BALANCING THE SCALES: THE CASE FOR THE INADMISSABILITY OF COUNSELLING RECORDS IN SEXUAL ASSAULT TRIALS

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I. INTRODUCTION

In December 1995, defence counsel appearing in a sexual assault matter before the Queanbeyan Local Court issued a subpoena against the Canberra Rape Crisis Centre (CRCC) seeking the complainant's counselling file. The staff and collective of the CRCC decided that, in keeping with Centre policy, every effort would be made to protect the confidential communications of their client. Di Lucas, Administrator of the CRCC, appeared before the Queanbeyan Local Court on 14 December 1995. Ms Lucas stated her opposition to the requirement that she produce the counselling file and, due to her refusal to comply with the subpoena, was sentenced by the Magistrate to imprisonment in the Court's watch house. Ms Lucas was released from the watch house some four hours later on the condition that she provide to the Court the subpoenaed file in a locked briefcase - to which

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only she knew the combination - with the question of defence access to the file to be decided at a later hearing.[1]

The stand taken by Ms Lucas to protect the confidentiality of her client's communications received extensive media attention and prompted a public debate about the legal protection available for confidential communications between a counsellor[2] and a victim of sexual assault. As the law presently stands, there is no statutory or common law privilege which protects the confidential communications between a counsellor and a victim of sexual assault, so that counsellors are unable to give their clients a guarantee that their communications will remain confidential. That Di Lucas was prepared to go to gaol, rather than permit the disclosure of a client's counselling file to the defence, raises the question as to why she, and others like her, consider it is necessary to prevent the disclosure of such communications.[3] This question, which is the central focus of this article, is addressed by examining the effects of disclosure at three levels: on victims and complainants of sexual assault, on counsellors and sexual assault services[4] and on the administration of justice. The second half of the article is devoted to an examination of three possible legislative options for protecting counselling records from disclosure to the defence, pre-trial, or during proceedings and an analysis of their strengths and weaknesses.

II. THE EFFECT OF DISCLOSURE OF COUNSELLING RECORDS ON VICTIMS AND COMPLAINANTS OF SEXUAL ASSAULT

There are serious dangers associated with the disclosure and unrestricted use of information that is communicated by a victim[5] of sexual assault within the context

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1 M Kingston, "Privacy Issue as Rape Therapist Jailed" *Sydney Morning Herald*, 15 December 1995, p 1. See *Police v White* (unreported, Queanbeyan Local Court, Magistrate Gould, 25 January 1996).

2 Victims of sexual assault can receive counselling from a wide variety of professionals, such as social workers, psychologists, psychiatrists and trained counsellors in women's refuges, women's health centres, rape crisis centres and sexual assault services. In New South Wales, these services are funded by the New South Wales Department of Health. The issues and law reform options discussed in this article are applicable to all professional counsellors; the term 'counsellor' is used in the generic sense and is inclusive of all professionals who have provided counselling to victims of sexual assault either before or after the assault.

3 The following discussion concerning the disclosure of counselling records is limited to those records made subsequent to a complainant's initial medical examination in the presence of a sexual assault counsellor after an alleged sexual assault. See discussion *infra*, Section III.

4 In New South Wales, the New South Wales Department of Health has established more than 40 sexual assault services around the State. These are specialised services located within major public hospitals or community health services: Legislative Council, Parliament of New South Wales, Standing Committee on Social Issues, *Sexual Violence: Addressing the Crime (Inquiry into the Incidence of Sexual Offences: Part II)*, 1996 at 73. The primary purpose of these services is to provide professional counselling and support to victims of sexual assault. Similar services exist in other States. The term 'sexual assault service' is used in the generic sense to apply to any service in Australia which provides such counselling services.

5 The views in this paper pertain to all victims of sexual assault who may become complainants in a sexual assault matter, such as adult women and men who are assaulted as adults, adult women and men who were assaulted under the age of 18, and male and female adolescents and children assaulted under the age of 18. Nonetheless, it is noted that the vast majority of victims of sexual assault and child sexual abuse are female and the vast majority of offenders are male: P Gilmartin, *Rape, Incest and Child Sexual Abuse:*

of a therapeutic relationship.[6] Specifically, the disclosure of such information raises the following issues for complainants in a sexual assault matter:

(i) infringement of privacy and confidentiality;
(ii) threats to the recovery process and psychological harm;
(iii) fears of retribution and safety; and
(iv) conflict between seeking counselling and reporting or proceeding with a case.

From a complainant's point of view, the main concerns about confidentiality and privacy relate to the perceived implications of the accused having access to personal information about the complainant. These concerns have been recognised by L'Heureux-Dube J in *R v Osolin*[7] who observed that:

> [R]outine disclosure of [therapeutic] records and unrestricted cross-examination upon disclosure threaten to function very unfairly against anyone who has undergone mental or psychiatric therapy, whatever the precipitating event or nature of the treatment, as compared to other members of the public. Such persons would be subject to an invasion of their privacy not suffered by other witnesses who are required to testify. They may have to answer to details of their personal life reflected in their records and effectively overcome a presumption, most often entirely unfounded, that their medical history is relevant to their credibility and ability to testify on the matter in issue.[8]

Whilst there are no constitutional rights to privacy in Australia, the concept of privacy and certain rights to privacy are enshrined under legislation, such as the *Privacy Act* 1988 (Cth) and the *Freedom of Information Act* 1982 (Cth). The *Privacy Act* 1988 (Cth) restricts the purposes for which personal information may be used by certain bodies in receipt of it whilst freedom of information legislation limits the disclosure of personal information in the hands of government to third parties.[9] This legislation indicates that, in some circumstances, privacy is considered to be a fundamental value in Australian society and the disclosure of

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Consequences and Recovery, Garland Publishing Inc (1994) pp 21-47; Legislative Council, Parliament of New South Wales, Standing Committe on Social Issues, *Sexual Violence: the Hidden Crime (Inquiry into the Incidence of Sexual Offences in New South Wales: Part 1)*, 1993 at 79-114. For this reason, we use the feminine pronoun to refer to victims and complainants and the male pronoun to refer to offenders, reflecting the reality of sexual assault in our society.

6 Defence lawyers may be given access to confidential counselling records by way of subpoena and exceptions to the hearsay rules contained in Part 3.2 of the *Evidence Act* 1995 (NSW) may mean such records will be admitted into evidence at trial. For example, statements of intention, belief and emotion (where relevant) may be admissible under s 66 if the complainant testifies and her statements in the subpoenaed counselling records were made about a matter 'fresh in her memory'. Alternatively, counselling records may be admissible under s 69 (business records) unless they were made in contemplation of proceedings. (The authors are grateful to Jill Hunter for this information). There are also other means by which such material could be admitted into evidence: see footnote 71, below. However, defence counsel are at liberty to refrain from tendering counselling records should they decide that the records do not assist their clients' case, since s 35 of the *Evidence Act* 1995 (NSW) states that there is no requirement on a party to tender documents that have been produced or inspected by them. In fact, counselling records may well contain information that will assist the Crown to make out its case. For these reasons, a defence counsel may only intend to use counselling records to inform their cross-examination of the complainant.

7 (1994) 109 DLR (4th) 478.

8 *Ibid* at 496.

9 See for example, s 41(1) *Freedom of Information Act* 1982 (Cth) and *Freedom of Information Act* 1989 (NSW), Schedule 1, cl 6(1).

personal and private information to the public or third parties is recognised as an infringement of individual rights in those situations. In other words, the interest in maintaining the privacy of personal information, such as that found in counselling records, is "a broad and independent value, separate and distinct from considerations about the fairness of the trial process".[10]

The effects of the infringement of privacy are reflected in complainants' reports that they have felt re-victimised by procedures that allow their privacy and confidentiality to be breached, thus reinforcing their experience of powerlessness and invasion from the original assault:

> I went to court two years ago and my uncle was found not guilty. The defence subpoenaed my files from my counsellor. I felt sick when this happened because he was allowed to have access to my thoughts and fears ... all the things I had discussed with my counsellor. She had not written everything that I had said but there were some things she had written about how I felt the abuse had affected me. He got that as well. I felt like I was being punished for speaking out. He had no right, in my mind, to have those files. They had nothing to do with him ... only me. It did not change what he did. I had bits of the files used against me in court. I was an angry child and they said that is why I made the story up.[11]

> My files were subpoenaed. It wasn't the court seeing them, the judge and the lawyers, that worried me so much because I knew that they could only support my case if I was given a chance to speak about them. What made me feel really upset was that my stepfather (who had raped me) would see them. He was lying about not having done it and I could just imagine him going through my personal records. It was like having him invade my life again. Ultimately what happened is that the defence didn't use them anyway ... but it didn't stop him getting access to my personal records. When I went to court I felt I was on trial ... I had no access to anything of his.[12]

Complainants are likely to be further psychologically traumatised by the knowledge that the accused may find out about the effects of the assault or that personal information may be disclosed to the defence if they undertake counselling. In fact:

> Common sense dictates that if people are aware that [therapeutic] records can and may very well be obtained to attack the credibility of a witness, they may be reluctant to seek needed and valuable treatment if there is any prospect that they may be required to testify at trial.[13]

As a result, the recovery process can be interrupted or stalled completely and complainants face the possibility of suffering long-term psychological harm, as one woman describes below:

> As a result of the defence subpoenaing my files I have literally been thrown into isolation. If I accept the support of friends and family then I risk the fact that they may hear things about me that I don't want them to know. My feelings of guilt, shame and humiliation would increase to the point that I would be unable to maintain the relationship anyway. So I reject the support before this can happen.[14]

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10 *R v Osolin*, note 7 *supra* at 491, per L'Heureux-Dube J.

11 Working Party Concerning Confidentiality of Counsellors' Notes, *Recommendations for the Protection of Counsellors' Notes in Sexual Assault Court Matters*, submission to the New South Wales and Commonwealth Attorneys-General, March 1996 at 5. The submission was written for the Working Party by A Cossins, R Pilkinton, F Martin, D Neilson and L Mitchell.

12 *Ibid* at 5-6.

13 *R v Osolin*, note 7 *supra* at 496, per L'Heureux-Dube J.

14 Cossins et al, note 11 *supra* at 7.

In addition, the possibility of retribution by the accused or those connected with the accused can be an added threat to a complainant's psychological recovery, as well as a threat to her physical safety. This fear is further exacerbated by a counselling file being subpoenaed by the defence. Even if a complainant's name and address are deleted, there may still be enough information in the notes for the accused to locate the complainant, to find out the names of friends and family and what services she is attending:

> If he [the offender] has access to my counselling files or whatever he could work out where I live. He would certainly know which counsellor I had been to and where she was. I am scared he will come after me.[15]

> After I knew he [the offender] had my files I was so scared that he would try to find me. I had a silent phone number and he didn't know where I lived. It became very scary going to counselling because he would have known which sexual assault service I was going to. I started to lock up the house at night and couldn't sleep. It was like waiting for him to turn up all the time. *During the court case he mouthed at me that he knew where I lived.* The police said that he was breaking his bail conditions if he came near me and that he would be warned ... but I still was terrified. I still am (emphasis added).[16]

For the above reasons, a victim of sexual assault is faced with the dilemma between seeking counselling support in order to deal with the effects of being sexually assaulted, or reporting the sexual assault to the police. It is likely that the publicity associated with the gaoling of Di Lucas has resulted in a decrease in the number of women reporting sexual assaults both to the police and to sexual assault services, since "[o]ne of the most powerful disincentives to reporting sexual assaults is women's fear of further victimization at the hands of the criminal justice system".[17] This view is supported by anecdotal evidence which shows that a sexual assault victim may withdraw a complaint if her files are, in fact, subpoenaed.[18] More specifically, the Sydney Rape Crisis Centre (SRCC) has reported:

> We consider the knowledge that counsellors' notes can be subpoenaed to be a major barrier for women who have been raped to laying a complaint with police, going ahead with a hearing, contacting sexual assault services and even continuing contact with this Centre... We estimate that this issue has influenced the decision of at least 25 per cent of the women who have contacted SRCC over the past 5 years... [out of about] 2700 new contacts per year... These women decided not to report to the police, not to proceed with court cases and in some instances to discontinue contact with sexual assault services... SRCC is the only rape crisis/sexual assault service in NSW where women who contact can remain completely anonymous... Women who contact frequently mention that they would not contact another sexual assault service because of a perceived and/or actual lack of complete confidentiality of files.[19]

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15 *Ibid* at 8.

16 *Ibid.*

17 *R v Osolin*, note 7 *supra* at 500, per L'Heureux-Dube J.

18 Cossins et al, note 11 *supra* at 8.

19 Personal communication, Liz Mulder, Coordinator of Counselling Services, Sydney Rape Crisis Centre, 22 April 1996.

III. THE EFFECT OF DISCLOSURE OF COUNSELLING RECORDS ON COUNSELLORS AND SEXUAL ASSAULT SERVICES

From the point of view of counsellors and sexual assault services, the disclosure of counselling records to the defence raises the following issues:

(i) the lack of relevance of such records to court proceedings;
(ii) ethical dilemmas and the conflict between legal and ethical obligations;
(iii) adverse effects on the counselling relationship;
(iv) reduction in the reporting of sexual assault to sexual assault services; and
(v) adequacy of methods of file-keeping.

When a woman reports a sexual assault to police in New South Wales, it is mandatory for her to be referred to a sexual assault service prior to making a statement to the police.[20] Upon referral, the victim of the assault undergoes a medical examination in the presence of a sexual assault counsellor. The forensic data that is then recorded by the doctor and counsellor is produced for the express purpose of providing information that will inform any subsequent court proceedings relating to the alleged assault.[21] This forensic data is of a similar nature to the police statement that is then made by the victim of the assault and both are designed to assist in any prosecution of the accused. However, as discussed below, any subsequent counselling that is received by the victim with the same or a different counsellor is of a completely different nature and for an entirely different purpose to the initial counselling contact. It is the information conveyed in subsequent counselling sessions (which is recorded in counselling files or records) to which defence lawyers seek access.

Counsellors have drawn attention to the differences between a counselling file and other evidence, such as a police statement which represents a complainant's version of events in response to questioning by investigative personnel, and which the complainant has the opportunity of checking to ensure accuracy. Contrary to the role of investigative bodies, counselling that is subsequent to the initial report to the police is not designed to be a fact-finding technique to aid the prosecution of the accused. A counselling file is quite different to a police statement in that, not only does a client not have the opportunity of checking its accuracy, but it also contains information pertaining to a client's emotional state, her psychological response to the assault and needs for support. One counsellor has observed:

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20 See New South Wales Police Service, *Commissioner's Instructions* at [67.02]; New South Wales Police Service, New South Wales Health Department and Office of the Director of Public Prosecutions, *New South Wales Government's Inter-Agency Guidelines for Responding to Adult Victims of Sexual Assault*, 1995 at 12-14.

