

# THE ROLE OF A SACP LAWYER

## *A Brief Introduction to a New Role in the Criminal Law of NSW*

Rosemarie Lambert, August 2012

### **1. THE PRIVILEGE**

The *Sexual Assault Communications Privilege Service* is set out in Division 2 of Part 5 of Chapter 6 (sections 295-306) of the *Criminal Procedure Act 1986*.

### **2. STANDING**

Since amendments in late 2010, including insertion of s 299A (Protected Confider has standing), the person (the "protected confider") who is protected by the privilege – usually the complainant - has a right to appear in relation to the privilege. This overcomes the difficulty of the information/document "owner" (eg a healthcare provider organisation) having the sole right to object to a subpoena, and often ignoring the privilege and failing to even notify the person whose notes are being subpoenaed.

### **3. LEGAL REPRESENTATION for PROTECTED CONFIDER**

Since late 2011, Legal Aid NSW has established a specialist legal service to provide legal representation for protected confiders. The Sexual Assault Communications Privilege Service (SACPS) is located in the Civil Division to clearly separate it from the in-house defence practice. Most matters are assigned out to private practitioners. We now have a list of 28 solicitors from the Serious Crime Panel, through expressions of interest and a rigorous selection process, who are trained in SACP. This list includes 13 regional solicitors. We have arranged for representation for over 80 clients since late 2011 including locations as diverse as the Orange Children's Court, Cobar Local Court and Armidale District Court.

### **4. THIRD PERSON AT THE BAR TABLE**

The Protected Confider has a standing in relation to the privilege, and hence their legal representative appears as of right.

### **5. PROCEDURE FOR RULINGS ON CONFIDENTIAL MATERIAL**

The SACP lawyer would usually seek first access to any documents produced to the court. Consent to access/adduction is then negotiated, if possible. Submissions regarding any disputed material are then made without the defence or the crown having access to the material. This is somewhat similar to national security material being considered without access by the parties, as described by Judge Finnane in *R v Spillane* (unrep 9 Feb 2011).

## **6. WHO DOES THE SACP LAWYER ACT FOR?**

The SACP lawyer is an advocate for the protected confider, usually the complainant, and acts on their instructions. Most commonly, the interests of the prosecution are similar to the complainant's, but occasionally the SACP lawyer will be in opposition to the prosecution.

## **7. STREAMLINING THE PROCESS**

A SACP lawyer will generally aim to pinpoint which information is sought by both parties, take instructions regarding any consent to disclosure by their client, and narrow down the areas in dispute which require judicial determination.

In practice, this means there may be a bundle of redacted documents produced to both parties, with an accompanying s 300 consent by the complainant. Following that, there would then be a process of going through any contested parts of the documents with the judge or magistrate in court, with a kind of "speaking in code" reference to each potentially relevant part of the contested material. A challenge for the SACP lawyer would be to make persuasive submissions, without revealing the contents of the documents.

During oral evidence, the SACP lawyer may remain in court in anticipation of evidence or submissions veering into protected confidences, ready to object on their client's behalf.

## **8. PRELIMINARY CRIMINAL PROCEEDINGS**

Because there is an absolute privilege for "preliminary criminal proceedings" such as bail proceedings or committals, the SACP lawyer's role is relatively simple, and arguments would generally relate to definitional issues as to whether something is a protected confidence or not.

## **9. CONFIDENTIAL STATEMENT OF HARM**

Section 299D(3) provides for tendering of an affidavit of harm by or on behalf of the protected confider. This is not available to the crown or defence.

## **10. ETHICS**

Because of the nature of SACP proceedings whereby material is withheld from the parties in the matter, and made only available to the judge, a very high standard of ethics is required. A SACP lawyer should go through any confidential documents very carefully, noting anything that *may* be of any relevance to the proceedings, based on submissions by the parties. Where access to that material is contested, all potentially relevant material should then be highlighted to the judge for determination, applying the leave test (s 299D).