Legal Aid
NEW SOUTH WALES

The Sexual Assault Communications Privilege

Review of legislation, case law and practical guidance on seeking SACP material

Edwin Hulme
Solicitor, Legal Aid NSW

September 2021

"It is of utmost importance that courts acquaint themselves with relevant legislation and apply it.... Counsel plays a role in this process, too, and is obliged to point out to a judge the relevant legislation and how it ought be applied to the case in point. Non-compliance will result in an error of law and the potential invalidity of the juridical act, in this case the grant of leave to issue a subpoena and the subpoena itself. If left to go unchecked, errors of law can result in a mistrial of the accused and may cause substantial harm to others, including, in the present case, the protected confider."

Adamson J, R v Bonanno; ex parte Protected confider [2020] NSWCCA 156 at [13]

Contents

The Sexual Assault Communication Privilege

Introduction

The Sexual Assault Communications Privilege (SACP) is a qualified privilege over a broad range of counselling and therapeutic records which relate to a victim of sexual assault. The privilege applies in criminal proceedings, AVOs, and certain related civil proceedings.

The person whose records are subject to the privilege is referred to as a protected confider, or principal protected confider if they are the complainant. The legislation is otherwise not specific to role and applies equally to records of complainants, witnesses and accused persons in a criminal proceeding.

Definitions

The SACP legislation is in the Criminal Procedure Act 1986, ss295-306.

Protected confidences are *counselling communications* which are made in confidence, and are by, to or about a victim or alleged victim of a sexual assault offence: s296(1).

A sexual assault offence is a prescribed sexual offence: s295. Prescribed sexual offences are defined in reg 4 of the *Criminal Records Regulation 2019*.

Counselling communications are protected confidences even if they are made before the relevant sexual assault offence: s296(2(a), or are unrelated to the relevant sexual assault offence: s296(2)(b).

The legislation applies to subpoenas in criminal proceedings (defined to include AVO proceedings): s295.

Key features of the legislation

- Protected confidences cannot be compelled at all in preliminary criminal proceedings: s297(1)-(3). Preliminary criminal proceedings include committal and bail proceedings: s295.
- Leave of the Court is required to compel production: s298(1), produce: s298(2) or adduce: s298(3), a document recording a protected confidence. Notice is required for an application: s299C.
- Leave is required to issue a subpoena (or otherwise compel documents or evidence): s298(1).
- In order for leave to be granted the court must be satisfied that the documents or evidence sought (or sought to be adduced):
    - will have substantial probative value: s299D(1)(a).
    - relate to events about which evidence is not otherwise available: s299D(1)(b), and
    - that the public interest in admitting evidence which has substantial probative value substantially outweighs the harm to the protected confider of issue, access or such admission: s299D(1)(c).
- No person other than the protected confider to whom the documents or evidence relates may be given access to documents unless leave has been granted and that leave is consistent with such access: s299B(3).

Legislation and procedure

How to give notice

An applicant for leave must give notice in writing to each other party and each relevant protected confider: s299C(1).

District Court Practice Notes 18 and 19 refer to SACP and require the representative for the accused to indicate to the Court at arraignment (or the first AVL call-over for circuit matters) whether "a question may arise" under the SACP Division, and whether leave may be required. This is not the same as notice under s299C.

The s299C notice must specify:

- the document or evidence sought to be produced or adduced: s299C(1)(a)
- the date and time of return (for a subpoena): s299C(1)(c), and
- the date of the hearing (for adduction of evidence): s299C(1)(d).

The requirement to give notice to the protected confider is satisfied by giving notice to the prosecutor if the protected confider is not a party to proceedings: s299C(2)(a).

14 days' notice is prescribed, which may be reduced by the Court: s299C(4).

The Court may waive the notice period if notice has already been given, the protected confider has waived notice in writing, or there are "exceptional circumstances": s299C(5)(a)-(c).

You may not be able to provide some of the required dates (for example, you will probably not know the date of the hearing unless it is to be the first day of trial).

The critical notice term is generally the time between notice being provided to the ODPP and the listing of the notice of motion for mention or argument.

What happens when I give notice?

The ODPP have a referral pathway to Legal Aid's Sexual Assault Communications Privilege Service (SACPS).

The ODPP must contact the protected confider, advise them of the situation and obtain consent to refer the matter to the SACP Service.

Protected confiders will be referred to an inhouse or private solicitor. If Legal Aid NSW is providing an ongoing litigation service to the accused, a private solicitor will assist the protected confider.

The solicitor with carriage will seek general instructions, review materials including the Crown Case Statement/facts and statements of the protected confider and review the application. They will not generally have the whole brief.

Leave to issue, produce or adduce evidence of a protected confidence

Leave is sought by way of **Notice of Motion** (District Court) or **application** (Local Court). The motion or application should seek an order under s298(1) granting leave in accordance with s299D of the *Criminal Procedure Act* to issue a subpoena.

An affidavit in support should address the s299D factors, that is:

- how it is anticipated that the evidence contained in the protected confidence compelled will have substantial probative value: s299D(1)(a)
- why the evidence to which the protected confidence relates is *not available from any other source:* s299D(1)(b), and
- why the public interest in compelling or admitting the evidence substantially outweighs the public interest in maintaining the confidentiality of the protected confidence and protecting the principal protected confider from harm (being harm resulting from the disclosure of the protected confidences: s299D(1)(c), s299D(2).