21 Personal communication, Lil Vrkleveski, counsellor, Royal Prince Alfred Hospital, Sexual Assault Centre, 21 May 1996.

> I do not understand why counselling files, which usually contain information about a client's feelings are relevant to the facts of a sexual assault case. *It is not my role to investigate issues of consent, whether an assault took place and who the perpetrator was.* I am concerned with a client's emotional and social well-being. Investigation is properly handled by the Police (emphasis added).[22]

Because of the type of information contained in a counselling file, it is open to misinterpretation depending on the beliefs and attitudes of the reader:

> Should a file be subpoenaed for use in court the potential for misinterpretation and misrepresentation is unlimited without the appropriate context that for example a written summary would provide, instead of the file provided in total. The harm to the client and the misuse of evidence is inevitable.[23]

> [I]n our experience every woman who has been assaulted deals to some degree with issues of self blame, self doubt, responsibility for the assault, 'perhaps because this happened to me I must have really wanted it' thoughts, etc. These are part of dealing with the impact of trauma, but may be interpreted by the defence as saying that the woman asked for it/wanted it/deserved it or in some way brought it on herself.[24]

In order to comply with a subpoena, a counsellor is placed in an ethical dilemma that compromises the trust and confidentiality required for counselling to be an effective tool for client recovery. This dilemma raises the question:

> What to document and how much to leave out? This has the potential to discredit the counsellor in the eyes of the court if she is seen to have omitted significant problems in the client's life in her notes. This brings into question all of the evidence given by the counsellor in the witness box.[25]

Further, many counsellors consider that:

> Clients have a right to expect that information about their health and the services being provided to them will be treated confidentially. This is an assumption that finds support in the codes of ethical practice for health care professions and is reflected in organisational policy. The potential for harm if this confidentiality is breached is enormous.[26]

Codes of ethics regulate members of the Australian Psychological Society (APS) and the Australian Association of Social Workers (AASW). Under the APS *Code of Professional Conduct*, psychologists are bound by the general principle that:

> [They] must respect the confidentiality of information obtained from persons in the course of their work as psychologists. They may reveal such information to others only with the consent of the person or the person's legal representative, except in those unusual circumstances in which not to do so would result in clear danger to the person or others. Psychologists must inform their clients of the legal or other contractual limits of confidentiality.[27]

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22 Cossins et al, note 11 *supra* at 9.

23 *Ibid.*

24 *Ibid.*

25 *Ibid* at 10.

26 *Ibid.* See also L Gardiner and M Roberson, "Fishing Expeditions: Questioning the Legal Dragnet, the One that Got Away or Client Files and Confidentiality: Legal and Ethical Issues for Sexual Assault Counsellors", presented at the First National Conference on Sexual Assault and the Law, 28-30 November 1995 at 8.

27 The Australian Psychological Society Ltd, *Code of Professional Conduct*, 1995 at 2. By way of contrast, the AASW *Code of Ethics* qualifies the obligation of confidentiality on social workers by allowing disclosure where the law demands it: AASW, *Code of Ethics, By-Laws on Ethics*, 1994 at [3.4].

The disclosure of confidential communications to the defence not only appears to breach a psychologist's undertaking of confidentiality, but also threatens the integrity of the client/counsellor relationship, since a psychologist is bound by a number of provisions in the Code which are designed to safeguard the well-being of their clients. In fact, the Code makes each client's welfare a psychologist's foremost concern in the practice of his or her profession, since it recognises the inherent power imbalance within the client/psychologist relationship and the vulnerable and dependent position that clients have in that relationship. For example, the Code states that:

> The client is in an unique position of vulnerability in any therapeutic relationship. Vulnerability may stem from uncertainty about the differences between propriety and impropriety; the criteria for efficacy or harmfulness; what constitutes common accepted practice as compared with irresponsible or unusual therapy.
>
> Client's abilities to make judgements about their welfare are potentially lessened by the wish to succeed in therapy; the belief that the psychologist(s) will always act in the client's best interest, and the assumption of competence, knowledge and high ethical standards on the part of the psychologist. It is, therefore, incumbent upon the psychologist to be constantly mindful of the responsibility for protection of the clients' welfare and rights, and *for the rigorous maintenance of the trust implicit in the client-psychologist relationship* (emphasis added).[28]

In fact, far from being confined to the client/psychologist relationship, the above features characterise *all* client/counsellor relationships, since the counselling relationship is one which is *necessarily* based on privacy and trust, and confidentiality is an essential ingredient in maintaining levels of trust. More than that though, trust is considered to be essential to the recovery of a sexual assault victim who will often be faced with major issues concerning her sense of safety, privacy and self-esteem. As Gardiner and Roberson observe: "It is crucial to the recovery of the victim that post-assault interventions do not contribute to the client's existing feelings of violation, helplessness and powerlessness".[29]

Full recovery is likely to be impossible for victims of sexual assault if they know that their confidential communications may be disclosed to the defence and/or used against them during the accused's trial. It is in this context that the protection of confidential communications must be examined, since the disclosure of such information threatens the welfare of a victim of sexual assault who necessarily is placed "in a unique position of vulnerability in any therapeutic relationship".[30] As the law presently stands, no counsellor in New South Wales or any other State is able to give a client an undertaking that complete confidentiality can be assured.[31]

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28 The Australian Psychological Society Ltd, *ibid* at 14. Similarly, the AASW Code of Ethics, *ibid*, also places an obligation on social workers to safeguard the interests and rights, and enhance the well-being of their clients.

29 L Gardiner and M Roberson, note 26 *supra* at 7.

30 Australian Psychological Society Ltd, note 27 *supra* at 14.

31 Although s 22 of the *Health Administration Act* 1982 (NSW) makes it an offence for counsellors who are employed by the New South Wales Department of Health to disclose information obtained during counselling, this confidentiality or secrecy provision does not apply if counselling records are subpoened, see s 22(d).

Counsellors and clients have both reported that the practice of files being subpoenaed has a negative affect on the therapeutic relationship needed for counselling to be effective.[32] Several counsellors have raised the issue that victims of sexual assault, as victims of crime, have a right to quality therapeutic services and that the lack of confidentiality is detrimental to the the counselling relationship:

> Sexual Assault Services have a mandate to provide confidential services to victims of sexual assault. This is an essential element in facilitating clients access to the Service because of the sensitive nature of sexual assault, and the acknowledged fears of assault victims about reporting. If we cannot guarantee confidentiality to clients because of the possibility of their files being subpoenaed, this will have implications for access and most likely act as a deterrent to clients seeking support in the aftermath of a sexual assault.
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> When I have told my clients that the counselling notes of our session may be subpoenaed I have had direct experience of clients leaving counselling and in another case a client deliberately censors herself in discussing issues in counselling as she has a case coming up in court and I have been subpoenaed to give evidence.
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> [B]ased on personal experience many of my clients feel that we are aligned with the police and legal process. We are not seen as neutral bodies but as parts of a system which often re-abuses clients. This distracts from the therapeutic process. Counsellors are put in a difficult situation when recording file notes because what may be necessary in the therapeutic process may be misrepresented or distorted by the legal process.[33]

Victims' and counsellors' responses suggest that the continued lack of protection of the confidentiality of the client/counsellor relationship will lead to a reduction in victims reporting sexual assault to sexual assault services and, as a result, to the police, since "active support from counsellors encourages the reporting and prosecution of rape".[34] Such an outcome will have the effect of impairing the administration of justice by preventing the apprehension and conviction of offenders with the likelihood of further victimisation in the community. As it is, numerous international and national general population surveys show that the vast majority of sexual assaults are not reported to the police[35] and the failure to adequately protect the confidentiality of a victim's communications is likely to further erode the victims' willingness to report. This issue is highlighted by the experience of an American organisation similar to Australian Rape Crisis Centres. Of all the calls received in 1979 by Pittsburgh Action Against Rape, 32 per cent of callers sought anonymity. In 1980, local media in Pittsburgh raised questions about whether rape crisis counsellors could guarantee their clients' confidentiality. By August 1980, 80 per cent of the victims who telephoned the Pittsburgh Actions Against Rape sought anonymity and

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32 Cossins et al, note 11 *supra* at 7, 10-11.

33 *Ibid* at 10.

34 AY Joo, "Broadening the Scope of the Counsellor-Patient Privilege to Protect the Privacy of the Sexual Assault Survivor" (1995) 32 *Harvard Journal on Legislation* 255 at 262.

35 J Bargen and E Fishwick (for Office of the Status of Women), *Sexual Assault Law Reform: A National Perspective*, 1995 at 23; Standing Committee on Social Issues, note 5 *supra* at 139.

refused further counselling.[36] In light of this type of evidence, it is arguable that it is not in the public interest to "create a class of vulnerable victims who have to choose between accusing their attackers and maintaining the confidentiality of their records".[37]

According to Gardiner and Roberson, counsellors have developed a number of ways of solving the conflict between their legal and ethical obligations through the creation of what they call the "Dual File or Shadow File", the "Bland File", the "Cryptic File" and the "Clayton's File".[38] As the names imply, the dual or shadow file involves keeping one file for court and one for the counsellor, the bland file entails writing as little as possible and making comments relatively neutral, the cryptic file can only be understood by the counsellor recording the communications, and the clayton's file merely contains a name and number but very little content. Such methods of file keeping can be detrimental to the ongoing welfare of a client, as well as counsellor accountability, since they do not satisfy the therapeutic and professional needs for keeping files and reduce the ability of other counsellors from understanding the complete history of a client. Nonetheless, as the law presently stands, it is clear that counsellors are placed in "a *defensive* position based on the premise that any case file can be subpoenaed",[39] and counsellors are faced with the ethical question of how to record information, such as a client's feelings of self-blame and shame about an assault in such a way as to prevent that information from being used against the client if the sexual assault is prosecuted and goes to trial. Counsellors are unclear about the limits of the confidentiality of client communications, since at present those limits can only be determined on a case by case basis. As such, counsellors are unable to anticipate or predict the likely outcome of files being subpoenaed and the use to which confidential communications will be put. The present ethical dilemmas faced by counsellors are best summed up by Gardiner and Roberson:

> The question for us [as counsellors] is, how can we inform clients of the boundaries and limitations of confidentiality in the counselling relationship, when they are so unpredictable and unclear for us? Furthermore, if we are unable to clarify in which instances confidential information can be subpoenaed as evidence in criminal matters, *are clients entering the counselling relationship without making an informed choice?* What is the potential impact on the client, if they are entering counselling without making an informed choice, when choice and control are crucial to the recovery from trauma? (emphasis added)[40]

36 M Hoffman Neuhauser, "The Privilege of Confidentiality and Rape Crisis Counsellors" (1985) 8 *Women's Rights Law Reporter* 187 at 195.

37 *O'Connor v R* (unreported, Supreme Court of Canada, Lamer CJ, La Forest, L'Heureux-Dube, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ, 14 December 1995) at [121], per L'Heureux-Dube J.

38 L Gardiner and M Roberson, note 26 *supra* at 5.

39 *Ibid* at 9.

40 *Ibid* at 10.

IV. THE EFFECT OF DISCLOSURE ON THE ADMINISTRATION OF JUSTICE

Many of the effects of disclosure that are of concern to complainants, counsellors and sexual assault services necessarily impinge on the proper administration of justice, and give rise to the following issues:

(i) impairment to the administration of justice;
(ii) reinforcement of a de-facto presumption of guilt on complainants;
(iii) unreliability of counsellors' notes as evidence;
(iv) encouragement of a policy of disobedience to court orders;
(v) infringement of the public interest in protecting victims of crime; and
(vi) prevention of the reporting of sexual assaults.

As much as it could be argued that the non-disclosure of counselling records to the defence has the potential to impair the administration of justice from the accused's point of view, there is an equally compelling argument to be made about impairment to the administration of justice from the point of view of sexual assault complainants if no steps are taken to *balance* these competing interests. In other words:

> [W]hat constitutes a fair trial [must] take into account not only the perspective of the accused, but ... the lawful interests of ... complainants and the agencies which assist them in dealing with the trauma they may have suffered. What the law demands is not perfect justice, but fundamentally fair justice.[41]

Disclosure to the defence and admissability of a complainant's counselling file must be examined in light of the historical common law legacy which stripped a woman of credibility if she had 'engaged' in sexual activity. As a result of this legacy, a de-facto 'presumption of guilt' is placed on female complainants in sexual assault trials, so that it can be said that it is the complainant who is on trial and must prove her 'innocence' in that she did not consent to sexual relations with the accused. This is not surprising given that:

> The traditional common law position with regard to witnesses who alleged rape, was that women who participated in consensual sex outside marriage could be cross-examined about their sexual activity. *Prior sexual activity was said to be indicative of a propensity to consent to sexual activity at large.* The common law also considered a complainant's sexual activity as relevant to her truthfulness (emphasis added).[42]

Such views clearly stem from the archaic dichotomous view of women as either "damned whores or god's police".[43] In fact,

> Distrust and contempt for the unchaste female accuser was formalised into a set of legal rules unique to rape cases. The most prominent rule allowed the use at trial of evidence of the complainant's unchaste conduct. *These rules combined to shift the*

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41 *O'Connor v R*, note 37 *supra*, see unreported summary, per McLachlin J.

42 M Aronson and J Hunter, *Litigation: Evidence and Procedure*, Butterworths (1995) p 759 at [19.68].

43 A Summers, *Damned Whores and God's Police: The Colonization of Women in Australia*, Penguin Books (1975).

> *usual focus of a criminal trial from an inquiry into the conduct of the offender to that of the moral worth of the complainant* (emphasis added).[44]

As a result, a number of factors "were deemed relevant to the credibility of complainants in sexual assault trials that did not bear on the credibility of witnesses in any other trial and which functioned to the prejudice of victims of sexual assault".[45] In fact, a host of 'commonsense' mythologies were created which:

> [D]eem[ed] that certain types of women were 'unrapable' and others, because of their occupations or previous sexual history, unworthy of belief ... [T]hat women by their behaviour or appearance may be responsible for the occurrence of sexual assault ... [T]hat drug use or dependence on social assistance are relevant to the issue of credibility as to consent ... [T]hat the presence of certain emotional reactions and immediate reporting of the assault, despite all of the barriers that might discourage such reports, lend credibility to the assault report, whereas the opposite reactions lead to the conclusion that the complainant must be fabricating the event ... [T]hat women, out of spite, fickleness or fantasy and despite the obvious trauma for victims in many, if not most, sexual assault trials, are inclined to lie about sexual assault.[46]

Thus, a woman or child who reports a sexual assault:

> [H]as her victimisation measured against the current rape mythologies, *ie*, who she should be in order to be recognised as having been, in the eyes of the law, raped; who her attacker must be in order to be recognised, in the eyes of the law, as a potential rapist; and how injured she must be in order to be believed. If her victimisation does not fit the myths, it is unlikely that an arrest will be made or a conviction obtained.[47]

Such is the extent to which these myths are entrenched in social and legal consciousness that sound empirical evidence on the high level of under-reporting and under-prosecution of sexual assaults has not been sufficient to shift propositions which are based merely on supposition and prejudice.

In light of this historical background, it is clear that one of the aims of defence strategies is not, in fact, to ascertain the truth of the facts in issue in a sexual assault trial, but to undermine the administration of justice by placing the complainant's 'moral worth' on trial, and reconstructing the complainant's version

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44 H Galvin, "Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade" (1986) 70 *Minnesota Law Review* 763 at 792-3, cited in *R v Seaboyer* (1991) 83 DLR (4th) 193 at 218, per L'Heureux-Dube J. Whilst legislative provisions known as rape shield provisions exist in every Australian jurisdiction to limit the admissibility of a complainant's prior sexual history and hence to limit the ability of defence counsel to bring the 'moral worth' of the complainant into question, and whilst much has been gained by their introduction in limiting cross-examination of complainants in relation to their sexual history, the increasing limitations of these provisions has been discussed in several reports and papers. See J Bargen and E Fishwick, note 35 *supra* at 77-93; Law Reform Commission of Victoria, *Rape: Reform of Law and Procedure (Appendices to Interim Report No 42)*, 1991; M Heenan, "Factors Affecting the Prosecution of Rape Cases in Victoria: an Evaluation of the *Crimes (Rape) Act* 1991", presented at the Australian and New Zealand Society of Criminology, 11th Annual Conference, 29 January - 1 February 1996; R Bonney, *Crimes (Sexual Assault) Amendment Act 1981 Monitoring and Evaluation, Interim Report No 3 - Court Procedures*, New South Wales Bureau of Crime Statistics and Research, 1987; Standing Committee on Social Issues, note 4 *supra* at 25-9.

