Public Defenders Conference - February 2014

Sexual Assault Communications Privilege (SACP)

***Criminal Procedure Act (NSW)* Chapter 6, Part 5, Division 2**

The history of the provisions

Provisions protecting counselling communications of sexual assault complainants have been in force in NSW since 1997. The original provisions shared many similarities with those currently in force and were initially found in Part 3.10 of the *Evidence Act 1995: Evidence Amendment (Confidential Communications) Act No.122 of 1997*.

Following the decision in *R v Young* [1999] 46 NSWLR 681, the provisions were taken from the *Evidence Act* and enacted with certain amendments in the *Criminal Procedure Act 1986 ("CPA"): Criminal Procedure Amendment (Sexual Assault Communications Privilege) Act No.48 of 1999.* The Court in *Young* had held that the privilege did not apply to production of documents on subpoena. The amendments ensured privileged documents did not need to be so produced.

Another decision of the Court of Criminal Appeal, *R v Lee* [2000] NSWCCA 444, led to further amendments: *Criminal Procedure Amendment (Sexual Assault Communications Privilege) Act No.13 of 2002*. The Court in *Lee* held that the privilege was restricted to counselling relationships where expert advice was provided by "persons skilled, by training or experience, in the treatment of mental disease or trouble". The principle purpose of the 2002 Act was described in the 2nd Reading Speech as:

> "to ensure that the sexual assault communications privilege is capable of protecting confidential communications made in connection with counselling provided by counsellors who lack formal training or qualifications in the diagnosis of psychiatric and/or psychological conditions and which takes the form of listening to the thoughts and feelings of the alleged sexual assault victim and providing verbal or other support, rather than providing expert advice." (2nd Reading Speech, Legislative Assembly, 21 March 2002).

More recently, in 2010, following a pro bono pilot run cooperatively by the Women's Legal Service (NSW), the Bar Association and a number of commercial law firms, amendments to the SACP provisions in the *Criminal Procedure Act* were enacted: *Courts and Crimes Legislation Further Amendment Bill 2010*. While on foot the pilot provided

legal representation to complainants who sought to protect the confidentiality of their counselling notes under the provisions then in force.[1] The amendments included:

- requiring the leave of the court to compel (by subpoena or otherwise) production of privileged material (s.298(1));
- broadening the standing of a protected confider (ordinarily the complainant) not a party to the proceedings(s.299A);
- requiring that a court ensure a protected confider is not only aware of the protections afforded by the provisions but also allowed sufficient time to seek legal advice (s.299)

In conjunction with the 2010 amendments, substantial funding was allocated for the provision of legal representation to protected confiders.

These most recent amendments have had significant implications for the conduct of sexual assault trials. Together with more regular appearances on behalf of protected confiders, there has been more frequent judicial consideration of the provisions. That consideration has highlighted numerous difficulties with both the interpretation and practical operation of the provisions. The decisions include descriptions of the provisions as "opaque", being drafted in "draconian terms", placing "a heavy burden on trial judges" and making "it more likely that an innocent person will be convicted".[2]

The Provisions[3]

The provisions are now in Part 5, Division 2 of Chapter 6 (ss.295 – 306) of the *CPA*. Chapter 6 is entitled "Evidentiary matters". Part 5 is entitled "Evidence in sexual offence proceedings". Division 2 is entitled "Sexual assault communications privilege".[4]

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[1] "*From Pilot Project to Systemic Reform*", Jillard, Loughman and McDonald, Alt LJ 37(4).

[2] *R v Veitch* [2013] NSWDC 97 at [9], *NAR v PPC1* [2013] NSWCCA 25 at [4], *R v Markarian* [2012] NSWDC 197 at [25].

[3] A copy of the entire Division is annexed.

[4] Section 274 provides that Chapter 6 applies, to the extent that it is capable of being applied, to all offences whenever committed and in whatever court dealt with. Accordingly the SACP provisions apply to both summary and indictable matters. Also, Part 3.10, Division 1B of the *Evidence Act* (NSW) contains provisions that apply SACP to certain civil proceedings.

Section 295(1) contains a number of definitions that apply to the Division including:

> "**harm**" includes actual physical bodily harm, financial loss, stress or shock, damage to reputation or emotional or psychological harm (such as shame, humiliation and fear).
>
> "**principal protected confider**" means the victim or alleged victim of a sexual assault offence by, to or about whom a protected confidence is made.

Section 296 defines a "**protected confidence**":

> "(i)n this Division "protected confidence" means a counselling communication that is made by, to or about a victim or alleged victim of a sexual assault offence."

