interest immunity in relation to a question they are asked in court should draw this to the court's attention, and, if appropriate, seek an adjournment to allow the State the opportunity to consider whether to make the claim.

Who Should Swear the Affidavit?

- 4.219 The psychologist who treated the "protected confider" will usually be the most appropriate person to swear an affidavit in support of a claim of either professional confidential relationship privilege or sexual assault communications privilege. The psychologist will be likely to be the most appropriate person to assist the court in

¹⁵⁹ Section 154 of the *Criminal Procedure Act*; see above at [4.170].

¹⁶⁰ See the Premier's Direction in Memorandum 97-26, clause 4. The Solicitor General has delegated his responsibility in this respect to the Crown Advocate.

¹⁶¹ See further below at [4.221]-[4.227].

¹⁶² See above at [4.53]-[4.57], [4.65]-[4.66].

outlining the harm that may be caused to the protected confider by giving evidence of the psychologist's treatment and personal observations of the protected confider. The psychologist may also provide expert opinion on the effect that disclosure of confidential communications can have on persons generally, and on the protected confider in particular.

- 4.220 It will rarely, if ever, be appropriate for the protected confider to give evidence, even by confidential affidavit.

Confidential Affidavits

- 4.221 The risk in submitting evidence to substantiate the harm that may be caused to a "protected confider" (under either the professional confidential relationship privilege or the sexual assault communications privilege) should the evidence be disclosed is that detailing the basis of the harm in open court, or even in a closed court in the presence of the parties, may itself harm the protected confider.
- 4.222 The preferable approach, in my view, is to swear both an open and a confidential affidavit in support of the claim. The confidential affidavit will be prepared on the basis that it will be provided only to the court, and not to the parties to the proceeding or to their legal advisers.¹⁶³
- 4.223 The practice of tendering a confidential affidavit in public interest immunity claims made on behalf of the State is well established.¹⁶⁴ The basis of tendering an affidavit on a confidential basis is that the very reasons advanced in the affidavit for the non-disclosure of the evidence may themselves indicate facts the disclosure of which would cause the harm to the public interest which the claim is intended to prevent.¹⁶⁵
- 4.224 The practice of tendering affidavits on a confidential basis in support of applications under the sexual assault communications privilege has been successfully adopted in claims conducted by this Office.¹⁶⁶ There is in my view a compelling argument that an affidavit specifying the nature of the harm that may be suffered by the protected confider if the evidence the subject of the claim is disclosed should be tendered on a confidential basis. As Bartley states, in advocating the use of confidential harm statements in sexual assault communications privilege claims, to "provide specific details of the aggravation of an alleged victim's psychological injury or the violation

¹⁶³ The parties' legal representatives may suggest that the confidential affidavit be provided to them on the basis that they undertake not to disclose its contents to their clients. In my view this approach should be discouraged. If it is to be considered, the consent of the protected confider to this course should be obtained.

¹⁶⁴ See, for example, *National Crime Authority v Gould* (1989) 23 FCR 191 at 198-199 per Foster J, applying *R v Bebic* (unreported, NSW Court of Criminal Appeal, 27 May 1982), *Attorney General v Kaddour* [2001] NSWCCA 456, and *R v Fandakis* [2002] NSWCCA 5 at [28], [48] per Barr J.

¹⁶⁵ *National Crime Authority v Gould* (1989) 23 FCR 191 at 198 per Foster J.

¹⁶⁶ See, for example, *Regina v Dietz* (unreported, District Court of New South Wales, Belleair J, 02/21/0017, 29 October 2002).

of his/her innermost thoughts, feelings and insecurities would defeat the rationale and purpose” of the privilege.¹⁶⁷

4.225 It should be noted, however, that whilst the practice of providing confidential affidavits or statements in support of a sexual assault communications privilege claim has been successful at first instance, it does not appear to have been approved by an appellate court.¹⁶⁸ (I am not aware of any authority at all to support the practice in relation to a professional confidential relationship privilege claim.)

4.226 It is therefore prudent for the open affidavit to contain as much detail as possible without risking harm to the protected confider. The open affidavit may include, for example:

- the qualifications and experience of the psychologist,
- the circumstances in which the psychologist counselled the protected confider,
- the psychologist’s opinion of the public interest in upholding the confidentiality of professional communications in the present context,
- the basis (as far as is possible without harming the protected confider) of the psychologist’s opinion that the protected confider would be harmed by disclosure,
- a statement that further details of the harm that the psychologist are set out in the attached confidential affidavit, and
- a statement that it is the psychologist’s view that access to the confidential affidavit by anyone other than the judge would be harmful to the protected confider.

4.227 The confidential affidavit should specify, in as much detail as possible, the reasons why the psychologist believes the protected confider would be harmed by disclosure, and the consequences that she or he might suffer as a result.

Cross-Examination of the Deponent of the Affidavit

4.228 In public interest immunity claims, cross-examination of the person swearing the affidavit (whether open or confidential) in support of the claim is very rarely permitted.¹⁶⁹

4.229 It is not certain whether this principle would apply to claims of sexual assault communications privilege or professional confidential relationship privilege. In public

¹⁶⁷ Bartley, G, *Sexual Assault Communications Privilege*, (2000), NSW Bar Association Criminal Law Section Seminar, 10 October 2000, p. 18.

¹⁶⁸ Bartley, p. 19.