45 *R v Osolin*, note 7 *supra* at 498, per L'Heureux-Dube J. In New South Wales, s 102 of the *Evidence Act* 1995 (NSW) prevents the admissibility of evidence that is relevant only to a witness's credibility. However, in light of the discussion in this article in Sections IV and V (Part H) and the exceptions to the rule under s 102, the authors do not believe that s 102 will substantially benefit complainants in sexual assault trials.

46 *Ibid* at 498, per L'Heureux-Dube J.

47 *Ibid.*

of events in ways that perpetuate the myths associated with 'unchaste' girls and women. In essence, "[r]ape myths still present formidable obstacles for complainants in their dealings with the very system charged with discovering the truth"[48] and where cross-examination of a complainant's moral worthiness occurs and is permitted by a judicial officer, this is indicative of "the persistence of rape myths" within a legal culture.[49] For example, Kaspiew describes the violent rape of a woman by her employer[50] which "was allegedly the last in a series of similar incidents" and how it was reconstructed by the defence into a "'bit of tender loving care'":

> Victim/survivor (to police): I knew the less I fought I could probably prevent any further internal damage to me, than what I was already having done ... I was in a lot of pain from my vagina [because of an abortion three days earlier] - it was a burning sensation, I was devastated, I can't think of any words to adequately describe the way I felt.
>
> Accused's Barrister (during trial): What I suggest is that you were feeling very, very miserable, and here was the man that you'd had the relationship with in the past who was offering a little bit of TLC as it's known, tender loving care.[51]

Another common strategy of defence counsel is to repeatedly put the same proposition to the complainant, "phrased slightly differently, to build up a verbal momentum which emphasises the proposition and *de-emphasises* the answers"(emphasis added).[52] In fact, a question and answer format only gives the complainant scope for short answers, with no opportunity to elaborate or explain her version of events.[53] Thus, the court is left with a version of events as sketched out by the questions of the defence which may have little to do with reality. As one complainant observed: "I was asked whether I'd screamed, whether I'd hit him, kicked him - I had to keep saying 'no'. I was never given a chance to say why I didn't do those things".[54] Such questions promote the myth that if a "woman didn't fight back she consented"[55] and the question and short answer format are perfectly suited to perpetuating that myth.

Yet another strategy of the defence in a sexual assault trial is to reinforce the "[t]raditional ideology ... that unchaste women [and girls] become either vindictive or susceptible to rape fantasies and inclined falsely to charge men with rape"[56] by making such accusations to the complainant. For example, from a study of sexual assault trials in 1991, the Law Reform Commission of Victoria reported that 52 per cent of complainants were cross-examined in this way and "[i]n eight cases,

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48 *Ibid* at 213.

49 *R v Osolin*, note 7 *supra* at 498, per L'Heureux-Dube J.

50 *R v Ellis* (unreported, Melbourne County Court, Walsh J, 5 October 1993).

51 R Kaspiew, "Rape Lore: Legal Narrative and Sexual Violence" (1995) 20 *MULR* 350 at 357 (footnotes omitted).

52 *Ibid* at 378.

53 *Ibid.*

54 Law Reform Commission of Victoria, note 44 *supra* at 127.

55 Standing Committee on Social Issues, note 5 *supra* at 6. Note that in New South Wales, Western Australia, Tasmania, Victoria and Queensland law reform provisions have made it difficult to allege lack of consent on the part of the complainant due to lack of physical resistance: see J Bargen and E Fishwick, note 35 *supra* at 63-4.

56 *R v Seaboyer*, note 44 *supra* at 218, per L'Heureux-Dube J.

the issue of false report was raised even though the complainant had incurred physical injuries requiring medical treatment or hospitalisation".[57] There is, however, no empirical evidence that false allegations are more common in relation to allegations of sexual assault than other criminal offences. In fact, research shows that stereotype and myth govern the decisions of police and prosecuting authorities as to whether a sexual assault case is "founded" or "unfounded",[58] so that "police have in their minds an image of the ideal rape victim and the ideal rape case".[59] The extent to which a woman or child diverges from the 'ideal' (good but mythical) victim (because she is not a virgin, was drunk or drinking at the time of the assault, failed to report the assault within a 'reasonable' time, accepted a lift or went out with the offender, has a history of drug or alcohol abuse, has a psychiatric history, is unemployed and/or dependent on social welfare, has a sexual 'reputation' or did not resist or fight back) increases the probability of the case being filtered out and dismissed as being unfounded or as having no likely success at trial.[60] Such evidence suggests that sexual assault cases are more prone to attrition than other serious or violent offences which, coupled with the strong disincentives to reporting and the high level of under-reporting of sexual assaults, indicates that the probability of a false allegation being prosecuted is extremely low.

Since the 1980s, all Australian jurisdictions have enacted rape shield laws[61] indicating a parliamentary desire "to prevent the diversion of sexual assault trials into inquiries into the moral character and past behaviour of the complainant".[62] However, it may be that the very existence of such rape shield provisions has resulted in the use of subpoenas in relation to counselling records as an alternative means for defence counsel to indirectly introduce evidence about a complainant's moral character[63] which (with some exceptions) is no longer possible directly.

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57 Law Reform Commission of Victoria, note 44 *supra* at 104.

58 *R v Seaboyer*, note 44 *supra* at 207-11, per L'Heureux-Dube J.

59 L Holmstrom and A Burgess, *The Victim of Rape: Institutional Reactions*, Transaction Books (1983), cited in *ibid* at 211.

60 See *R v Seaboyer*, note 44 *supra* at 207-17, per L'Heureux-Dube J for a discussion of the research on this issue.

61 For a summary of these provisions, see J Bargen and E Fishwick, note 35 *supra* at 76-7.

62 *R v Osolin*, note 7 *supra* at 497, per L'Heureux-Dube J.

63 Under s 102 of the *Evidence Act* 1995 (NSW) "Evidence that is relevant only to a witness's credibility is not admissible". It remains to be seen how exceptions to the credibility rule under s 103 will be interpreted, although s 103 is likely to be more protective of witnesses that the common law given the high standard of relevance ('substantive probative value') that is required to be met under s 103 for credibility evidence to be admitted. However, given the myth and stereotype that governs the cross-examination of complainants and the exercise of judicial discretions in sexual assault trials (see Section V (Part H) of this article), it is, of course, possible that this rule may be manipulated to admit credibility evidence to undermine a complainant's credibility in a sexual assault trial. These considerations may also bear on the interpretation of another exception to the credibility rule under s 106, particularly, s 106(a). Even if there is no bias in the interpretation of exceptions to the credibility rule, there are other mechanisms which could see the admissibility of material from counselling records which may affect credibility; for example, "the mere fact that the 'only' apparent relevance of an item of evidence is to the credibility of a witness does not mean that it is not relevant to a fact in issue in the proceeding. Where a witness has testified in relation to some fact in issue, evidence relating to the credibility of the witness will indirectly affect the assessment of the probability of the existence of the fact in issue. Consequently, evidence relevant to a witness's credibility will have 'substantial probative value' ... where the evidence has a 'substantial' indirect effect on the

In fact, counselling records represent a mine of information for the distortion of a sexual assault trial into an 'inquiry into the moral worth of the complainant'. For example, in relation to the effects of a sexual assault, researchers report that approximately 70 per cent of rape victims meet the criteria for Post-Traumatic Stress Disorder (PTSD)[64] which is a complex syndrome involving a wide range of symptoms including survivor guilt.[65] Survivor guilt involves a phase of self-blame and self-recrimination on the part of the victim. Self-blame is likely to be interpreted in the literal sense and is unlikely to understood by the defence, the judge or the jury as a phase in which the victim processes the events leading up to the sexual assault, as a way of accepting and adjusting to the reality of the assault. Self blame is also unlikely to be understood as a phase of healing that affects *all* survivors of traumatic events (such as, war, car accidents, fires etc) who are affected by PTSD.[66] The phase of self-blame can be easily distorted by the defence by being taken out of the healing context and used to imply or assert that the complainant consented or had a motive for making a false report. The falseness of this view is demonstrated by the results of an empirical study which has shown that:

> ...the more women blamed themselves for the rape, the more suicidal they had been since the rape, the greater the likelihood that they had been psychiatrically hospitalized, and the lower their self-esteem.[67]

Counselling records are also likely to contain a range of information that can be used to invoke the stereotype and myth that plagues sexual assault proceedings: the number of past sexual relations, the existence of illegitimate children, drug, alcohol and psychiatric history, rebellious childhood history and so on. From post-trial interviews with jurors, La Free et al have documented that "a victim's nontraditional behavior may act as a catalyst, causing jurors' attitudes about how women should behave to affect their judgments under certain conditions".[68] These findings give weight to the dangers associated with the disclosure of counselling records in sexual assault trials:

> Although any evidence that a woman was forced to submit to a sexual act against her will (including use of a weapon or victim injury) might be expected to persuade jurors of the defendant's guilt, neither variable significantly affected jurors' judgments... In

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assessment of the probability of the existence of a fact in issue in the proceeding": S Odgers, *Uniform Evidence Law*, The Federation Press (1995) p 164. See also footnote 6 *supra* and footnote 71 *infra*.

64 E Frank and BP Anderson, "Psychiatric Disorders in Rape Victims: Past History and Current Symptomatology" (1987) 28 *Compr Psychiatry* 77 at 77-82; DG Kilpatrick, L Veronen and CL Best, "Factors Predicting Psychological Distress Among Rape Victims" in CR Figley (ed), *Trauma and its Wake: The Study and Treatment of Posttraumatic Stress Disorder* (1985) at 113-41.

65 PM Coons, C Cole, TA Pellow and V Milstein, "Symptoms of Posttraumatic Stress and Dissociation in Women Victims of Abuse" in RP Kluft (ed), *Incest-Related Syndromes of Adult Psychopathology*, (1990) 205 at 208. This is a syndrome which affects children and adults alike: JL Herman, *Trauma and Recovery*, Pandora (1994) pp 58-61; A Salter, *Transforming Trauma: A Guide to Understanding and Treating Adult Survivors of Child Sexual Abuse*, Sage Publications (1995) pp 189, 193-5.

66 JL Herman, *ibid* at 86-95; A Salter, *ibid* at 190-3.

67 BL Katz and MR Burt, "Self-Blame in Recovery from Rape: Help or Hindrance?" in AW Burgess (ed), *Rape and Sexual Assault*, Garland Publishing Inc (1988) 151 at 166.

68 F La Free, B Reskin and CA Visher, "Jurors' Responses to Victims' Behavior and Legal Issues in Sexual Assault Trials" (1985) 32 *Social Problems* 389 at 400, cited in *R v Seaboyer*, note 44 *supra* at 216, per L'Heureux-Dube J.

> contrast, jurors were influenced by a victim's 'character'. They were less likely to believe in a defendant's guilt when the victim had reportedly engaged in sex outside marriage, drank or used drugs, or had been acquainted with the defendant - however briefly - prior to the alleged assault.[69]

On the basis of such evidence, it can be expected that there will be a direct correlation between the amount of 'bad character' information that is introduced by the defence about the complainant and low rates of conviction, *irrespective of whether the "bad character" information is confirmed.*[70] More importantly, for the purposes of this article, it can be expected that there will be a direct correlation between the extent to which information from counselling records is used by the defence to establish a complainant's 'bad character' and low rates of conviction for sexual assault.[71]

In *Osolin's* case, for example, a majority of the Supreme Court of Canada held that the trial judge had erred in refusing defence counsel the opportunity to cross-examine the complainant about a notation in her counselling records which indicated that the complainant was concerned there may have been some conduct on her part that had led the accused to believe she consented and that she was having second thoughts about the case. The trial judge's refusal (upheld by the Canadian Court of Appeal) was made in a context in which:

> There [was] no dispute that the two accused, Osolin and McCallum, went to the complainant's trailer and entered her bedroom after having been told she was 'easy'. There [was] no dispute that their intention was to have sexual intercourse with her... There [was] no dispute that Osolin carried the complainant out of the trailer and that she was protesting as he did so. There [was] no dispute that she was driven 40 miles to a remote cabin, where McCallum, the driver, left Osolin and the complainant. There [was] no dispute that Osolin tied the complainant up, spreadeagled on the bed, and then had sexual intercourse with her. There [was] no dispute that the complainant was found crying and hysterical on the highway at 3:30 am in the morning, nor that she told the police that she had been raped. There [was] no dispute that her hysteria continued, and that she was taken to hospital. Finally, there [was] no dispute that her physical condition, including a bruised wrist and bruising and discoloration to the pubic area, was more consistent with resistance and rape than with consensual intercourse. Additionally, the complainant's version of struggle was confirmed by the discovery of her underpants about 20 feet from the trailer, where she said they had been torn off her after she was placed in the back seat of the car that took her to the remote cabin. The appellant admitted that the complainant made some protests over the course of the evening ... , that he overrode her complaints about her nakedness ... , and that he tends to adopt the attitude that 'no' means 'yes' until there is a clear indication of no consent.[72]

Contrary to a layperson's assumption that the above notation in the complainant's psychiatric records actually indicated that she did in fact consent,

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69 *Ibid* at 397, cited in *R v Seaboyer, ibid* at 216, per L'Heureux-Dube J.

70 K Catton, "Evidence Regarding the Prior Sexual History of an Alleged Rape Victim - Its Effect on the Perceived Guilt of the Accused" (1975) 33 *University of Toronto Faculty Law Review* 165 at 173, cited in *R v Seaboyer, ibid* at 216, per L'Heureux-Dube J.

71 Information in counselling records may be held to be admissible as the result of an application of the following provisions of the *Evidence Act* 1995 (NSW), s 43 (prior inconsistent statements of witnesses), s 106 (rebutting denials by other evidence), s 97 (exceptions to the tendency rule on the grounds of significant probative value) and exceptions to the hearsay rule, such as s 72. See also S Odgers, note 63 *supra*, pp 90-3, 120-1 and note 6 *supra*.

72 *R v Osolin*, note 7 *supra* at 536-7, per McLachlin J.

when examined in light of the above factual and therapeutic contexts, the reality is that expressed by one experienced counsellor; most women who have been sexually assaulted "deal to some degree with issues of self blame, self doubt [and] responsibility for the assault ... [which] are part of dealing with the impact of trauma".[73] It is conceivable, however, that defence counsel who are not concerned with ascertaining the context associated with a clear indication of self-blame would use the question and short answer format to elicit that the complainant did in fact make such a statement, thereby forbidding her the opportunity of explaining why such a statement was made. In this way, a clear psychological symptom of trauma can be used to implant in the mind of a jury the complainant's 'bad character'.

