Sexual Assault Communications Privilege

The Law and Practical Considerations

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The provisions that relate to sexual assault communication privilege ("SACP") are found in Chapter 6, Part 5, division 2 of the *Criminal Procedure Act* 1986 (NSW) ("CPA"). These provisions set up a scheme by which the counselling records of sexual assault complainants are protected from unwarranted intrusion. They establish a process by which a protected confider can appear in proceedings in which their counselling records are sought to be accessed and assert privilege over the documents. The process allows for staged determination by a court as to whether leave should be granted to compel production and give access to the records or adduce evidence of their contents.

The importance of the legal representative's role in guiding the court in terms of the SACP provisions and their application to a particular case was recently highlighted in *R v Bonanno; ex parte Protected Confider* [2020] NSWCCA 56 at [13] per Adamson J with whom the other members of the court agreed:

> It is of utmost importance that courts acquaint themselves with relevant legislation and apply it. The range and number of pieces of legislation required to be applied in a criminal trial means that there is rarely a substitute for reviewing the actual terms of the legislation to see whether they apply in a particular case. Counsel plays a role in this process, too, and is obliged to point out to a judge the relevant legislation and how it ought be applied to the case in point. Non-compliance will result in an error of law and the potential invalidity of the juridical act, in this case the grant of leave to issue a subpoena and the subpoena itself. If left to go unchecked, errors of law can result in a mistrial of the accused and may cause substantial harm to others, including, in the present case, the protected confider.

This paper aims to provide an overview of the relevant legislation with reference to recent decisions and a practical guide to navigating this area of the law for defence practitioners.

When do the provisions arise?

When it is intended to issue a subpoena to psychologists, psychiatrists, counsellors, social workers, schools, Family and Community Services, doctors, hospitals or similar (particularly in relation to sexual assault matters) – consideration should be given as to whether the documents sought may contain material that could raise a SACP issue.

Leave needs to be sought in (or in connection with) any criminal proceedings pursuant to s 298 of the CPA to seek to compel a person to produce a document recording a protected confidence[1] (or produce such a document or adduce such evidence).[2] "Criminal proceedings" are:

> (a) proceedings relating to the trial or sentencing of a person for an offence (whether or not a sexual assault offence) including pre-trial and interlocutory proceedings but not preliminary criminal proceedings, or
> (b) proceedings relating to an order under the *Crimes (Domestic and Personal Violence) Act* 2007.[3]

A person cannot seek to compel production of a document recording a "protected confidence", or produce such a document, or adduce evidence that would disclose such material in or in connection with any "preliminary criminal proceedings".[4] Preliminary criminal proceedings are any committal proceedings or proceedings relating to bail (at all stages).[5] This applies to all preliminary criminal proceedings whether or not the matter

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[1] "Protected confidence" is defined in s 296. "Document recording a protected confidence" is defined in s 295(2):
"… a reference to a document recording a protected confidence—
(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."
[2] s 298(1) – (3)
[3] s 295(1)
[4] s 297
[5] s 295(1)

relates to a sexual assault offence. In relation to a matter that is to be committed to the District Court, it appears that the effect of these provisions is that this kind of material will only be able to be sought after a matter is committed from the Local Court.

It should be noted that an alleged victim of a sexual assault offence cannot be compelled to produce a document or give evidence that would disclose the identity of their counsellor.[6]

What kind of material do the provisions apply to?

The provisions apply broadly to documents recording a "protected confidence".[7] A protected confidence is a "counselling communication that is made by, to or about a victim or alleged victim of a sexual assault offence."[8] The court will ultimately need to determine whether the content of each document amounts to a "counselling communication." A "counselling communication" is a communication:

- made in confidence by a person (the counselled person) to another person (the counsellor) who is counselling the person in relation to any harm[9] the person may have suffered, or
- made in confidence to or about the counselled person by the counsellor in the course of that counselling, or
- made in confidence about the counselled person by a counsellor or a parent, carer or other supportive person who is present to facilitate communication between the counselled person and the counsellor or to otherwise further the counselling process, or
- made in confidence by or to the counsellor, by or to another counsellor or

[6] s 298A
[7] s 298
[8] s 296(1)
[9] "Harm" is defined in s 295 as including "actual physical bodily harm, financial loss, stress or shock, damage to reputation or emotional or psychological harm (such as shame, humiliation and fear)."