"**Counselling communication**" is defined in s.296(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
> (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."

Section 296(5) then defines "**counsels**":

> "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."

Section 296(2) provides that counselling communications are protected confidences even if (i) they are made prior to the alleged offence or (ii) are not made in connection with the alleged offence, or a sexual assault or any condition arising from the alleged offence or a sexual assault.

Section 298 establishes that the court's leave is required prior to:

(i) compelling (by subpoena or otherwise) production of a protected confidence (s.298(1));

(ii) production to a party of a protected confidence (s.298(2));

(iii) adducing of evidence disclosing a protected confidence (s.298(3)).

Section 299D requires the court to be satisfied of certain things and to have taken specified matters into account for the purposes of deciding whether to grant leave. It provides:

> **299D Determining whether to grant leave**
>
> (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.
>
> (3) For the purposes of determining an application for leave under this Division, the court may permit a confidential statement to be made to it by or on behalf of the principal protected confider by affidavit specifying the harm the confider is likely to suffer if the application for leave is granted.
>
> (4) A court must not disclose or make available to a party (other than the principal protected confider) any confidential statement made to the court under this section by or on behalf of the principal protected confider.

(5) The court must state its reasons for granting or refusing to grant an application for leave under this Division.
(6) If there is a jury, the court is to hear and determine any application for leave under this Division in the absence of the jury.

Topics for discussion

The genesis of this paper was a recent trial (an outline of the facts is annexed).[5] Issues that arose either in the course of litigating the application of SACP provisions or reflecting on the litigation when preparing this paper included:

(i) What is the scope of a protected confider's standing?

(ii) Should leave be required to issue a subpoena?

(iii) What is proper scope of the definition of "counselling communication"?

(iv) Considerations when arguing a grant of leave under s.299D.

(i) The scope of a protected confider's standing

The enlarged standing given by s.299A, together with the funding of legal representation for protected confiders, has been a significant driver for the recent prominence of the provisions. Although protected confiders had standing under the former s.298(7), that standing was not triggered unless the person to whom a subpoena had been directed "objected" to production. In practice such objections were rarely made.

The increased standing has been augmented by positive obligations on parties to give notice to a protected confider of an application for leave (s.299C) and on courts to ensure protected confiders are aware of the provisions and have an opportunity to seek legal advice (s.299). Consequently, since the 2010 amendments came into force it has become routine for lawyers to appear on behalf of protected confiders.

Section 299A is in the following terms:

> "A protected confider who is not a party may appear in criminal proceedings or preliminary criminal proceedings if a document is sought to be produced or evidence is sought to be adduced that may disclose a protected confidence made by, to or about the protected confider."[6]

[5] An outline of the facts of the trial is annexed.

[6] Section 5F(3AA) of the *Criminal Appeal Act* gives standing in interlocutory appeals.

While the provision clearly gives standing to a complainant to appear when leave is being sought under s.298, whether or not a protected confider has standing to argue legitimate forensic purpose is less clear. In *KS v Veitch (No.2)* [2012] NSWCCA 266 Basten JA noted that the applicant (protected confider) had, at first instance, sought to have the subpoena set aside for want of legitimate forensic purpose (at [2]). However the scope of s.299A was not raised by the grounds of appeal and therefore not further considered.

A number of matters argue against s.299A extending standing to argue legitimate forensic purpose in respect of any subpoena that might catch a protected confidence. A protected confider only has standing if "a document is sought to be produced or evidence is sought to be adduced that may disclose a protected confidence". Section 299A says nothing in relation to other material caught by the terms of a subpoena. Rarely would a subpoena, in terms, be limited to production of "protected confidences". On the contrary many subpoenas won't contemplate the production of protected confidences but may unintentionally (given the breadth of the provisions) catch them.

Section 299A does not provide standing, and protected confiders should not be given the opportunity, to argue legitimate forensic purpose generally. Any such argument should be limited to circumstances in which the subpoena, in its terms, limits production to protected confidences or particular documents have been identified in material already produced. However, given "substantial probative value" is a prerequisite to any grant of leave (s.299D), the need for a protected confider to argue legitimate forensic purpose in such circumstances seems otiose.

Further, a protected confider and their legal representative will often have had little, if any, access to other relevant material such as the police brief (other than statements a protected confider may have made themselves). Consequently they will not be as well informed as the parties or, in many circumstances, the producing party to argue legitimate forensic purpose.

(ii) Should leave be required to issue a subpoena?