In addition, there is a need to examine the effect of the use of evidence, which some counsellors consider to be unreliable and inaccurate, on the proper administration of justice in a sexual assault trial. Gardiner and Roberson have raised the issue that counsellors' notes are not necessarily an accurate and, therefore, reliable reflection of a client's communications. For example:

> A file may hold the perceptions of the person that [sic] writes in the file, which may or may not be an accurate account of what the client/patient has communicated. As such, the file can hold and perpetuate misinformation ... [such as] [a]n incorrect history, or personal information which has been subjectively interpreted without clarifying its personal meaning to the client/patient.[74]

The unreliability of counselling records is compounded by the fact that complainants do not have the opportunity, as is the case with a police statement, to read the counselling records to ensure that they are an accurate reflection of their communications. Whilst it can be argued that all relevant evidence should be made available to a court in a sexual assault trial, it must be recognised that counselling records may well have little to do with the truth-seeking process:

> [R]ecords concerning statements made in the course of therapy are both hearsay and inherently problematic as regards reliability. A witness's concerns expressed in the course of therapy after the fact, even assuming they are correctly understood and reliably noted, *cannot be equated with evidence given in the course of a trial.* Both the context in which the statements are made and the expectations of the parties are entirely different. In a trial, a witness is sworn to testify as to the particular events in issue. By contrast, in therapy an entire spectrum of factors such as personal history, thoughts, emotions as well as particular acts may inform the dialogue between therapist and patient. Thus, *there is [a] serious risk that such statements could be taken piecemeal out of the context in which they were made* to provide a foundation for entirely unwarranted inferences by the trier of fact (emphasis added).[75]

Unless the counselling context and the methods by which information is elicited by the counsellor from the client are clearly understood by the judge and jury, the information in counselling records becomes an unreliable and inaccurate guide for ascertaining the facts in issue in a sexual assault trial, as explained by one complainant below:

> When I reported the sexual abuse to the police, I made a conscious decision not to tell them that I had been receiving counselling as an adult. The reason for this was that I

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73 Cossins et al, note 11 *supra* at 9.

74 L Gardiner and M Roberson, note 26 *supra* at 3.

75 *R v Osolin*, note 7 *supra* at 496-7, per L'Heureux-Dube J.

> knew it would all be used against me in court, especially since I had seen an alternative therapist for quite a long period. After disclosing the incidence of child sexual abuse to my parents at age thirteen, I was sent to a psychiatrist. My mother briefed the psychiatrist with her version of the story, before I was seen. The perpetrator was acquitted, one of the reasons being that recorded in the psychiatrist's files was my mother's version of events which were inconsistent with my version of the events. (Despite the fact that my mother claimed no knowledge of the abuse that had been occurring over a period of four years, some six years prior to my disclosing).[76]

A further aspect of the administration of justice relates to whether the widespread practice of using subpoenas to gain access to a complainant's counselling records has and will continue to inhibit the reporting of sexual assaults to police on the grounds that:

> [Women] [w]ith good reason, ... have come to believe that their reports will not be taken seriously by police and that the trial process itself will be yet another experience of trauma. It must be obvious that if, in addition to the current disincentives, such victims face the revelation of intimate details of their lives *via* the release of their [therapeutic] records, the disincentive to reporting could only increase.[77]

For these reasons, L'Heureux-Dube J in *Osolin's* case has concluded:

> If the net result is to discourage witnesses from reporting and coming forward with evidence, then, in my view, it cannot be said that such practices would advance either the trial process itself or enhance the general goals of the administration of justice.[78]

In light of the views of complainants and counsellors discussed in Section II, the inescapable conclusion is that a failure to legislate to protect counselling records from being disclosed in sexual assault trials will "only frustrate further our still inadequate attempts to extend to victims of sexual assault the protection of the justice system to which they are entitled".[79] Ironically, where a subpoena results in the disclosure of counselling records to defence counsel on the grounds of relevance and the accused's right to a fair trial, this places the criminal justice system's protection of victims of sexual assault at risk and implicates the criminal justice system as "the means by which offenders escape prosecution".[80]

In *Osolin's* case, for example, the sole purpose for the defence's claim that specific information in the complainant's psychiatric records was relevant was to show "what kind of person the complainant [was]".[81] At trial, the defence had sought to show that the complainant, a 17 year old girl, was of 'bad character' by cross-examination of the complainant about her prior sexual history[82] and by constructing a theory (apparently based on the problematic relationship the complainant had with her parents) that she made up the allegations of sexual assault "to avoid a confrontation with her parents after she had been out all night".[83] As L'Heureux-Dube J describes below:

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76 Cossins et al, note 11 *supra* at 6.
77 *R v Osolin*, note 7 *supra* at 501, per L'Heureux-Dube J.
78 *Ibid* at 497, per L'Heureux-Dube J.
79 *Ibid* at 500.
80 *Ibid* at 501.
81 *Ibid* at 503.
82 *Ibid* at 542, per McLachlin J.
83 *Ibid* at 505, per L'Heureux-Dube J.

> Prior to disclosure [of the complainant's psychiatric records] counsel freely admitted that he did not know what he would find and the records might not supply him with anything of assistance, but he nonetheless claimed that they were necessary to make full answer and defence... [However,] it is clear that the appellant intended to use these records to establish the very sort of prejudice to the complainant which informs rape myths... Counsel to the appellant frankly admitted that he wanted to adduce evidence concerning her parents' reaction to the assault because 'that relates directly to what kind of person the complainant is'. Moreover, the cross-examination of her psychiatrist ... on those records in the voir dire also clearly reveals the manner in which the appellant regarded the material as relevant. Both sources disclose that the defence intended to use the information gained from the record to wage a wide-ranging attack on the credibility of the complainant and establish her 'bad character'... [I]n the voir dire ... the defence raised such issues as her past use of drugs and alcohol, difficulties in social relations, previous history of sexual relations, and fights with her mother. I can only conclude that the defence hoped to use expert testimony on the medical records to invite the jury to draw inferences about the credibility of the complainant based on ... her past sexual history. These are precisely the inferences based upon myths which work to the prejudice of complainants in sexual assault and which Parliament, in its amendments to the law governing sexual assault, has attempted to prevent.[84]

In light of these observations, it must be questioned whether it is in the interests of the administration of justice to permit an appeal on the tenuous grounds of the lack of opportunity given to the defence counsel to cross-examine a complainant on more evidence concerning her so-called "bad character". As McLachlin J puts it:

> Having chosen to conduct his case as he saw best at the time, Osolin comes to this court and asks for a new trial so that he can explore alternative avenues which he thought it best to eschew at the time, pleading that a failure to grant him this new trial will amount to a fundamental miscarriage of justice. I cannot agree. An accused is entitled to a trial, in which he may cross-examine on as many defences as he chooses. *He is not entitled to a series of trials, exploring one theory on one and another on a second* (emphasis added).[85]

A. The Relationship of Victims and Counsellors to the Criminal Justice System

Because sexual assault is a crime, "sexual assault counsellors ... are working in the context of the criminal justice system ... [which] is a constant presence, always there in the background influencing [a counsellor's] practice".[86] While sexual assault counsellors are bound by the general legal obligation to disclose evidence to the defence for the purposes of criminal proceedings, many counsellors take the ethical position, based on moral or social values or professional obligations, that information communicated to them by a client should not be disclosed under any circumstances. If faced with a court order to disclose such information in a sexual assault trial, this can put counsellors in the invidious position of being penalised for contempt of court in the form of imprisonment or a fine[87] if they maintain this

84 *Ibid* at 505; see also Cory and McLachlin JJ who concurred with L'Heureux-Dube J's view of the purpose of the defence's cross-examination: *ibid* at 539, per McLachlin J; *ibid* at 522, per Cory J.

85 *Ibid* at 543, per McLachlin J.

86 L Gardiner and M Roberson, note 26 *supra* at 1.

87 See for example, *District Court Act* 1973 (NSW), s 199.

ethical position. Because of the possibility that their records can be subpoened, counsellors are faced with other ethical issues concerning the recording of client communications and the content of client records. In short, counsellors are constantly faced with competing ethical and legal obligations for which there is presently no adequate solution and it is questionable whether it is appropriate to make counsellors "part of the law enforcement machinery of the State".[88]

Arguably, imprisonment or the imposition of a fine are inappropriate ways to deal with the conflict between preserving the confidentiality of communications in a client/counsellor relationship, and protecting the accused's right to adduce all relevant evidence. Although it has been said that, in Australia, imprisonment for contempt of court is rare,[89] there are several instances of imprisonment of journalists for contempt[90] which, in addition, to the recent imprisonment of Di Lucas, set unfortunate precedents for resolution of the conflict between preserving the confidentiality of certain relationships and the rights of the accused. As the practice of issuing subpoenas in relation to counsellor's notes is now widespread throughout New South Wales and other Australian States,[91] victims of sexual assault should not have to rely on the willingness of their counsellors to suffer imprisonment or a fine to ensure (at least some) protection of the confidentiality of their communications, nor should a policy of disobedience to court orders be encouraged for the protection of client confidentiality.

There is a clear public interest in protecting victims of crime which, in New South Wales, has been recognised by the enactment of legislation enabling victims to apply to the Victims Compensation Tribunal for compensation for crimes which cause personal injury or death.[92] In addition, there is a specific public interest in protecting victims of sexual assault which is recognised through the funding of rape crisis centres, sexual assault units in major public hospitals, the victims of crime counselling service, the witness assistance program in the Office of the Director of Public Prosecutions and directions under the New South Wales Police Service Commissioner's Instructions and the *Inter-Agency Guidelines for Responding to Adult Victims of Sexual Assault* which require police officers to refer victims of sexual assault to sexual assault services. The Charter of Victims' Rights published by the New South Wales Attorney-General's Department states, amongst other things, that victims of crime have a right of access to medical and counselling services and welfare, health and legal services.[93] Relevantly, one American study has found that when survivors were asked to rank those who

88 The Commission (Toronto), *Report of the Commission of Inquiry into the Confidentiality of Health Information*, 1980 at 91, cited in *R v Osolin*, note 7 *supra* at 491, per L'Heureux-Dube J.

89 See Law Reform Commission of Western Australia, *Report on Professional Privilege for Confidential Communications (Project No 90)*, 1993 at 16.

90 *Ibid* at 16, 45, 47-57.

91 Personal communications to the authors from the Sydney Rape Crisis Centre, the Canberra Rape Crisis Centre, Nowra Sexual Assault Service, Blacktown Sexual Assault Service, Wagga Wagga Sexual Assault Service, Tweed Valley Health Service, Lismore Women's Health Centre, Royal Prince Alfred Hospital Sexual Assault Service, Royal North Shore Hospital Sexual Assault Service, Sexual Assault Referral Centre, Perth and Yarrow Place, Adelaide.

92 *Victims Compensation Act* 1987 (NSW).

93 New South Wales Attorney-General's Department, *Victims' Rights* (pamphlet).

provided them with the most assistance after a sexual assault, rape crisis workers were ranked highest and above that of other forms of assistance such as that provided by clergy.[94] Because sexual abuse gives rise to high rates of post-traumatic stress disorder, institutionalisation for psychiatric disorders[95] and an increased rate of suicidal tendencies,[96] it would be safe to say that sexual assault constitutes a major mental health problem in Western society. As such, the role of sexual assault counsellors in helping victims to regain their mental health is crucial. Clearly, the right of sexual assault victims to obtain appropriate care is threatened if a victim is aware that her communications to a counsellor may be subpoenaed by the defence and, as a result, decides not to consult a counsellor or report the assault to the police. The increasingly common tactic of defence counsel issuing subpoenas in relation to counselling records means that, contrary to the Charter of Victims' Rights, there is no safe haven for victims of sexual assault, and counsellors are placed in the invidious position of betraying their client's trust and becoming vehicles for perpetuating the injustice placed on complainants in sexual assault trials. In light of these considerations, legislative reform is a logical extension of the type of protection that already exists to enable victims to recover from the effects of a sexual assault.

V. THE LAW REFORM OPTIONS FOR PROTECTING THE CONFIDENTIALITY OF COUNSELLING RECORDS IN SEXUAL ASSAULT TRIALS

A number of exceptions exist to the principle protecting the accused's right to a fair trial,[97] although, as noted previously, there is no specific privilege which applies to confidential communications between counsellors and their clients. At present, the only legal mechanisms for the protection of such information are the doctrine of public interest immunity (although for reasons not canvassed here it is arguable whether a counsellor or a counselling service could successfully claim that privilege),[98] the rule that there is no pre-trial discovery in criminal

94 M Hoffman Neuhaser, note 36 *supra* at 262.

95 *O'Connor v R*, note 37 *supra* at [120], per L'Heureux-Dube J; see for example, EH Carmen, PP Rieker and T Mills, "Victims of Violence and Psychiatric Illness" (1984) 141 *American Journal of Psychiatry* 378; JL Herman, "Histories of Violence in an Outpatient Population" (1986) 65 *American Journal of Psychiatry* 137; JB Bryer, BA Nelson and JB Miller, "Childhood Physical and Sexual Abuse as Factors in Adult Psychiatric Illness" (1987) 144 *American Journal of Psychiatry* 1426.

96 Standing Committee on Social Issues, note 5 *supra* at 8; EH Carmen et al, *ibid.*

97 SB McNicol, *The Law of Privilege*, Law Book Company Ltd (1992) pp 1-3. In Australia's adversary criminal justice system, witnesses are bound by the principle that they are required to disclose all relevant evidence in a trial. This requirement "has traditionally been described as an inherent [power]" of a court but these days is governed by procedural rules of court enacted in each Australian jurisdiction. The basis for the principle is to avoid impairment of the proper administration of justice by preventing incorrect or unjust decisions from being made to ensure the accused's right to a fair trial: *Carter v Managing Partner, Northmore Hale Davy and Leake* (1995) 183 CLR 121 at 128, per Brennan J (*Carter*); PK Waight and CR Williams, *Evidence: Commentary and Materials*, Law Book Company Ltd (1995) pp 40-1, 144.

98 For the views of the High Court concerning the likelihood of success of a claim of public interest immunity in criminal proceedings, see *Commonwealth v Northern Land Council* (1993) 176 CLR 604 at 618, per

proceedings,[99] the rules governing the terms of a subpoena,[100] and provisions of the *Evidence Act* 1995 (NSW) which govern the admissability of relevant evidence where its probative value is substantially outweighed by its unfair prejudice to a party.[101]

Some jurisdictions within Australia have created statutory exceptions to the principle protecting the accused's right to a fair trial, such as the privileges protecting confidential communications between doctors and patients and clerics and penitents.[102] In New South Wales, the common law privilege, legal professional privilege, has been replaced by a statutory privilege, client legal privilege, under ss 118 and 119 of the *Evidence Act* 1995 (NSW). As exceptions to the principle protecting the administration of justice, these statutory privileges are justified on public policy grounds, since they represent "the law's judgment that certain *social* relationships are worthy of promotion and protection"(emphasis added).[103]

In light of the above discussion about the effects of disclosure of counselling records, it can be argued that where a victim of sexual assault seeks counselling for the purposes of dealing with the effects of sexual assault, the client/counsellor relationship which then arises is another social relationship worthy of promotion and protection. In fact, the above discussion concerning the effects of disclosure of counselling records challenges the view that in relation to professional relationships (other than the lawyer/client relationship) "there is no stronger argument in favour of the protection of any one relationship ... over any of the others".[104] It is to be noted that those who take such a view have not canvassed the specific legal and ethical issues which arise in relation to sexual assault proceedings.

This article examines three possible statutory options (by way of amendment to the *Evidence Act* 1995 (NSW)) for resolving the conflict between preserving the confidentiality of the client/counsellor relationship and the accused's right to adduce all relevant evidence to establish her innocence. Option one is a form of protection which would make counselling records completely inadmissable in pre-trial or trial proceedings based on (a) the premise that the public interest in protecting confidentiality is paramount and outweighs the public interest in an

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Mason CJ, Brennan, Deane, Dawson, Gaudron and McHugh JJ and *Alister v R* (1983) 154 CLR 404 at 450, per Brennan J. For a consideration of a claim of public interest immunity in relation to criminal proceedings (and disclosure of the name of informants) see *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171. For a consideration of a claim of public interest immunity in relation to counselling records in a sexual assault matter, see *Police v White* (unreported, Queanbeyan Local Court, Magistrate Gould, 25 January 1996). See also *Evidence Act* 1995 (NSW), s 130(4) since that provision raises the question as to whether counselling records could be ever said to relate to matters of state as required by s 130(1) (exclusion of evidence of matters of state). Even if they could be, see s 130(5) as to the nature of the matters which would prevent a successful claim being made under s 130(1).