by or to a person who is counselling, or has at any time counselled, the person.[10]

A person counsels another person if they have "undertaken training or study or has experience that is relevant to the process of counselling persons who have suffered harm" and listens to and gives verbal or other support or encouragement to the other person, or advises, gives therapy to or treats the other person. There is no requirement that they be paid for this.[11]

A counselling communication is a protected confidence even if it was made before the acts constituting the relevant sexual assault offence occurred (or are alleged to have occurred.) [12] It is a protected confidence even if it 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.[13] A communication may be made in confidence even if a third party is present, if they are present to "facilitate communication or to otherwise further the counselling process."[14]

You think material you want might contain a protected confidence – what now?

At this stage it is practical to prepare a draft subpoena. Once this has been settled, notice should be given pursuant to s 299C. This section says that an applicant for leave under this division must "as soon as is reasonably practicable" give notice in writing of the application to the other parties and the protected confider (or their nominee) that:

- specifies the document that is sought to be produced or the evidence that is sought to be adduced (in practical terms – attach the draft subpoena), and

[10] s 296(4)(a) – (d)
[11] s 296(5)
[12] s 296(2)(a)
[13] s 296(2)(b)
[14] s 296(3)

- in the case of a notice to a protected confider who is not a party to the proceedings—advises the protected confider that the protected confider may appear in the proceedings concerned, and
- in the case of an application for leave to compel (whether by subpoena or any other procedure) a person to produce a document—specifies the day on which the document is to be produced, and
- in the case of an application for leave to adduce evidence—specifies the day (if known) when the proceedings are to be heard, and
- includes any other matter that may be prescribed by the regulations.

A protected confider who is not a party to the proceedings has a right to appear in the proceedings.[15] Usually the protected confider is not a party to the substantive proceedings and in those circumstances notice can be given to the prosecutor, who is then obliged to pass it on to the protected confider within a reasonable time after it is received.[16]

In terms of when the matter should be listed for argument, it should be noted that a court cannot grant an application for leave until at least 14 days (or such shorter period as may be fixed by the court) after notice has been given.[17] The requirement to give notice can be waived if:

- notice has already been given in respect of an application under this Division, being an application that relates to the same protected confidence and the same criminal proceedings,[18] or
- the principal protected confider has consented in writing to the notice being waived, or
- the court is satisfied that there are exceptional circumstances that require

[15] s 299A
[16] s 299C(2)- (3)
[17] s 299C(4)
[18] For example where leave was previously granted to issue a subpoena and leave is then being sought to adduce evidence contained in material produced.

the notice to be waived.[19]

Seeking leave from the court

Leave needs to be sought in (or in connection with) any criminal proceedings pursuant to s 298 of the CPA to:

1. seek to compel a person to produce a document recording a protected confidence;
2. produce a document recording a protected confidence; or
3. adduce evidence if it would disclose a protected confidence or the contents of a document recording a protected confidence.[20]

The decision in *PPC v Stylianou* [2018] NSWCCA 300 provides some guidance on how this operates on a practical level. In brief, the facts arising in *PPC v Stylianou* were that leave was granted by a District Court judge to issue subpoenas without having access to the documents, when the documents were later produced a different judge granted the parties access to the documents without further determining leave. On appeal, it was said that s 298(1) and (2) both refer to production of a document to the court.[21] This essentially creates a two-stage requirement for leave – when issuing a subpoena requiring production and when adducing evidence. However in relation to documents produced following a grant of leave to issue a subpoena where the documents were not examined, the following was also said in *PPC v Stylianou* at [21] per Macfarlan JA with whom the other members of the Court agreed (emphasis added):

> [21] It is clear that s 299B(3) circumscribes the Court's power to grant access to documents recording protected confidences: the Court may not grant such access "unless" one of the conditions stated in that subsection is satisfied. The subsection does not however state, either

[19] s 299C(5)
[20] s 298(1) – (3)
[21] *PPC v Stylianou* [2018] NSWCCA 300 at [12] and following, per Macfarlan JA with whom the other members of the Court agreed

expressly or impliedly, that the documents must be made available to the parties if one of those stated conditions is satisfied. Instead, it simply assumes the existence of a power of the Court to grant or withhold access and engrafts a stricture on the exercise of that power. Contrary to the respondent's submission, fulfilment of one of the alternative conditions in s 299B(3) is a necessary, but not a sufficient requirement, for entitlement to an order for access.