Berman SC DCJ identified many difficulties with the SACP provisions in *R v Markarian* [2012] NSWDC 197. They included:

> "How is the person who issues the subpoena supposed to know whether the document would contain a protected confidence?" (at [2]) and
>
> "[W]hat happens if a subpoena is issued without leave being granted? Can, as in this case, leave be granted retrospectively…?"

Where a subpoena is issued to a psychologist known to have counselled the complainant about an alleged sexual assault the need to apply for leave is obvious. What if all that is sought are the times and dates of appointments with the counsellor? What if the records sought are the DOCS / FACS files of an accused's own children and there is no suggestion that the complainant had ever been "counselled" in the context of her dealings with that Department?

As regards the later questions, Basten JA concluded "it was open to the trial Court to disregard the irregularity" (at [29]). He reasoned that as s.299B(1) provided the court with power to "consider the document" to resolve any question under the provisions and s.299B(4) gave power to the court to "make any orders it thinks fit to facilitate its consideration", the practical effect of what had happened in that case (i.e. the arrival of the documents at court) is what would have needed to occur in order for the court to properly consider an application for leave to issue the subpoena.

Basten JA appears to be of the view that a court determining an application for leave to issue a subpoena (s.298(1)) should utilise its powers under s.299B(4) so it can consider their contents. Similarly, in *NAR v PPC1* [2013] NSWCCA 25 Adams J said:

> "[g]enerally speaking, it is obvious that the s.299D issues cannot be considered without examining the documents themselves or having sufficient information to make what might be called the statutory inquiries. The practical reality will almost invariably be that the documents have to be examined" (at [4]).

If this is the position, why not do away with the requirement to obtain leave to issue the subpoena and, instead determine the same issue in the context of resolving questions of production and access (s.298(2))?

(iii) What is proper scope of the definition of "counselling communication"?

This question has at least 2 aspects:

(a) does the communication have to have been made in the context of counselling engaged in following the offence the subject of the proceedings (or the offence in respect of which the witness / protected confider is to give evidence of in the proceedings), or does it cover a counselling communication whenever made;

(b) what is covered by the term "harm" as used in s.296(4) and defined in s.295(1).

A preliminary consideration is whether any communication was (or could have been) made in confidence. Things said in a counselling context are not "counselling communications" unless they were "made in confidence": s.296(4). To take the FACS documents subpoenaed in my trial, regardless of whether or not the other preconditions establishing a "counselling communication" were met, it was difficult to see how anything the complainant had said to FACS officers regarding the care of the children was voiced on the understanding (by her) that it was "in confidence".

Another preliminary consideration is whether or not the person who "counsels" has "undertaken training or study or has experience that is relevant to the process of counselling". Again to take the FACS example, could it be argued that child care workers trained in the investigation and prevention of harm to children have undertaken such training, study or experience"?

As regards (a), in *KS v Veitch (No.2)* (at [16]) Basten JA (with whom Harrison and Beech-Jones JJ agreed) identified a conflict between "the expansive provisions in s.296(2)" and the definition of *counselling communication* in s.296(4). Section 296(2) says that a relevant communication may be protected even if it "was made before the acts constituting the relevant offence occurred" or "was not made in connection with" such an offence. However, Basten JA observed that the reference in s.296(4) to the "harm" a person "may have suffered" supports the inference that:

> "the harm in question is that suffered by the person as a consequence of the alleged offence".
>
> and later he said:

> "[s]imilarly, in sub-s (5) the concept of counselling is limited to a circumstance where the counsellor had undertaken training or study or has experience relevant to the process of counselling persons "who have suffered harm": again, the reference appears to be to the harm suffered by the victim as a consequence of the alleged offence."

Ultimately, because the respondent to the appeal did not challenge the position adopted by the trial judge, the broader interpretation "was accepted" by the Court of Criminal Appeal (CCA) "for the purposes of dealing with" the issues then before it (Basten JA at [19]). In *NAR v PPC1* Beech-Jones J (Hoeben CJ and CL and Adams J agreeing on this point) applied Basten JA's judgment in *KS v Veitch (No.2)* noting "[n]o different contention was made on behalf of the applicant in this matter."

Only some trial judges have accepted the wider interpretation. In judgments publicly available, those judges have accepted it with reservation: see *R v Markarian* at [12], *R v Russell* [2013] NSWDC 129 at [29]. Williams J, the presiding judge in *Veitch*, following its return from the CCA to the District Court, adopted the narrower definition of counselling communication: *R v Veitch* [2013] NSWDC 97 at [23]. He ruled that medical and psychiatric records of the complainant dealing with a pre-existing condition (or conditions) "up to the date of the offence" were not protected confidences because they did not relate to "any relevant harm suffered by the complainant". In doing so he concluded that "harm", consistent with that word's use in s.296(4) and (5), only related to harm arising as a consequence of the alleged offence.