99 *R v Sobh* (1993) 65 A Crim R 466 at 467, per Brooking J.

100 *R v Saleam* (1989) 16 NSWLR 14.

101 *Evidence Act* 1995 (NSW), ss 135- 6.

102 See Law Reform Commission of Western Australia, note 89 *supra* at 12-13; *Evidence Act* 1995 (NSW), s 127; *Evidence Act* 1995 (Cth), s 127.

103 SB McNicol, note 97 *supra,* pp 2-3.

104 *Ibid,* p 6. See also Law Reform Commission of Western Australia, note 89 *supra* at 105 at 115.

accused being able to adduce all relevant evidence, or (b) the premise that counselling records are not relevant to the facts in issue or the credibility of the complainant in a sexual assault trial. Option 1(a) is a statutory client/counsellor privilege which, as a "class" privilege, would be specific to the sexual assault victim/counsellor relationship, whilst option 1(b) is a statutory exclusion specific to communications which arise as a result that relationship. Both would have the effect of preventing the counsellor of a complainant in a sexual assault matter from disclosing the confidential communications of the complainant without the consent of the complainant. Option two is a statutory client/counsellor privilege subject to an exception which again would be specific to the victim of sexual assault/counsellor relationship but would not apply if the defence could show that the confidential communications were necessary for establishing the innocence of the accused. Option three is a statutory judicial discretion which would be specific to the sexual assault victim/counsellor relationship and would permit the counsellor of a complainant in a sexual assault matter to refuse to answer questions or disclose counselling records at the discretion of the judicial officer presiding over the trial or pre-trial proceedings. For the reasons set out below, it is the authors' view that options 1(a) or (b) are the only method which adequately address the effects of disclosure of confidential communications on victims of sexual assault, counsellors, sexual assault services and the administration of justice.

A. The Scope of Option 1: Weighting the Balance in Favour of the Complainant

The existence of a client privilege indicates that the public interest in favour of protecting the confidentiality of the particular relationship has been deemed to override the public interest in ensuring the accused's right to adduce all relevant evidence. The nature of a client privilege is best exemplified by legal professional privilege, in that, where it applies to confidential communications:

> [T]here is no question of *balancing* the considerations favouring the protection of confidentiality against any considerations favouring disclosure in the circumstances of the particular case. The privilege itself represents the outcome of such a balancing process and reflects the common law's verdict that the considerations favouring the 'perfect security' of communications and documents protected by the privilege must prevail (emphasis added).[105]

The client privilege envisaged for the protection of the confidentiality of the client/counsellor relationship is the same type of privilege which protects the confidentiality of the lawyer/client relationship at common law.

The existence of a statutory exclusion, on the other hand, indicates that the information in question is deemed not to be relevant to a fact in issue or the credibility of a witness. In relation to both options, all confidential communications between a complainant and her counsellor would be exempt from being disclosed to the defence and would be inadmissable in a sexual assault trial unless the complainant chose to waive the privilege. This would mean that at the

105 See *Carter*, note 97 *supra* at 133, per Deane J.

time of counselling, counsellors would be able to give an assurance to their clients that all their communications were confidential and protected by law.

Critics of the creation of a client privilege or a statutory exclusion are likely to raise the objection that such provisions would have the general effect of "depriv[ing] judicial proceedings of information which would be relevant to the determination of issues and to the interests of justice".[106] In particular, it is likely to be argued that the creation of a privilege or an exclusion will be detrimental to the administration of justice on the grounds that confidential communications in counselling records may be critical for determining the innocence of an accused person in a sexual assault trial and that, in the absence of such information, an accused may be wrongly convicted. For that reason, critics will argue that such records are, in fact, relevant and that the public interest in the protection of confidential communications within the client/counsellor relationship does not outweigh the public interest in courts having available to them all relevant evidence. Whether such objections are well-founded in that a statutory privilege or exclusion would constitute an infringement of an accused's right to a fair trial, cannot be determined until an examination is made of the concept of relevance and the public policy reasons for protecting the confidential relationship between a complainant and her counsellor.

B. The Concept of Relevance in a Sexual Assault Trial

Relevance, as a legal concept, is founded on the notion of commonsense.[107] By way of definition (but not elucidation), evidence at common law will be admissable in court if it is considered to be directly or indirectly relevant to a fact in issue or to the credibility of a witness.[108] The *Evidence Act* 1995 (NSW) defines relevant evidence as that which "if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding"[109] or the credibility of a witness.[110] However, because of the persistence of rape myths in sexual assault trials, "the question that must be asked ... is, why are [counselling] records deemed, or more likely to be deemed, both relevant and necessary in sexual assault trials?"[111] In other words, what makes such records relevant?

Arguably, counselling records are considered to be relevant based on the hypothetical premise that they may potentially reveal a complainant's statement that the accused did not commit the alleged sexual assault, that she consented to sexual relations with the accused or that the records contain a prior inconsistent statement. Except where it might be assumed that the complainant has made a

106 Law Reform Commission of Western Australia, note 89 *supra* at 40-1.

107 *R v Osolin*, note 7 *supra* at 499, per L'Heureux-Dube J.

108 PK Waight, note 97 *supra*, p 17.

109 *Evidence Act* 1995 (NSW), s 55(1).

110 *Evidence Act* 1995 (NSW), s 55(2). Credibility evidence will be admissible in cross examination under s 103 of the *Evidence Act* 1995 (NSW) if it is of "substantial probative value". Odgers observes that the dictionary definition of probative value is the same definition used in s 55(1) of the *Evidence Act* and s 55(2) "makes it clear that evidence relating only to the credibility of a witness is considered to satisfy this test of relevance": S Odgers, note 63 *supra*, p 164.

111 *R v Osolin*, note 7 *supra* at 499, per L'Heureux-Dube J.

mistake as to identity, this type of reasoning can only be sustained by the myth that women are prone to making false claims of sexual assault for the purposes of protecting their reputations or seeking revenge. In this way, by using the sense common to Western cultural and legal thought, the records become relevant. That commonsense, however, is founded on masculinist beliefs of women's unreliability, dishonesty and moral unworthiness. To a holder of that commonsense belief, it would then be a logical step to deem that counselling records are relevant to determining the lack of credibility of the complainant in question. Thus, it can be seen that relevance:

> Whatever the test, be it one of experience, common sense or logic, ... is a decision particularly vulnerable to the application of private beliefs. Regardless of the definition used, the content of any relevancy decision will be filled by the particular judge's experience, common sense and/or logic.[112]

Relevance in a sexual assault trial has historically been imbued with stereotypical and mythical notions of "good" and "bad" women and girls. That this is still the case is evidenced by the cases in which "unchasteness" is considered to be relevant to the issue of consent and a complainant's credibility[113] and a judge with a commonsense view based on myth and stereotype would not recognise the prejudicial effect on a complainant of evidence that he or she deems to be relevant.

In relation to the determination of the relevance of counselling records in a sexual assault trial, L'Heureux-Dube J has suggested that "[t]he best way to examine the question of relevance is to place the proposed use of psychiatric [or therapeutic] evidence in the circumstances of the ordinary trial".[114] In other words, will the issue of the relevance of such records be determined differently in other criminal trials? If the view is taken that such records are more relevant in a sexual assault trial, will it be because of the conscious or unconscious myth that victims of sexual assault are inherently less credible and more untrustworthy than other witnesses? In addition, L'Heureux-Dube J observes, "There is no doubt that any attempt by the Crown to conduct a wide-ranging inquiry into the entire medical [or therapeutic] history of a criminal accused would be met with concerns about prejudice to the accused and irrelevance to the issue at trial".[115] In a context where a complainant in a sexual assault trial is required to rebut presumptions about her moral unworthiness and the myths associated with women who are raped, the same

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112 *R v Seaboyer*, note 44 *supra* at 228, per L'Heureux-Dube J.

113 The extent to which stereotype and myth still inform sexual assault proceedings in Australia was demonstrated at the recent National Conference on Sexual Assault, "Balancing the Scales", 20-1 June 1996, in which a number of papers revealed the extent to which sexual assault law reform has failed to curtail defence counsel strategies which are designed to undermine the credibility of complainants and to educate the judiciary about the dangers of reliance on myth and stereotype to inform issues of admissability. For example, L Kealley and C Killey, "We're Going to Light the Bloody Thing Ourselves"; S Taylor, "Understanding the Impact of the Legal Process on the Sexual Assault Victim" and P Easteal, "A Masculocentric Reality: The Limits of Law Reform and Choices for the Future". See also note 44 *supra* and note 168 *infra*.

114 *R v Osolin*, note 7 *supra* at 500, per L'Heureux-Dube J.

115 *Ibid* at 491, per L'Heureux-Dube J.

concerns of prejudice and lack of relevance should have direct bearing on the disclosure and admissability of counselling records.

A different commonsense view based on empirical evidence and the experience of complainants is that women who report a sexual assault face the risk of further victimisation by the criminal justice system and the risk that they are more likely to be disbelieved than taken seriously. Rather than counselling records containing a mine of information for the defence about the "bad character" of the complainant, this commonsense view would see them as being peripheral to the trial process and a source of probable misinterpretation and bias. In fact, once the basis of relevancy decisions have been shown to be founded on stereotype and myth, information to do with prior sexual history, prior drug and/or alcohol history and the like can have no bearing on the facts in issue in a sexual assault trial or the complainant's credibility. Further, "records concerning statements made in the course of therapy are both hearsay and inherently problematic as regards reliability"[116] because of the methods by which they are created and information is elicited by a counsellor and cannot be equated with other relevant evidence given in the course of a sexual assault trial, such as police statements from the complainant and other witnesses, medical examinations of the complainant, DNA evidence and the like.

The different commonsense views which can inform the concept of relevance are illustrated in *Osolin's* case. Although, one of the majority judges, Cory J, conceded that the defence's purpose for cross-examination on the notation in question "appear[ed] to be the very sort of improper purpose for which evidence cannot be adduced"[117] but his Honour found that:

> [I]t is the duty of the trial judge to ensure that the accused's rights with regard to cross-examination, which are so essential to the defence, are protected. The trial judge had before him all the medical records. It would have been appropriate to permit cross-examination with regard to the [notation], particularly to determine if it would throw any light either upon *a possible motive of the complainant to allege that she was the victim of sexual assault or with regard to her conduct which might have led the appellant to believe that she was consenting to sexual advances* (emphasis added).[118]

Justice Cory reveals the influence of the myth that women are prone to make false allegations of sexual assault in his appraisal of the relevance of the notation in question. Consider the different commonsense view of L'Heureux-Dube J who directly challenges the myths associated with women who allege sexual assault:

> With regard to the ... notation, I am unable to see how this statement, four and a half months after the incident, can be at all relevant to the issues of consent or the appellant's mistaken belief in consent at the time. The complainant's reflections on how the situation might have been avoided, even assuming they are correct, can have no probative value as to whether or not there was consent to the assault or mistaken belief in consent on the part of the appellant. In any event, it is hardly surprising that such statements are to found in medical records; in this, as in other traumatic situations such as the death of a loved one, ... it is not uncommon for people to blame

116 *Ibid* at 496.
117 *Ibid* at 522, per Cory J.
118 *Ibid* at 522.

> themselves for the event. It is well known that victims of sexual assault in particular often feel responsible for not having done enough to prevent the attack.[119]

The prejudicial basis of relevancy decisions in sexual assault trials clearly supports the enactment of a statutory exclusion to reflect the need to discard such prejudice in the interests of justice. In fact, for there to be any connection between information in counselling records and the credibility of the complainant or a fact in issue, it "must be bridged by stereotype (that "unchaste" women lie and "unchaste" women consent indiscriminately), *otherwise the propositions make no sense.*[120] A draft statutory exclusion in set out in Appendix 1.

C. Public Policy Considerations in Sexual Assault Trials

In relation to a client privilege, the majority decision by the High Court in *Carter v Managing Partner, Northmore Hale Davy and Leake* (*Carter*)[121] supports the argument that public interest considerations can be sufficient to outweigh the objections to an absolute privilege. In *Carter*, Brennan, Deane and McHugh JJ held that the common law did not recognise an exception to legal professional privilege in favour of an accused person in a criminal trial on the grounds that production of the privileged information may establish the innocence of the accused.[122] Their Honours considered that to create such an exception to legal professional privilege on the grounds of the public interest in an accused's right to a fair trial "would interfere with the operation of the doctrine of legal professional privilege in ways that are altogether hostile to its rationale".[123]

In *Grant v Downs*[124] Stephen, Mason and Murphy JJ stated that the rationale for legal professional privilege was to "assist and enhance the administration of justice"[125] and that its existence reflected the *paramountcy* of the public interest in "facilitating the representation of clients by legal advisers"[126] over the public interest in promoting a fair trial by making available all relevant evidence to the accused. In the opinion of Brennan J in *Carter*, "[T]he basic justification for allowing the privilege is the public interest in facilitating the application of the rule

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119 *Ibid* at 506.

120 *R v Seaboyer*, note 44 *supra* at 227, per L'Heureux-Dube J. This is, in fact, exactly the type of reasoning that would need to be involved in permitting the admissibility of character evidence under the exceptions to the credibility rule under s 103, *Evidence Act* 1995 (NSW).

121 Note 97 *supra.*

122 *Ibid* at 131, per Brennan J; at 140, per Deane J; at 167 per McHugh J. Note, however, that this case does not apply in New South Wales. In *R v Pearson* (unreported, Court of Criminal Appeal, Gleeson, CJ, Smart and Sully JJ, 5 March 1996) the Court of Criminal Appeal held that "[T]he practical effect of s 123 of the *Evidence Act* 1995 (NSW), when read together with s 118 ... is to reverse the effect of the decision of the High Court in *Carter*, note 97 *supra.* It is common ground that in criminal proceedings to which the *Evidence Act* 1995 (NSW) applies, s 123 produces the practical result that legal professional privilege does not stand in the way of obtaining access to subpoenaed documents, at least in circumstances where a legitimate forensic purpose of the accused at a criminal trial is served by being given access to such documents for the purpose of potential use at the trial": at 5-6, per Gleeson CJ, with whom Smart and Sully JJ agreed.

123 See *Carter*, note 97 *supra* at 167, per McHugh J.

124 (1976) 135 CLR 674.

125 *Ibid* at 685.

126 *Ibid* at 685, per Stephen, Mason and Murphy JJ.

of law"[127] and, apart from exceptions on the basis of illegality, Brennan J considered that the public interest in an accused's right to a fair trial was insufficient to ever outweigh the public interest in preserving the confidentiality of the lawyer/client relationship:

> An exception created in order to serve the interests of a person charged with a criminal offence would create, at least potentially, a right in such a person to destroy any privileged communication between legal adviser and client... No a priori assurance of confidentiality could be given to a client consulting a legal adviser, since confidentiality of such consultations would be contingent on the absence of an accused person's subpoena seeking production or evidence of the communication. The contingency would have a chilling effect on the seeking of advice as to the law governing proposed conduct or relating to an event or transaction... An exception which permits a person charged with a criminal offence to compel production or evidence of privileged communications would not only be out of harmony with the purpose of the privilege; it would also permit absurd anomalies.[128]

In Australia, there is now clear precedent for a common law privilege to protect particular confidential communications with no exception based on the public interest in an accused's right to a fair trial and subject only to exceptions or exclusions founded on illegality.[129] For public policy reasons, the High Court has deemed that the rights of the accused are secondary to maintaining the integrity of the lawyer/client relationship (and the confidentiality which is essential to its operation) and, hence, the administration of justice.