[22] To accept a contrary view would be to leave a significant gap in the protection afforded by the CP Act to the disclosure of documents recording counselling confidences. Ordinarily, as in the present case, the Court would grant leave to issue subpoenas for the production of such documents without it having the opportunity to inspect the documents. On the respondent's argument, a determination that granting access to the documents when produced would be consistent with the grant of that leave would, without more, require, in nearly every case, that access to the documents be given to the other parties to the proceedings. On that argument, the Court would not need to be satisfied of the matters specified in s 299D, or of any other matters that the Court would ordinarily take into account before granting access to subpoenaed documents. As Berman DCJ said, that result would be "inconsistent with the object of the legislation". That object is reflected in the following passage from the Second Reading Speech made in respect of the 2010 Amendment to Division 2 (*Courts and Crimes Legislation Further Amendment Act 2010* (NSW)):

> "The privilege is not just designed to prevent the unnecessary adduction of evidence of protected confidences before a jury, but is designed to prevent the inappropriate subpoena of such confidences in the first place, and then the inappropriate granting of access to them."

Unlike his Honour, I do not consider that the text of the legislation requires that result: as I have said, there is nothing in s 299B(3), or elsewhere, to indicate that compliance with that subsection is a sufficient, as well as a necessary, condition to entitle parties to an order granting them access to protected counselling documents. **As a result, depending on the particular circumstances of the case, including the nature of any submissions of the PPC, the Court may have to examine some or all of the subpoenaed documents to enable it to determine whether access to them should be granted to the accused in criminal proceedings.**

Section 298(2) operates to ensure that documents produced to the court other than in accordance with a grant of leave will still need to be the subject of a grant of leave before

access can be granted.[22]

Should the court look at the documents?

When issuing a subpoena the threshold question is – does the document record a protected confidence? It is often likely difficult to ascertain the answer without the document in question being examined. Section 299B provides that if a question arises under the Division, "a court may consider the document or evidence."[23] A court may make "any orders it thinks fit to facilitate its consideration of a document or evidence under this section."[24] In practical terms, a court can made orders pursuant to s 299B(4) that the documents be provided to the court or the solicitor appearing for the protected confider (on an undertaking that the documents be provided to the court). That way the court (and the protected confider) can examine the documents to determine whether they contain a protected confidence and, if they do, whether leave should be granted thereafter.

It may be that in certain situations sufficient information is before the court without examining the documents to enable it to make an assessment as to whether leave should be granted to issue the subpoena. In that situation it is important to be aware of the position in *PPC v Stylianou* in respect of further steps that may need to be taken before access is granted to the documents after they are produced (as discussed above).

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[22] *PPC v Stylianou* [2018] NSWCCA 300 at [13]
[23] s 299B(1)
[24] s 299B(4). This, and the authorities on this were considered in *Rohan v R* [2018] NSWCCA 89 per R A Hulme J with whom the other members of the Court agreed. Although the appeal was dismissed, it was said that the trial judge erred in holding that s 299B(4) (enabling the court to require production of the documents for the purpose of inspecting them) was irrelevant (at [67].) It was said in *KS v Veitch (No 2)* [2012] NSWCCA 266 that an order requiring the production of the documents was one that could be made for the purpose of determining a question arising under Pt 5, Div 2 (at [58].) Reservation was expressed in *Rohan v R* (although this reservation was not shared by Walton J) in respect of this approach in relation to a consideration of leave to issue a subpoena (at [59] – [60].) Nonetheless *KS v Veitch (No 2)* confirmed the availability of a direction of a judge to compel production of documents to determine a question of leave to issue a subpoena and this was followed (at [60] and [67].) Decisions that follow were referred to, notably *NAR v PPC1 [2013] NSWCCA 25* and *ER v Khan [2015] NSWCCA 230* (see [60] – [66].)

What documents need to be prepared when seeking leave?

A notice of motion and supporting affidavit should be prepared by the party seeking the documents, annexing any evidence relied upon in support of the application. The notice of motion should include what orders are sought in respect of leave and might include any preliminary order sought pursuant to s 299B(4) to have the material provided to the court.