In coming to the above conclusion Williams DCJ noted that the CCA's remarks to date have been obiter. The CCA hasn't heard full argument on the point and there remains an absence of appellate authority. Furthermore the focus of the provisions has always been to protect communications between counsellors and complainants occurring between the time of the alleged offence and trial. That this is so is evident from 2nd Reading Speeches to legislation introducing or amending the provisions as well as the name of the Division itself: "Sexual assault communications privilege".

When introducing the original provisions into the *Evidence Act* (NSW) in 1997, the then Attorney General said, inter alia:

> "It goes without saying that a person who <u>has suffered</u> the grave trauma of sexual assault will often be assisted in recovery by seeking counselling….

> The bill was motivated by the Government's concern to provide protection for confidential communications such as these and, in doing so, to emphasise the public interest in ensuring the confidentiality of such relationships" (NSW Legislative Council, Hansard 22 October 1997) (emphasis added)

Similarly, the 2002 speech already quoted referred to "confidential communications" made by the "alleged sexual assault victim". The terminology used appears to assume that the protected communications are made following the allegation.

The 2nd Reading Speech of the Attorney General that dealt with the most recent amendments referred to the terms of 1997 speech as well as seven principles agreed in May 2010 by the Standing Committee of Attorneys-General "to be applied as the minimum standard for protection of sexual assault counselling communications" (NSW Legislative Council, Hansard 24 November 2010). Only principles 1 and 3 spoke to the type of counselling communications to be protected. They were:

> 1. Legislative protections restricting the disclosure of sexual assault counselling communications should reflect the public interest in encouraging victims of sexual assault to undertake counselling without fear that what they say in confidence can be later used in legal proceedings without strong justification.
>
> and
>
> 3. Legislative protections should allow for a broad definition of 'counselling', that is to say, not limited to counselling provided by psychiatrists and registered psychologists.

Until s.296 has been fully considered by the CCA the temporal reach of the definition of counselling communication will remain unsettled.

As regards (b), again the CCA has not yet considered what is covered by the term "harm". In the meantime there has been disagreement amongst trial judges as to its meaning. In *Markarian* Berman SC DCJ was of the view that "harm" included medical treatment for physical injuries. He said (at [20]):

> "A communication made in confidence to another person who is counselling the person in relation to any harm is a counselling communication as defined. The breadth of the words, "any harm" will be immediately noticed and the term "counsellor" includes a situation where one person treats another person such as by putting a band aid on a scratch."

In *Russell* Marien SC DCJ disagreed with Judge Berman on the reach of "counselling communication". He said, referring to the above reasoning in *Markarian*:

> "that conclusion overlooks the requirement in s 296(4) that to attract the privilege a communication must be made by the person to a person who is counselling the person or is made in the course of counselling. I am unable to see how the placing of a band aid on a scratch at a casualty department (to use His Honour's example) could be described as counselling or being part of the process of counselling."

According to Marien SC DCJ communications relating to the care of purely physical ailments (even if made confidentially) did not fall within s.296 because those providing such care were not "counsellors". However, given the definition of "harm" includes "actual physical harm" (s.295(1)) and a person "counsels" another person if the person "treats the other person" (s.296(5)), one might argue that Marien DCJ himself overlooked "treat" in s.296(5).

Another area of controversy is, assuming the wider interpretation of s.296 continues to be accepted (i.e. that any counselling from birth to the time of trial is caught), whether pre-existing health problems (e.g. inherited conditions) are caught. On one view "harm" implies damage one person has inflicted on another: *KS v Veitch (No.2)* per Basten JA at [18]. However an example used by Berman SC DCJ in *Markarian*, of a person injuring their wrist after falling off a skateboard, did not contemplate casual conduct by another person.

The definition of "harm" in the Australian Oxford Dictionary (2002 Reprint) is "hurt" or "damage". Arguably those words, particularly 'damage', suggest that harm properly encompasses injury not caused by another person.