The question which arises is whether the rationale for protecting the confidentiality of the client/counsellor relationship is also sufficient to outweigh the public interest in an accused's right to adduce all available evidence.[130] More particularly, the question is whether the administration of justice is best served by preventing the distortion of a sexual assault trial into an inquiry into the moral worth of the complainant and the protection of confidentiality and the rights and privacy of particular victims of crime. Nonetheless, in relation to legal professional privilege, Deane J recognised in *Carter* that:

> [T]here is force in the argument that legal professional privilege should, as a matter of policy, give way in any case, particularly a criminal case, in which a conclusion is reached that the considerations favouring the disclosure of privileged material in the particular circumstances of the particular case outweigh the considerations favouring the preservation of confidentiality.[131]

His Honour also commented that it may appear "somewhat paradoxical that 'the perfect administration of justice' should accord priority to confidentiality of disclosures over the interests of a fair trial, particularly where an accused is in

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127 Note 97 *supra* at 120.

128 *Ibid* at 129-30.

129 *Ibid* at 130, per Brennan J; at 134-5, per Deane J; at 163, per McHugh J.

130 The issue of whether counselling/therapeutic records should be subject to a privilege in *all* criminal and civil trials is not within the scope of this article but has been addressed in a recent US Supreme Court case which held that significant private and public interests supported the recognition of a psychotherapist privilege in a civil action for wrongful death: *Jaffee v Redmond* (unreported, Supreme Court of the United States, Rehnquist CJ, Stevens, O'Connor, Kennedy, Souter, Tomas, Ginsburg, Breyer JJ, 13 June 1996). In addition, some form of psychotherapist/patient privilege has been enacted in 50 states in the United States.

131 Note 97 *supra* at 137-8.

jeopardy in a criminal trial for a serious offence".[132] Such arguments can also be made in relation to a client/counsellor privilege but can be answered by recognising that, because of the non-investigative and therapeutic context of a counselling relationship, the cases in which a client/counsellor privilege would significantly infringe the rights of the accused "are so exceptional that they do not justify its curtailment".[133] Further, a client/counsellor privilege "does not rest simply upon the confidence reposed by the client" in her adviser but rests upon "the necessity of carrying ... out [the confidence]".[134] In other words, because confidentiality is inimical to the psychological recovery of a victim of sexual assault, because of the life and death consequences that can arise as the result of a sexual assault,[135] the likely decline in reports of sexual assault to the police and the consequent impediment to the apprehension and conviction of offenders, and the public interest in preventing the undermining of the administration of justice by perpetuating the myths about women who are sexually assaulted, the rationale for protecting the confidentiality of the client/counsellor relationship can be said to clearly outweigh the rights of the accused to have all relevant evidence made available to him. In essence, the public policy issue is whether we as a society are prepared to indirectly encourage the widespread sexual assault of (mostly) women and children by inhibiting the opportunities for sexual assault victims to safely report and recover from trauma. On the basis of clear evidence from sexual assault services and counsellors that complainants will actively censor their communications or not seek counselling at all, it can also be argued that if a client's communications are "not completely secure, the likelihood is that the privileged communication ... would not be made ... in the first place"[136] and that uninhibited written records of client communications will not be made by counsellors, since counsellors will be "conscious of the danger to the client involved in the making or retaining of an uninhibited record".[137]

Furthermore, the objections to the creation of a client privilege need to be seen in perspective, since, unlike a lawyer/client relationship in which the types of confidential communications subject to privilege are unlimited,[138] information communicated to a counsellor by a victim of sexual assault will be specifically related to the *effect* of the sexual assault upon the victim.[139] As previously discussed:

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132 *Ibid* at 154, per Toohey J.

133 *Ibid* at 138, per Deane J commenting on legal professional privilege.

134 *Russell v Jackson* (1851) 68 ER 558 at 560 per Turner VC; cited in *Carter*, note 97 *supra* at 146-7, per Toohey J.

135 Cossins et al, note 11 *supra* at 7; see also note 95 *supra*.

136 See *Carter*, note 97 *supra* at 139, per Deane J.

137 *Ibid*.

138 SB McNicol, note 97 *supra*, p 41.

139 L Gardiner and M Roberson, note 26 *supra* at 9.

> "[w]hile [police] investigations and witness testimony are oriented toward ascertaining *historical* facts, therapy generally focuses on exploring the complainant's emotional and psychological responses to certain events, after the alleged assault has taken place"(emphasis added).[140]

As such, the processing of the psychological effects of a sexual assault will have no relevance to one of the main aims of the defence, that of establishing that the victim has made a false allegation either because she actually consented to sexual relations with the accused, or because she had a motive for lying.

C. Scope of a Client Privilege

Communications between a lawyer and client are subject to the "dominant purpose" test under ss 118 and 119 of the *Evidence Act* 1995 (NSW); that is, communications which have been made "for the dominant purpose of the lawyer ... providing legal advice".[141] This statement of the scope of client legal privilege raises the questions as to whether *all* communications contained in counselling records should be subject to a client privilege for the purposes of preventing pre-trial disclosure or disclosure in court. In addition, along the lines of legal professional privilege[142] and client legal privilege, should communications which are recorded as having been made between a counsellor and a representative of the client (for example, friend, spouse, parent or other relative) and between a counsellor and a third party (for example, colleague of a counsellor) and between the client and a counsellor's agent also be subject to the privilege? Arguably, such communications, as well as all those between the counsellor and client, should be subject to the privilege if they were imparted in a relationship which encourages the imparting of confidences and arises by virtue of the counsellor's (or agent's) employment capacity or by the actual imparting of the confidences themselves.

D. Waiver of the Privilege

In order to ensure the greatest degree of protection of a client's confidentiality, it would be necessary for the privilege to belong to the client. A counsellor would then be prevented from disclosing any document or answering any question which would reveal the confidential communications of the client unless the consent of the client was obtained, thus preserving the integrity of the client/counsellor relationship. Such a privilege is analogous to client legal privilege and legal professional privilege, both of which can be waived by the client. However, the creation of a privilege that belongs to the client is contrary to the nature of the cleric privilege under s 127 of the *Evidence Act* 1995 (NSW) which belongs to the cleric. This represents a second option that, in order to prevent a complainant from being subject to undue pressure to waive the privilege, the privilege ought to belong to the counsellor. However, the authors consider that to ensure that counsellors do not readily hand over the records in response to a subpoena and to

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140 *O'Connor v R*, note 37 *supra*, see unreported summary, per McLachlin J.

141 This test also applies to the contents of a confidential document prepared by the client or lawyer: *Evidence Act* 1995 (NSW), ss118(c) and 119(b).

142 SB McNicol, note 97 *supra*, p 44.

minimise the impact of lack of control to the recovery process, the preferable option is to create a privilege that belongs to the client.

E. An Example of a Client Privilege

In New South Wales, s 127 of the *Evidence Act* 1995 (NSW) creates a statutory privilege relating to confidential communications between clerics and penitents. There are strong analogies between the client/counsellor relationship and the cleric/penitent relationship, since both are dependent upon trust and the need for confidentiality. Like clerics, counsellors serve an important role in promoting the psychological well-being of people who seek their services. In fact, clerics and counsellors may often be the only people to whom others can turn for solace and advice and this is particularly the case for victims of sexual assault who may be stigmatised, blamed or ostracised for being sexually assaulted.[143] In fact, "[f]ailure to receive needed support from those closest to the victim can result in an experience that has been referred to as the 'second injury".[144] In order to appropriately protect confidential communications between a counsellor and a complainant in a sexual assault matter, a special privilege similar to s 127 could be drafted. A draft provision is set out in Appendix 1.

F. The Scope of Option 2: Weighting the Balance in Favour of the Accused

Until *Carter's* case, legal professional privilege was considered by a number of authorities to not apply to a refusal to give evidence or disclose documents in a criminal trial if that information could establish the innocence of the accused.[145] However, the dissenting judges in *Carter* envisaged the existence of a client privilege (applicable to the lawyer/client relationship) subject to an exception in favour of an accused in a criminal trial.[146] Clearly then, it would be possible to create a client privilege to protect the confidentiality of counselling records in a criminal trial with the express exception that the privilege would not apply if, in the opinion of the judicial officer, information in the records would be necessary[147] for establishing the innocence of the accused.[148] A privilege of this type is, thus,

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143 Standing Committee on Social Issues, note 5 *supra* at 4-5.

144 *Ibid* at 5 (references omitted).

145 SB McNicol, note 97 *supra*, pp 101-4; R Cross and C Tapper, *Cross on Evidence* (1985) Butterworths, London, pp 399-400; D Byrne and JD Heydon, *Cross on Evidence*, Butterworths, (1991) pp 711-12; PJ Richardson, *Archbold: Pleading, Evidence and Practice in Criminal Cases*, Sweet and Maxwell (1993) p 1573. In citing these texts in *Carter*, note 97 *supra*, Deane J questioned the reliability of the authority on which this supposed exception was based: at 136-7. In His Honour's view, such an exception "should not be accepted in this country": at 136.

146 See *Carter*, *ibid* at 156, per Toohey J; at 158-9, per Gaudron J.

147 *Ibid* at 156-7, per Toohey J.

148 This express exception may need to be made in addition to exceptions based on illegality which have been held to apply to legal professional privilege and include: communications made for the purposes of crime, fraud, or abuse power, concealing the whereabouts of a ward of court or frustrating the execution of a court order: see *Carter*, *ibid* at 130, per Brennan J. Note the view of Deane J in *Carter*, that these exceptions are better described as "exclusions from the reach of legal professional privilege", since they "are directed to circumstances in which the privilege does not attach with the result that the particular communication or document is not protected by legal professional privilege at all": *ibid* at 134-5. Justice McHugh also

inherently different to the legal professional privilege type of privilege,[149] in that the exception indicates that the public interest in protecting the confidentiality of the client/counsellor relationship is not paramount and must be weighed against the public interest in protecting the accused's right to a fair trial. However, this option does not constitute an infringement of an accused's right to adduce all relevant evidence, since where a substantiated claim of relevance is made out by the defence, the privilege would not apply to some or all of the records in question.

For the purposes of this article, the critical question is whether a privilege subject to an exception would adequately protect the administration of justice by preventing the misuse of counselling records to transform the trial into an inquiry into the moral worth of the complainant. First, the exception would need to be drafted to place:

> [T]he onus on the accused of satisfying the court that the [information is] necessary for the proper conduct of the defence though the accused may be at a disadvantage in satisfying that onus. In that respect, if some onus is not placed on the accused, there is a real risk that the curial process may be frustrated by fishing expeditions.[150]

In undertaking that balancing process, the exception would then need to be subject to explicit guidelines, in order to prevent the defence from making unsubstantiated claims as to the relevance of the records and having ready access to them for the purposes of fishing for "bad character" information about the complainant. In arguing that the privilege did not apply, defence counsel would need to be required to show that a claim of privilege could not be sustained by demonstrating how the counselling records in question would be necessary for establishing the innocence of the accused. In other words, a judicial officer would need to make an assessment of "the amount of material assistance to the defence which is likely to be derived from disclosure".[151] Legislation would need to stipulate that the defence would be required to show a legitimate claim and to base its claim on more than a general unsupported claim concerning the credibility of a witness, an unsupported claim that a statement of consent or a prior inconsistent statement might be revealed, that a psychiatric or therapeutic record can be taken as indicative of a witness's unreliability,[152] that the records would reveal the identity of an alleged offender, or an unsupported claim that a counsellor has implanted memories of sexual abuse in the complainant's mind. In essence, fishing expeditions for the purpose of possibly leading the defence to relevant evidence should not be sufficient to bring a claim within the exception to the privilege.

Again, in order to prevent fishing expeditions by the defence, the exception would need to be applied by a judicial officer upon inspection of the records and after being satisfied that information in them is necessary for establishing the

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considers that these exceptions are in fact exclusions: *ibid* at 163. See also Toohey J for a discussion of the exceptions: *ibid* at 150-4.

149 See *Carter, ibid* at 133, per Deane J.

150 *Ibid* at 157, per Toohey J, commenting on the scope of legal professional privilege.

151 *Ibid* at 140, per Deane J.

152 See *O'Connor v R*, note 37 *supra*.

innocence of the accused.[153] The necessity for inspection of counselling records is best summed up by a Canadian judge, Judge Masse, who observed in *R v KAD:*[154]

> [I]n my limited experience, very little material in [clinical] records is of any use at all to the defence and then only marginally so. Consequently, if the entire files are ordered disclosed, the entire privacy interests of the witness will have been destroyed at great emotional cost and prejudice to the witness whereas the case for the accused will be but marginally advanced. Therefore, it seems to me that vetting the records, as tedious and as time consuming a task as that may be for a judge, is a necessary process to undertake if the privacy interests of the witness are to be balanced with the right of the accused to make full answer and defence.[155]

In exercising what is in fact a judicial discretion at this stage, guidelines would be necessary to require a judicial officer to assess the weight of the public interest in protecting confidentiality by having regard to the likelihood of psychological or physical harm to the complainant and harm to the administration of justice if confidentiality were breached. In essence, at this stage a judicial officer will be required to assess the *relevance* of the counselling records to a fact in issue or the credibility of the complainant. In order to prevent the use of a commonsense test based on stereotype and myth, an example of the legislative guidelines that would be necessary are listed below to guide a judicial officer on the issue of relevance:[156]

(i) the need to remove from the fact-finding process any discriminatory belief or bias;

(ii) the risk that the evidence may unduly arouse prejudice, sympathy or hostility in the jury;

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153 While the proposed requirements appear to impose an onerous burden on the defence, these requirements are in general accord with the principles outlined in *R v Saleam*, note 100 *supra*. In *Saleam*, the New South Wales Court of Criminal Appeal held that in relation to subpoenas couched in wide terms a trial judge "should require counsel for the accused to identify expressly and with precision the legitimate forensic purpose for which he seeks access to the documents, and the judge should refuse access to the documents until such an identification has been made." Further, the trial judge "must be satisfied that it is 'on the cards' that the documents would materially assist the accused in his defence." Finally, before granting access, a trial judge "should usually inspect the documents ... for himself, as it is unfortunately not unknown for the objection taken to be misconceived": at 18 per Hunt J. In Canada, where the Supreme Court of Canada has directly considered a court's discretion to order production of counselling records, a majority of the court held that in balancing the competing rights of the accused and the complainant, the following factors should be considered: "(1) the extent to which the record is necessary for the accused to make full answer and defence; (2) the probative value of the record; (3) the nature and extent of the reasonable expectation of privacy vested in the record; (4) whether production of the record would be premised upon any discriminatory belief or bias; (5) the potential prejudice to the complainant's dignity, privacy or security of the person that would be occasioned by production of the record": *O'Connor v R*, *ibid.* In addition, L'Heureux-Dube J proposed two further factors that the majority did not agree with: (1) "the extent to which production of records of this nature would frustrate society's interest in encouraging the reporting of sexual offences and the acquisition of treatment by victims" and (2) "the effect on the integrity of the trial process of producing or failing to produce, the record, having in mind the need to maintain consideration in the outcome": *O'Connor v R*, note 37 *supra*.