¹⁶⁹ See, for example, *Young v Quin* (1985) 4 FCR 483 at 486 per Bowen CJ.

interest immunity claims in relation to oral evidence, the person swearing the affidavit will rarely be the person currently giving evidence. In claims of professional confidential relationship privilege or sexual assault communications privilege, however, the psychologist witness may well be the deponent of the affidavit – and may already be under cross-examination at the time of making the claim. It may also be argued that the special principles preventing the cross-examination of the deponent in public interest immunity claims should not be applied in other circumstances.

- 4.230 I would expect, however, that there would be a strong argument that psychologists should not be permitted to be cross-examined in relation to the specific details of the harm that they believe may be caused to the protected confider. If the court accepts a confidential affidavit setting out details of the harm, then it would be very unlikely to allow cross-examination touching on the matters contained in the confidential affidavit.
- 4.231 The court may be more likely to allow cross-examination of psychologists in relation to parts of their affidavit evidence which do not go to specific details of the harm that may be caused to the protected confider. If psychologists provide an opinion on the general public interest in preserving the confidentiality of psychologist-client communications, or an opinion based on their experience of the harm that may be caused to protected confiders in general, it is difficult to see how a valid objection could be made to the psychologist being cross-examined on these statements.

5. Conclusion

- 5.1 The circumstances in which psychologist witnesses may successfully object to a question requiring them to disclose communications made in confidence by their clients depend very substantially on the nature of the particular proceedings. The opportunities for a successful claim will be considerably greater if the adducing of evidence in the proceedings is governed by the *Evidence Act* (NSW). Psychologist witnesses in those proceedings may be able to gain the benefit of the professional confidential relationship or the sexual assault communications privileges.
- 5.2 I have considered in this advice the possible application of common law privileges, public interest immunity (at common law and under section 130 of the *Evidence Act*), the “professional confidential relationship privilege” established by Part 3.10, Divisions 1A of the *Evidence Act 1995* (NSW), and the “sexual assault communications privilege” established by Part 3.10, Division 1B of the *Evidence Act* (NSW) and Part 7 of the *Criminal Procedure Act 1986*. My summaries of the possible application of these sources of law are set out above.¹⁷⁰

¹⁷⁰ Common law privileges at [4.17]-[4.25]. Public interest immunity at [4.27]-[4.70]. Professional confidential relationship privilege at [4.75]-[4.116]. Sexual assault communications privilege at [4.117]-[4.192].

- 5.3 The common law does not recognise any privilege protecting the disclosure of communications between psychologists and their clients.
- 5.4 There may be limited circumstances in which a claim of statutory or common law public interest immunity could be claimed in relation to evidence by psychologists of their clients' confidential communications. The claim must relate to matters of state or protect a governmental function. Confidences made by clients to psychologists relating to their experiences of sexual assault will not generally be protected by public interest immunity. Although psychologist witnesses have the right to make a claim of public interest immunity on their own behalf, claims of public interest immunity are almost invariably made by the State.
- 5.5 Psychologists may in many circumstances be able to claim that the professional confidential relationship privilege should prevent confidential information provided by their clients from being given in evidence. This privilege is established by Part 3.10, Divisions 1A of the *Evidence Act 1995* (NSW), and applies to proceedings in "NSW courts". The privilege requires the court to exclude evidence of a "protected confidence" if satisfied that the harm that would or might be caused to a "protected confider" by the disclosure of the evidence outweighs the desirability of the evidence being given. The court may be less likely to uphold the claim where the evidence is of substantial probative value and importance to the proceedings or is led by the defendant in a criminal proceeding.
- 5.6 The sexual assault communications privilege, established by Part 3.10, Division 1B of the *Evidence Act* (NSW) and by Part 7 of the *Criminal Procedure Act 1986*, substantially restricts the circumstances in which a "counselling communication" made by, to or about a victim or alleged victim of a sexual assault offence may be given in evidence in criminal proceedings before a "NSW court". The privilege imposes a far more demanding test before evidence of a protected confidence will be admitted in criminal proceedings than that established by the professional confidential relationship privilege. The sexual assault communications privilege is, however, only available in civil proceedings in very limited circumstances.
- 5.7 The Commonwealth *Evidence Act* does not establish any privileges equivalent to the sexual assault communications and professional confidential relationship privilege established in the New South Wales *Evidence Act* and *Criminal Procedure Act*. The opportunities for psychologist witnesses to prevent the disclosure of evidence of confidential communications made to them in proceedings in which the Commonwealth *Evidence Act* applies are therefore extremely limited. The only possible basis is likely to be a claim of statutory public interest immunity under section 130 of the Commonwealth *Evidence Act*.
- 5.8 Psychologist witnesses should, where possible, prepare in advance evidence to be relied upon in support of their claims of professional confidential relationship

privilege, sexual assault communications privilege and (in the rare circumstances in which it may be appropriate for them personally to make a claim) public interest immunity. In most circumstances the psychologist should swear an open affidavit outlining the background to the claim and the general nature of the harm that will be caused to the protected confider, and a further confidential affidavit specifying the details of the harm that would be likely to be caused. Psychologists should not, however, fail to make an appropriate claim merely because such evidence is not immediately available. They should seek an adjournment in order to prepare such evidence or, in the case of public interest immunity, to provide the State with the opportunity to consider whether to make the claim.

Signed:

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Client ref:

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