The affidavit should detail the evidence that will be relied upon to found the application for leave. The importance of a thorough affidavit that sets up the foundation for the argument cannot be overstated. The factors that are to be considered in respect of an application for leave are set out in s 299D of the CPA (extracted later in the paper). Relevant documents should be annexed to the affidavit. These might include:

- documents from the brief of evidence that demonstrate why the material sought is of importance and/or provide necessary background to the application; and
- any other material that is persuasive in determining the significance of the material sought (remember s 299D of the CPA specifically refers to regard being had to other documents or evidence which might afford the material sought substantial probative value.)

Forensic decisions may need to be made about how to approach this issue, particularly when material relied upon comes from a source other than the brief of evidence.

Consideration should be given as to whether the application relates only to leave to compel production (issue a subpoena) or whether it is practical to make an application for leave to adduce the evidence as part of the same process. If leave is granted only in relation to issuing the subpoena and at a later stage during the trial the document is

sought to be adduced, the process will need to be repeated and the legal representative for the protected confider given the opportunity to be heard again. This has the potential to interrupt the trial and cause considerable delay. This is a matter, again, where forensic decisions will need to be made. If a determination is made refusing leave and new material emerges during the course of the trial that suggests that the application should be made again, this can be done. In both these situations the requirement for notice can be waived if it relates to the same protected confidence.[25]

Can the protected confider consent to production of the documents?

Provision is made for the protected confider to consent to the production of a document or adducing of evidence that records or discloses a protected confidence. This consent needs to be in the form set out in s 300(2). There are particular requirements in relation to consent where the protected confider is under fourteen years of age.[26]

Factors to be considered in determining the application – "the test"

The application should be determined in the absence of any jury.[27] No document or evidence can be disclosed or made available unless:

- the court has determined that no protected confidence is recorded in the document or disclosed in the evidence, or
- if leave has been given to a party and only in accordance with that leave.[28]

The considerations in respect of a grant of leave to produce documents or adduce evidence are set out in s 299D of the CPA:

[25] s 299C(5)(a)
[26] s 300(1)(b) and (1A)
[27] s 299D(6)
[28] s 299B(3)(a) and (b)

(1) The court cannot grant an application for leave under this Division unless the court is satisfied that:

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

(b) other documents or evidence concerning the matters to which the protected confidence relates are 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.

(2) Without limiting the matters that the court may take into account for the purposes of determining the public interest in preserving the confidentiality of protected confidences and protecting the principal protected confider from harm, the court must take into account the following:

(a) the need to encourage victims of sexual offences to seek counselling,

(b) that the effectiveness of counselling is likely to be dependent on the maintenance of the confidentiality of the counselling relationship,

(c) the public interest in ensuring that victims of sexual offences receive effective counselling,

(d) that the disclosure of the protected confidence is likely to damage or undermine the relationship between the counsellor and the counselled person,

(e) whether disclosure of the protected confidence is sought on the basis of a discriminatory belief or bias,

(f) that the adducing of the evidence is likely to infringe a reasonable expectation of privacy.

If the court determines that a communication contained in a document is a protected confidence, prior to granting leave, the court must be satisfied that the document will have substantial probative value. If the court is of the view that the document or part of the document has substantial probative value, the court would move on to consider the balancing exercise set out in s 299D(1)(c). In relation to the balancing exercise called for by s 299D(1)(c), the court must take into account the matters set out in s 299D(2). Leave to issue a subpoena cannot be granted without consideration by the court of the matters listed in s299C and s299D.[29] The legal representative has a responsibility to assist the court in respect of the application of the legislation in each individual case.[30] Each document should be considered individually.

The onus is on the party asserting privilege to establish that the documents are in fact privileged.[31] This may include a need to provide evidence in respect of matters such as whether the document contains a counselling communication (for example in relation to a person's training, study or experience). The protected confider may provide a confidential affidavit to the court that details the harm that the person is likely to suffer if leave is granted.[32] This is directed to a consideration of s 299D(1)(c) and would likely address the types of matters detailed in s 299D(2).

The court is required to give reasons for granting or refusing an application for leave.[33]

[29] *R v Bonanno; ex parte Protected Confider* [2020] NSWCCA 156 at [12] per Adamson J with whom the other members of the Court agreed
[30] *R v Bonanno; ex parte Protected Confider* [2020] NSWCCA 156 at [13]
[31] *ER v Khan* [2015] NSWCCA 230 at [84] per Hall J with whom the other members of the Court agreed
[32] s 299D(3)
[33] s 299D(6)