154 Unreported, Ontario Court of Justice - Provincial Division, Masse J, 29 July 1994, cited in R Delisle, "Discovery and Privilege: the Aftermath of Stinchombe, Osolin and O'Connor", presented at the 1995 Atlantic Trial Judges Seminar, 19-21 October 1995 at 33.

155 *Ibid.* This statement was made in the context of a determination of the relevance of clinical records which had been subpoened by the defence after objection by the Crown.

156 Factors (i)-(iii) and (vii) are adapted from s 276(3) of the *Canadian Criminal Code*.

(iii) the potential prejudice to the complainant's personal dignity and right of privacy;
(iv) the potential harm on the complainant's psychological and physical health (and any other person in the community);
(v) the potential harm to the administration of justice in discouraging the reporting of sexual assault and apprehension of offenders;
(vi) the public interest in affording women, men and children protection from sexual abuse and in encouraging victims of sexual assault to seek medical and psychological services and an assessment of the likelihood of victims failing to report to those services;[157]
(vii) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination of the case, having regard to both the complainant's and the accused's interests in justice;
(viii) whether the information is otherwise available to the defence and reasonable attempts have been made to gain access to it;
(ix) the likely effect of disclosure on the particular client/counsellor relationship, taking into account the likelihood of harm and the importance of confidentiality to that relationship;
(x) the ethical, moral and professional obligations of the counsellor in preserving client confidentiality;
(xi) the public interest in the maintenance of other client/counsellor relationships of a like nature to the one under consideration and the importance of confidentiality to those relationships;
(xii) the importance of confidentiality to the proper functioning of sexual assault services in general;[158] and
(xiii) an assessment of whether a subpoena is being used as an intimidatory tactic on the part of the defence[159] and the effect of that on the integrity of the administration of justice.

Where a decision is made that counselling records would be necessary for establishing the innocence of the accused, and, in order to restrict the degree of infringement of a client's confidentiality, a judicial officer would need to be required to permit disclosure only of those parts of the records which would do so, with conditions that access be given to the accused's legal representative only. A judicial officer would also need to be required to prevent the disclosure of those parts of the records which would be reasonably likely to disclose to the accused the complainant's address or employment or the names and addresses of friends

157 See *O'Connor v R*, note 37 *supra* at [156], per L'Heureux-Dube J.
158 Some funding agreements between governments and sexual assault services are based on the service being provided on a confidential basis which raises the question as to whether the disclosure confidential communications has the potential to impede the proper functioning of those services and their availability to victims of sexual assault. This type of agreement exists, for example, between the Canberra Rape Crisis Centre and the Australian Capital Territory, Commissioner for Housing: personal communication, Angela Jones, Canberra Rape Crisis Centre, 12 May 1996.
159 Some counsellors have communicated to the authors their view that subpoenas have been used as an intimidatory tactic against the complainant which has resulted in complainants dropping their complaints. See also note 191 *infra*.

and family of the complainant,[160] in the event the conditions regarding access were breached.

G. The Scope of Option 3: Weighting the Balance Against the Complainant

A general judicial discretion has been recommended by the Law Reform Commission of Western Australia (LRCWA) and the Australian Law Reform Commission (ALRC) for dealing with the confidentiality of communications between professionals (other than lawyers) and their clients, patients or sources of information.[161] The LRCWA has recommended the creation of a judicial discretion which would allow a witness to refuse to answer any question or produce any document on the grounds that the answer or production would breach a "special relationship". The Commission recommended that the discretion be exercised by striking a balance between the public interest in disclosing such information to a court and the public interest in preserving the confidentiality of the communications in question.

In New South Wales, a judicial discretion is also the preferred option of the New South Wales Attorney-General who, in a press statement issued on 10 April 1996, announced his intention to introduce legislation that will give judicial officers a "new discretion so that they will not be forced to require disclosure of secret information or the identity of the source" of information.[162] The Evidence Amendment (Confidential Communications) Bill 1996, which was released for public comment in June 1996, contains a general, non-specific discretion which is applicable to any confidential communications made to a person "acting in a professional capacity and who, when the communication was made, 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".[163] The main impetus for the introduction of a judicial discretion in New South Wales was a perceived need to protect journalists' confidential sources of information,[164] a protection which has been canvassed in a number of reports,[165] although there is some doubt as to whether other states will follow the lead of the New South Wales Government.[166] Because of this impetus, the proposed general judicial discretion is broadly drafted and lacks the specificity needed to address the specific features of the sexual assault

160 This is a necessary safeguard that arises from the evidence of fears of retribution expressed by some victims of sexual assault discussed above.

161 Law Reform Commission of Western Australia, note 89 *supra* at 19, 104-16, 129-30; Australian Law Reform Commission, *Evidence (Report No 26)*, 1985 at 513; Australian Law Reform Commission, *Evidence (Report No 38)*, 1987.

162 See also New South Wales Attorney-General's Department, *Protecting Confidential Communications from Disclosure in Court Proceedings: Discussion Paper*, 1996.

163 Evidence Amendment (Confidential Communications) Bill 1996 (NSW), Schedule 1.

164 D Nason, "State Law Reform to Protect Sources" *The Australian*, 11 April 1996; E Simper, "Source Protection Proposition Draws Fire from all Directions" *The Australian*, 13-4 April 1996.

165 See Law Reform Commission of Western Australia, note 95 *supra*; Australian Law Reform Commission, note 161 *supra*; Senate Standing Committee on Legal and Constitutional Affairs, *Off the Record: Inquiry into the Rights and Obligations of the Media* (1994) Parliament of the Commonwealth of Australia.

166 D Nason, note 164 *supra*.

trial, the victim of sexual assault/counsellor relationship and the public interest in preserving the confidentiality of such a relationship.

The question is whether a judicial discretion is sufficient to overcome the disadvantages to a complainant as a result of disclosure of confidential communications in a sexual assault trial. The application of a judicial discretion may appear to be very similar to the client privilege subject to an exception discussed under option 2. However, the starting point of a judicial discretion is quite different, since a judicial discretion of the type proposed by the New South Wales Government maintains the rule that a witness is required to answer any questions or produce any document or face prosecution for contempt of court. As such, when the discretion is exercised, it is merely a *relaxation* of the rule in particular circumstances, so that the onus is on the witness to make out a case for being excused from answering any question or producing any document. By way of contrast, the starting point of a client privilege subject to an exception is that the rule compelling a witness to answer questions or produce documents is *displaced* unless the defence is able to show that the privilege should not apply on the grounds that the confidential communications in questions are necessary for establishing the innocence of the accused. It can be argued, therefore, that a judicial discretion places too great a burden on a counsellor to establish why they should be excused from answering a question or disclosing a document. The burden not only has implications for the likely disadvantage to the complainant in a sexual assault trial, but also has resource implications for counsellors and sexual assault services in relation to representing themselves or instructing legal representation.

The view expressed by a respondent to the LRCWA's discussion paper on confidential relationships is apposite here in that a "[J]udicial discretion is only as good as the person making the decision. People who reach the status when they are required to make such decisions may well be older, educated in a conservative way, and be of middle or upper class"[167] and, therefore, out of touch with modern community standards. There is sufficient evidence to show that male judges and magistrates (who constitute the vast majority of the judiciary) are likely to adhere to the myths that when a woman says "no" she often means "yes", that women often lead men on and then cry rape to protect their reputations and that if a woman has had consensual sex with one man on a casual basis outside of marriage she is likely to consent to sex with *any* man.[168] As the following discussion shows, it is likely, therefore, that such traditional prejudices will affect the exercise of a judicial discretion governing the disclosure and admissibility of counselling records.

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167 Law Reform Commission of Western Australia, note 89 *supra* at 128.

168 For a summary of the myths associated with sexual assault, see Standing Committee on Social Issues, note 5 *supra* at 6; *R v Seaboyer*, note 44 *supra* at 208-9, per L'Heureux-Dube J; *R v Osolin*, note 7 *supra* at 498, per L'Heureux-Dube J. For evidence of the effect of these myths in sexual assault trials see R Kaspiew, note 51 *supra* at 351-82; R Graycar and J Morgan, *The Hidden Gender of Law*, The Federation Press (1990) pp 339-41; C Smart, "Law's Truth/Women's Experiences" in R Graycar (ed) *Dissenting Opinions: Feminist Explorations in Law and Society* (1990) 1; *R v Seaboyer*, note 44 *supra* at 213-14, per L'Heureux-Dube J.

H. Judicial Discretion versus Statutory Privilege

Because of the distortion that can and does occur during sexual assault trials about a complainant's conduct and her "moral worth", it is unlikely that a judicial discretion will adequately balance the competing public interests in the administration of justice. For example, the judicial discretions under the rape shield provisions, s 409B of the *Crimes Act* 1900 (NSW) and s 37A of the *Evidence Act* 1958 (Vic), have been shown to be incapable of adequately protecting a complainant in a sexual assault trial from having information about her prior sexual history (either with the accused or others) being admitted into evidence.[169] Research shows that when defence counsel introduce information concerning past sexual history, stereotype and myths about "unchaste" women will be used by juries to "resolve" the issue to which the past sexual history is directed.[170] For example, Kaspiew explains the way "[T]he boundaries [are] drawn around the victim/survivor's story by the legal process ... [in such a way as to mean] that a significant amount of [a woman's] sexual history is deemed relevant to [a] case".[171] In her discussion of *R v Ellis*, she documents how, under the judicial discretion residing in s 37A, evidence was admitted of a consensual sexual history with the complainant's *other* employer, as was evidence in relation to consensual relationships with two other men, thus raising the moral worth of the complainant:

> The defence ... used this evidence as an opportunity to denigrate the victim/survivor, evoking stock stories about 'loose women'. In relation to evidence about her relationship with her other employer, *deemed relevant because this led to the defendant demanding sex*, this aim was achieved by forcing the victim/survivor to describe the incident in detail.
>
> [Q] You had intercourse on a brick pile, is that what you're telling the jury?
> [A] No it was actually in the back of his car.
> [Q] What did you do first on the brick pile? (Inaudible response)
> [Q] You're not reluctant to tell us this are you, [Miss Smith]?
> [A] It's not that I'm reluctant as that I'm embarrassed.
> [Q] You're embarrassed to tell, well, unfortunately you have to say some things in courts that are embarrassing. You're on the brick pile, Adams has come out and what did you do there?
> [A] As I said we were talking and then we started kissing and then we had oral sex.
> [Q] You sucked his penis, did you?
> [A] Yes, I did.
> [Q] You sucked his penis on the brick pile opposite the office when there were two other men around, is that what you're telling the jury?
> [A] They're gone by that stage.[172]

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169 J Bargen and S Doyle, "Women's Experiences in Court as Victims of Sexual Assault", presented at the Australian and New Zealand Society of Criminology, 11th Annual Conference, 29 January - 1 February 1996; M Heenan, note 44 *supra*; Law Reform Commission of Victoria, note 44 *supra* at 101-4; J Bargen and E Fishwick, note 35 *supra* at 76-93. In a recent study of the application of s 37A in sexual assault trials in Victoria, Heenan reports that approximately one third of complainants were questioned about their sexual history both at the committal and trial stages: M Heenan, *ibid.*

170 See *R v Seaboyer*, note 44 *supra* at 214-15, per L'Heureux-Dube J for a summary of the relevant research.

171 R Kaspiew, note 51 *supra* at 378.

172 *Ibid* at 379 (emphasis added, footnotes omitted).

As Kaspiew observes:

> The relevance of the entire incident is questionable, but the degree of detail the victim/survivor was forced to go into is contestable even from a narrow legal perspective. *Given that the existence of the relationship was not contested, it is impossible to see what function, other than denigration of the victim/survivor, this degree of detail serves.* The defence's repetition of the detail, and the ostensible (but unsustainable) rationalisation that 'unfortunately you have to say some things in court that are embarrassing', clearly demonstrate that such denigration was the aim. That such cross-examination was permitted is evidence of the judge's complicity in this denigration. His superfluous characterisation of the incident as *'lust in the dust'* is further evidence of this complicity (emphasis added).[173]

The fact that evidence of the complainant's sexual history with her employer was deemed to be relevant in *R v Ellis* indicates the extent to which the myth that "unchaste" women will consent to sex with any man informed the proceedings in this case.

Although it has been reported that the introduction of s 409B into New South Wales in 1981[174] saw a "halv[ing of] the frequency with which the sexual experience of the complainant was raised", there have been many cases "in which evidence of prior sexual experience was admitted not conforming to the criteria specified in s 409B (3)-(8)".[175] For example, Bonney reported that "a wider scope than was perhaps intended ... has been given" to the provision, particularly in relation to the scope of s 409B(3)(b), that is, the admissibility of evidence relating to a relationship between the accused and complainant which was existing or recent at the time of the alleged offence. Bonney also reported finding little consistency in judicial rulings under the (3)(b) exception. More recently, a phone-in conducted by the New South Wales Sexual Assault Committee reported that 33 per cent of those who had been complainants in a sexual assault trial had had their prior sexual history admitted as evidence.[176] Furthermore, Bronitt reports that, whilst the introduction of s 409B saw a significant reduction in the practice of defence counsel in raising prior sexual history, its introduction had "virtually no impact on judicial practice...[I]n cases where defence counsel raised evidence of sexual experience *the evidence was admitted in 93.3 per cent of cases*"(emphasis added).[177]

This evidence concurs with that of Bargen and Fishwick who report recent restrictive interpretations of s 409B by the New South Wales Court of Criminal Appeal (CCA) in *R v Henning,*[178] *Morgan*[179] and *M v R,*[180] in particular the

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173 *Ibid* (footnotes omitted).

174 This provision was introduced under the *Crimes (Sexual Assault) Amendment Act* 1981 (NSW).

175 R Bonney, note 44 *supra* at 41, cited in J Bargen and E Fishwick, note 35 *supra* at 85.

176 New South Wales Sexual Assault Committee, *Sexual Assault Phone-In Report*, Ministry for the Status and Advancement of Women, 1993 at 41.

177 SH Bronitt, *Rape Law Reform: A New Agenda*, unpublished paper tabled during the course of evidence to the Standing Committee on Social Issues, 30 August 1995, cited in Standing Committee on Social Issues, note 4 *supra* at 25.

178 Unreported, New South Wales Court of Criminal Appeal, Gleeson CJ, Campbell and Matthews JJ, 11 May 1990.

179 (1993) 67 A Crim R 526.

180 (1993) 67 A Crim R 549.

suggestion that "the protection provided for [the complainant] is often at the expense of the (more traditional) protections provided to the accused in all criminal trials".[181] Concerns about these restrictive interpretations have also been made by the New South Wales Parliamentary Standing Committee on Social Issues which considered that "the NSW Court of Criminal Appeal has significantly eroded the protection afforded to complainants under s 409B"[182] and "that recent interpretations of s 409B by the courts are operating to undermine the original intent of the provision".[183]

In particular, the New South Wales CCA has observed that because of the requirement under s 409B that a judge must be satisfied that the probative value of the complainant's sexual history outweighs any distress, humiliation or embarassment a complainant might suffer, this amounts to:

> [A] strong protection for the victim - indeed a double protection. First, the evidence must specifically come within one of the permitted categories; and secondly, the court must decide that the probative value of the evidence outweighs any humiliation or distress it may cause. This is a distinctly stronger protection for the victim that a mere judicial discretion to disallow any relevant question.[184]

Similarly, the CCA in *Morgan* was of the opinion that the provision is weighted too far in favour of protection of the complainant and throws up the possibility of injustice to the accused.[185] However, such an opinion (by judges who are unlikely to have had the experience of their intimate sexual details being revealed in open court, nor the experience of refuting the implication that evidence of a sexual history means that they could be lying about something that happened subsequently) reveals that the CCA has little understanding that there is much more at stake for a complainant than distress or embarassment in having her sexual history admitted as evidence. As McLachlin J observed in *Seaboyer:*

> The main purpose of [rape shield provisions was] to abolish the old common law rules which permitted evidence of the complainant's sexual conduct which was of little probative value and calculated to mislead the jury. The common law permitted questioning on the prior sexual conduct of a complainant without proof of relevance to a specific issue in the trial. Evidence that the complainant had relations with the accused and others was routinely presented (and accepted by judges and juries) as tending to make it more likely that the complainant had consented to the alleged assault and as undermining her credibility generally. These inferences were based not

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181 J Bargen and E Fishwick, note 35 *supra* at 87.