(iv) Some thoughts on arguing a grant of leave

All grants of leave under the Division, whether for production of, access to or admission of evidence, are subject to s.299D. As regards production or access, a finding that a document has "substantial probative value" is a precondition to any grant of leave. "Probative value" is a familiar phrase used regularly in determining admissibility of evidence: *Evidence Act (NSW), ss.55, 97, 98, 101,135 and 137.*

In *KS v Veitch (No.2)* when discussing the meaning of the phrase "substantial probative value", as used in s.299D(1), Basten JA said (at [31]-[32]):

> "Under the general requirements in relation to a subpoena or a notice to produce, it is not necessary that the moving party demonstrate that the material sought will be admissible in evidence; the accepted test of a "legitimate forensic purpose" is undoubtedly broader than that….
>
> [32] It follows that the first limb, requiring that the court be satisfied that the document or evidence "have substantial probative value", before allowing the accused access to it, will constitute a significant reduction in the material which might be made available to the accused under the general law with respect to access to material on subpoena or through a notice to produce (or, indeed, a call for a document in the course of proceedings). This reduction is the result of the inclusion in s 299D(1) of paragraph (a)."

There is a suggestion in this reasoning that the presence of "substantial probative value" in s.299D(1)(a) requires demonstration of admissibility even when leave is only sought for production or access. That suggestion is supported by the terms of s.299D(1)(c) which actually includes the word "admitting". Basten JA described s.299D(1), as "assuming that the information contained in the documents will in fact be admitted into evidence in one form or another". Although his Honour recognised that an accused often seeks access to documents for reasons other than obtaining admissible evidence (e.g. to "formulate lines of cross-examination") he declined to consider the practical operation of the section, instead concluding "[h]ow that assumption would operate in particular circumstances is not a matter which can helpfully be addressed in the abstract" (at [35]).

In *Veitch* [2013] NSWDC 97 Williams DCJ's touched on related issues. He observed that the trial over which he was presiding was, in effect, "one person's word against another's" and one the jury would have to accept the complainant's evidence beyond reasonable doubt prior if they were to find the accused guilty: *Murray* (1987) 11 NSWLR 12. The credibility of the complainant was therefore critical. Of course, this is the case is many many sexual assault trials. It would be a strange result, and potentially work significant unfairness, if an accused was required to establish material was admissible before production of (or access to) it was granted.

Perhaps consideration needs to be given to amending the word "admitting" in s.299D(1)(c) to the phrase "disclosure of".

As regards the balancing process required by s.299D(1)(c) in conjunction with s.299D(2), support for disclosure might be found in the nature of documents sought as well as the relationship in which the alleged sexual assaults are said to have occurred. For example in my trial, disclosure of protected confidences found within the FACS files made in the course investigating the complainant's care of the children would, arguably, do little to discourage "victims of sexual offences to seek counselling": s.299D(2)(a). Further disclosure of a complainant's medical records to an accused who had been in a relationship with the complainant at a time spanning the creation of the records would ordinarily be unlikely to "infringe a reasonable expectation of privacy": s.299D(2).

Conclusions and thoughts on reform

As touched upon already, there is a real question as to the practicality of and need for the requirement for leave to issue subpoenas. In addition to Basten JA's judgment in *Veitch* that overcomes the irregularity of a failure to apply for leave, Adams J expressed view in *NAR v PPC1* that practically s.299D issues can't be considered without examining the documents in any event.

The scope of the definition of "counselling communication" remains uncertain, particularly in relation to its temporal reach. While the view remains that communications unrelated to an alleged sexual assault whenever made are caught, the practical operation of the provisions will continue to be onerous. Any subpoena that conceivably catches a record relating to the treatment (of any kind) of a sexual assault victim at any time of that person's life arguably falls within the protections afforded by the provisions.

Furthermore, in circumstances where the legal representatives of the parties (other than those of the protected confider) can't examine the documents prior to access being granted, their ability to assist the court is extremely limited: s.299B(3). This creates particular difficulties when large quantities of documents fall within the terms of the subpoena and there is a dispute about whether any contain counselling communications. Judges are forced to examine each and every document themselves for the purposes of determining the existence of any protected confidence.

Consistent with the suggestions of Adams J in *NAR v PPC1,* thought needs to be given to amendments that would, at the very least, allow a judge to give access to counsel for the Crown and defence for the purposes of (i) determining the existence of protected confidences and (ii) making submissions on the tests in s.299D.

Finally, whether or not s.299D(1)(c) requires an accused to satisfy a court that the material will ultimately be admitted needs clarification. Material of this type is often important in formulating lines of cross-examination. Of course, such cross-examination is critical to the proper assessment of a complainant's credit. In circumstances where sexual assault trials are almost always determined on that assessment alone, any suggestion that demonstrated admissibility is a precondition to access ought to be removed.

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