182 Standing Committee on Social Issues, note 4 *supra* at 25-6.

183 *Ibid* at 28.

184 *M v R,* note 180 *supra* at 557, per Gleeson CJ, Allen and Meagher JJ.

185 *Morgan,* note 179 *supra* at 535, per Mahoney JA with whom Gleeson CJ and Sully J agreed. Even more problematic was the view of the CCA that based on "common human experience" it would be open to a jury to conclude that in some circumstances women who have had prior sexual intercourse are of bad character and lack credibility: *ibid* at 532, per Mahoney JA. Specifically, Mahoney JA observed: "But I do not think I should conclude that it would not be properly open to a jury of men and women to conclude that for [the complainant] to have such sexual intercourse an hour or two after forced intercourse is, in the relevant sense, unlikely or contrary to human experience": *ibid* at 533. For those reasons, the CCA concluded that the trial judge should have permitted cross-examination of the complainant about her sexual relations with her boyfriend after the alleged sexual assault by Morgan and the verdict of the trial judge was set aside and a new trial ordered. Implicitly, the only possible explanation for the complainant having sex with her boyfriend after the alleged sexual assault by Morgan was that she had made a false complaint and had in fact consented to sex with him.

> on facts, but on the myths that unchaste women were more likely to consent to intercourse and in any event, were less worthy of belief. These twin myths are now discredited.[186]

If such evidence is admitted, the complainant is at the mercy of the defence to reconstruct her sexual history in such a way as to give life to the myths associated with "unchaste" women and women who are portrayed as sexually immoral are likely to find they are considered less deserving of protection by the criminal justice system. Even the mere suggestion that a complainant has falsely accused the accused because of their prior sexual history (whether true or not) is likely to be sufficient to prejudice a jury against the complainant. Given that a significant proportion of sexual assaults of women are committed by men known to them,[187] there is obviously wide scope for the continued admission of this type of evidence through a wide interpretation of s 409B and the continued abuse of the administration of justice by the use of defence strategies to discredit the complainant.

The above examples demonstrate the problems associated with the application of a judicial discretion in sexual assault trials. It cannot be over-emphasised how important the role of a judicial officer is in a sexual assault trial, since he or she "determines the appropriateness of particular lines of cross-examination and rules on questions of admissibility".[188] In fact, as the "'lust in the dust' comment (by the judge in *R v Ellis*) indicates, stock stories could not be perpetuated in the legal system without judicial complicity".[189] For these reasons, the disclosure of confidential communications between a complainant and her counsellor under a judicial discretion has the potential to undermine the administration of justice by reinforcing the de-facto burden on a complainant to prove her "moral worth". Short of being severely physically injured during a sexual assault (and even in that situation there is no guarantee),[190] this is a very difficult burden for a complainant to shift. In addition, the administration of justice is further undermined if subpoenas seeking counselling records are being used as a tactic of intimidation to deter victims from proceeding with cases.[191]

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186 *R v Seaboyer*, note 44 *supra* at 258.

187 Standing Committee on Social Issues, note 5 *supra* at 107, 137.

188 R Kaspiew, note 51 *supra* at 379.

189 *Ibid.*

190 See for example, *R v Henning*, note 178 *supra*, in which the complainant's allegations of gang-rape by five men, were supported by extensive injuries described as those usually only seen in immediate post-childbirth. The complainant had given evidence that she had known one of the accused men at school but had not seen him since leaving school except on one occasion about a month before the assault. Remarkably, the CCA held that the Crown's questioning of the complainant on this issue raised the issue of a "recent relationship" under s 409B(3)(b) which, in turn, raised the exception to admissible prior sexual history under s 409B(5). The CCA quashed the convictions of the five accused men on that basis and ordered a re-trial.

191 Such a tactic has been explicitly recommended by Canadian Bar Association: Sharon McIvor interviewed by Geraldine Doogue, *Life Matters*, ABC Radio, 30 January 1996; Women's Legal and Education Action Fund (1995) 6 *Leaflines* 5. In addition, Canadian cases indicate the broad nature of what can only be described as fishing expeditions on the part of the defence; in *R v K(M)* (1994) 30 CR (4th) 94, for example, the defence sought production to virtually all existing official information about the complainant, who alleged that she had been sexually abused by her uncle at the age of 14. Subpoenas were issued in relation to the complainant's school records, medical records, records of attendances at a birth control

I. The New South Wales Draft Judicial Discretion

The draft judicial discretion which is the subject of the Evidence Amendment (Confidential Communications) Bill 1996 may be exercised on the court's own initiative or on the application of either the confider (in the case of counselling records, the complainant) or the confidant (in the case of counselling records, the counsellor). The court is required to "direct that evidence not be adduced" if it is satisfied that two criteria apply:

(i) "that harm would or might be caused (whether directly or indirectly)" to the confider from disclosure; and

(ii) "the nature and extent of the harm outweighs the desirability of the evidence being given".[192]

The fact that the New South Wales Attorney-General has chosen a general judicial discretion as the means by which to protect the confidentiality of the client/counsellor relationship gives rise to the following limitations:

- A judicial discretion is only as good as the person exercising it and, as discussed above, there is a judicial tendency to give great weight to an accused's right to adduce all relevant evidence. Many judicial officers remain uninformed about the issues affecting complainants in sexual assault trials and there is a substantial risk that stereotype and myth will affect the exercise of the discretion. If disclosure is granted, the records can still be used by the defence to prejudice judicial officers and juries against complainants.
- A judicial discretion assumes that counselling records may be relevant, however, this article has shown that the communications in such records can only have a bearing on the issues in a sexual assault trial if the decision as to relevance is based on stereotype and myth about women who allege sexual assault. As such, a discretion does nothing to address the clear threat to the administration of justice by the disclosure of counselling records to the defence.
- A judicial discretion maintains the rule that a witness is required to answer any questions or produce any documents or face contempt of court. This means that the onus will be on counsellors or complainants to satisfy the court that it should exercise its discretion to protect the disclosure of confidential counselling records to the defence. This gives rise to major resource issues, such as, are sexual assault services and private counsellors sufficiently resourced to hire legal representation or will counsellors be willing to appear in court themselves? If a counsellor is not willing to make out a case to protect her or his client's confidentiality, will complainants have the resources to hire legal representation themselves and, if not, the ability to appear in court to represent their interests?

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clinic, records of admissions to and treatment in hospital and records with the Children's Aid Society. In the face of such wide-ranging searches on the part of the defence, it is obvious that any and all aspects of a complainant's life history, as recorded in official records, may be used against her if such information is deemed to be relevant and admissible.

192 In making that assessment the court *may* take into account a list of seven broad and general factors.

- Under common law principles, if a counsellor objects to the requirement that he or she comply with a defence subpoena, the defence must first establish a legitimate forensic purpose before access will be granted to counselling records.[193] Since there is no indication in the legislation that this common law rule is to be displaced,[194] it appears that the issue as to whether confidentiality should be a ground for preventing disclosure will be assessed once a legitimate forensic purpose has been satisfied. However, the proposed judicial discretion places the onus on the counsellor to justify a claim of confidentiality. At this stage of the inquiry, therefore, there is potentially less protection available because of the switch in onus onto the counsellor.
- Judicial officers will be required to undertake a new balancing process in every individual case which means that variation in approaches by different judicial officers will give rise to inconsistency and an inability to predict when disclosure will occur.
- No guarantee of confidentiality can be given to victims of sexual assault since there is no way of predicting the circumstances in which the discretion will be exercised in favour of the rights of the complainant.
- A general judicial discretion does not provide sufficient safeguards to adequately address the specific problems associated with breach of confidentiality and its impact on the personal safety and recovery of victims of sexual assault.
- The proposed general judicial discretion fails to direct judicial officers to prevent the disclosure of personal details of a complainant in a sexual assault trial such as her address, place of work, and the counselling service she attends. This means that the very real fears that sexual assault victims have for their safety following an assault (as discussed in Part II) are not taken into account by the proposal.

In addition, it is of particular concern that the proposed discretion refers only to *evidence* that may be adduced. Confidential counselling records are frequently subpoenaed and disclosed to the defence. Defence counsel use that information to inform their cross-examination of the complainant without openly acknowledging its source but will not in all cases attempt to introduce the actual counselling records into evidence. Because the proposed judicial discretion explicitly states that the court may only direct that protected confidences not be introduced into *evidence*, it thereby creates a loophole that will allow defence lawyers to argue that the discretion does not permit the court to deny a party access to protected confidences by way of subpoena. To remedy this situation, the discretion must allow a court to direct that confidential information either not be adduced into evidence or produced to a party to proceedings.

193 *R v Saleam*, note 100 *supra*.

194 The authors are grateful to Jill Hunter for this observation.

V. CONCLUSION

By placing the issue of the protection of counselling records within the context of the stereotype and myth which continue to plague sexual assault trials, what emerges is that the use of subpoenas to gain access to a complainant's counselling records is a specific defence strategy designed to undermine the administration of justice. It is likely that defence counsel use subpoenas either as a tactic of intimidation to encourage complainants to withdraw their complaint or to 'fish' for information about a complainant's 'bad character'.

Counsellors who are charged with the responsibility of resisting defence access to counselling records are now engaged in a new battlefront with defence lawyers over the respective rights of the complainant and the accused in a sexual assault trial. The effects of the disclosure that have been examined in this article support the view that there is a clear public interest in introducing effective law reform to protect the confidentiality of counselling records. Arguments based on both basic principles of evidence and public policy grounds are sufficient to support major legislative reform to protect records from disclosure, either in the form of a statutory exclusion or a client/counsellor privilege akin to legal professsional privilege to prevent:

- the perpetuation of the stereotype and myth associated with women who allege sexual assault and re-victimisation of complainants by the criminal justice system;
- the introduction of potentially unreliable and inaccurate hearsay evidence;
- the distortion of confidential communications outside of an understanding of the therapeutic and healing process; and
- a decrease in, and continued under-reporting of sexual assault and consequent under-prosecution of offenders.

The New South Wales draft judicial discretion represents an inadequate response to serious flaws in the way sexual assault trials have been and continue to be conducted as inquiries into the moral worth of complainants. The judicial response to s 409B of the *Crimes Act* shows how judicial officers can undermine the intention of Parliament to remedy the injustice imposed on complainants in sexual assault trials. If the New South Wales Attorney-General is serious about creating a remedy for the situation that led to the gaoling of Di Lucas, the history of the judicial interpretation of s 409B shows that the Attorney must consider a more effective law reform option than a judicial discretion to prevent it succumbing to a similar fate.

The extent to which counselling records continue to be disclosed to the defence or deemed to be relevant in sexual assault trials will confirm the view that the criminal justice system is complicit in indirectly encouraging the sexual assault of women and children. Indeed, the relevance of "bad character" evidence can only be sustained by the belief that "unchaste" women are unrapable. If judges adhere to such a belief they will always find that the records are relevant for the accused to have a fair trial. In the words of one defence lawyer:

> The myth is that a 'bad woman' is *incapable* of being raped... We have to deal with the myth that the credibility of a 'bad woman' is immediately in question. I was never sure what that phrase meant... [A]ll I knew was that it was of benefit to hurl as much dirt as possible in the direction of such a woman, hoping that some of it would stick and that the jury would disbelieve what she said (emphasis added).[195]

It seems apposite for L'Heureux-Dube J to have the last word on this matter: "If, indeed, we are searching for the truth, such a result is repugnant"[196] and the use of counselling records to produce such a result must cease to be countenanced by the criminal justice system.

195 Quoted in *R v Seaboyer*, note 44 *supra* at 239, per L'Heureux-Dube J (emphasis added).
196 *Ibid.*

APPENDIX 1

Definitions

127A (1) In this Division:

"complainant" means any person who makes a complaint that a sexual offence as under a relevant provision of the *Crimes Act* 1900 (NSW)[197] has been committed against her/him by another person/s and by reason of making the complaint is required to give evidence in any court proceedings resulting from the said complaint;

"counsellor" means any person who is or was involved in a relationship with a complainant which encourages or encouraged the imparting of confidences and arises or arose by virtue of the person's employment capacity or by the actual imparting of confidences[198] and whose primary purpose is the rendering of advice or assistance.[199] This definition includes but is not limited to the following:

(a) social workers;
(b) psychologists;
(c) psychiatrists;
(d) drug and alcohol counsellors;
(e) mental health counsellors;
(f) women's refuge counsellors;
(g) health centre counsellors; and
(h) rape crisis centre counsellors.

"confidential communication" means

(a) any communication imparted by a complainant or her or his representative in a relationship with a counsellor or his/ her agent which encourages or encouraged the imparting of confidences; and
(b) any communication imparted by the counsellor to her or his agent about the complainant.

Client/Counsellor Privilege

127B (1) A person who is or was a counsellor shall not produce to a party to proceedings or divulge during proceedings concerning a sexual assault offence as defined under a relevant provision of the *Crimes Act* 1900 (NSW) any confidential

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197 A relevant provision is defined as either ss 61I-P, 64, 65A, 66, 66A-D, 66F, 73-75, 78A, 78B, 78H, 78I, 78K, 78L, 78N-Q and 80A of the *Crimes Act* 1900 (NSW).

198 This part of the definition is based on the definition of "special relationship" formulated by Hardie Boys J in *R v Secord* [1992] 3 NZLR 570 at 574 in relation to a general judicial discretion in relation to confidential communications under s 35 of the New Zealand *Evidence Amendment Act (No 2)* 1980. As Hardie Boys J recognised, it is a formulation that goes beyond the Wigmore formulation of when a confidential relationship arises: JH Wigmore, *Evidence in Trials at Common Law (Volume 8)* (McNaughton, rev) 1961 Little Brown and Company, p 527.

199 This part of the definition is adapted from s 1035 of the Californian *Criminal Code* 1980. California was the first state in America to enact a privilege for sexual assault counsellor and client communications: R Delisle, note 154 *supra* at 46.

communications made to the person by a complainant, except with the consent of the complainant in writing.

(2) Subsection (1) does not apply to any confidential communications which give rise to a person's reporting requirements under the *Child (Care and Protection) Act* 1987 (NSW).[200]

OR

Statutory Exclusion in Sexual Assault Proceedings

127B(1) Confidential communications between a complainant and her or his counsellor are excluded from production to a party to proceedings and inadmissible in proceedings concerning a sexual assault offence as defined under a relevant provision of the *Crimes Act* 1900 (NSW), except with the consent of the complainant in writing.

200 Because the client privilege would only apply in pre-trial or court proceedings in which the counsellor's client is the complainant in a sexual assault matter, this limitation would prevent any conflict with a counsellor's reporting requirements under the *Child (Care and Protection) Act* 1987 (NSW), s 22 and Reg 10, in relation to the sexual abuse of a child under 16 years of age and would probably make subsection (2)(iii) redundant. However, this subsection has been included to highlight the issue.