Scope of material sought

If the legislation is applied strictly, only privileged material which meets the statutory tests can be compelled, produced or adduced. It is not uncommon for an application for leave to include submissions regarding the relevance of a specific counselling session—and a proposed subpoena schedule which requires production of the entire file of the complainant.

The scope of the proposed subpoena schedule is a common source of dispute. The duty to the client may require a broadly cast net, however you should be prepared to suggest a more specific schedule if the court does not agree with your proposed terms.

Consider carefully what material is sought, and how the material sought satisfies the relevant leave tests. A subpoena which captures only material which is relevant to the issues raised in the notice of motion is less invasive (a factor relevant for the public interest leave test).

Leave considerations: threshold test and statutory tests

There is a threshold issue as to whether the material sought is subject to the legislation. The onus is on the protected confider to demonstrate that the material sought is (or at issue stage, is reasonably expected to be) privileged within the meaning of the Division.

Section 296(5) of the *Criminal Procedure Act* specifies that a person **counsels** another person if the person:

- has training, study or experience relevant to the process of counselling persons who have suffered harm: 296(5)(a), and
- listens to and gives verbal support or other support or encouragement to the other person: s296(5)(b)(i), or
- advises, gives therapy to or treats the other person: s296(5)(b)(ii).

A **counselling communication** is a communication made in confidence by the counselled person to the counsellor: s296(4)(a), to or about the counselled person by the counsellor s296(4)(b), or made in confidence by or to a counsellor, by or to another counsellor or former counsellor about the counselled person: s296(4)(d).

Protected confidences are **counselling communications** about a victim or an alleged victim of a sexual assault offence: s296(1), being a prescribed sexual offence: s295(1).

Harm includes actual physical bodily harm, financial loss, stress or shock, damage to reputation or emotional harm including shame, humiliation and fear: s295(1).

There has been first instance consideration of whether inferences can be drawn as to whether certain health professionals are 'counsellors':

- In *R v Markarian*[1] Berman J proceeded on the basis that documents from Wollongong Hospital and Wollongong

1 *R v Markarian* [2012] NSWDC 197 at [19]

Mental Health Service were counselling records.

- In *R v Bruce Russell*[2] Marien J said that "such training, study and experience can be inferred in the case of nurses, doctors and social workers, particularly when carrying out mental health assessments".

Courts have been willing to accept that general practitioners have the requisite training, study and experience to perform counselling within the broad definition of s296(5)(b), especially when treatment includes (for example) general counselling or mental health referrals.

If questions arise about a document or evidence, including whether the treatment provided appears to constitute counselling within the definition, the Court may inspect the document in question.[3] The court may also receive affidavit evidence establishing any or all of the statutory requirements.

A counsellor must be engaged in counselling to attract the privilege. *ER v Khan* related to FACS records of JIRT investigations. In that matter the persons involved were psychologists and had the relevant counselling "training, study or experience" but were performing investigative functions rather than "advising, giving therapy to, or treating" the complainant at the relevant time.[4] Some records of the JIRT psychologist were considered privileged, it was not a blanket exclusion.

Where there is a real question about whether or not material is privileged, or if you are seeking mostly unprivileged material but cannot easily separate privileged from unprivileged with a schedule, consider making an application for the court to use the discretionary power under s299B(1) and (4) to inspect the material (see below "Judicial Discretion")

There has also been first instance consideration about what, exactly, is covered by the legislation – that is, what is meant by "counselling". The literal reading of the legislation is extremely broad and the inclusion of "actual bodily harm" and "financial loss" as types of relevant harm suggests this breadth is deliberate.

A broad construction relies on the broad definition of 'harm' and the inclusion of 'treats' to effectively include most medical treatment: see for example, see Berman J's comments in *R v Markarian*.[5] The broad interpretation is not entirely consistent with the public interest section of the test or the second reading materials.

A narrow construction relies on the common meaning of 'counsels' and incongruity between the second reading materials (which focus on traditional counselling) and the broad construction. It is not consistent with the legislative definition of harm or the inclusion of 'treats' in the s296 definition.[6]

There has been no definitive statement by the CCA. In KS v Veitch (No 2), Basten J accepted the broad definition but noted that "the respondent did not challenge this construction".[7]

It is the author's experience that judicial officers frequently accept the broad definition. It should be noted that most of the mandated public interest provisions in the balancing test refer specifically to material which falls within the narrow definition. In practice this may mean there is a lower bar to obtaining material that is outside the narrow definition, or a claim of privilege on that material may not be upheld.

Section 299D(1)(a): substantial probative value

Most SACP argument relates to this provision. As Basten J said:

> "it is the use which might be made of the documents by the party seeking access which must be the focus of

2 *R v Bruce Russell [*2013] NSWDC 129 at [32]
3 s299B(1), *ER v Khan* [2015] NSWCCA 230 at [81]
4 *ER v Khan* [2015] NSWCCA 230 at [80]-[95]
5 *R v Markarian* [2012] NSWDC 197
6 *R v Bruce Russell* [2013] NSWDC 129; *R v Firebrace* (No 3) [2014] NSWDC 276; *R v Guerrera, Nicolino* [2014] NSWDC 347
7 *KS v Veitch (No 2)* [2012] NSWCCA 266 at [18]-[19]

the court's determination."[8]

Substantial probative value is a higher standard than significant probative value, which requires the evidence in question to be "important" or "of consequence".[9]

Admissibility

For material to have substantial probative value it must be admissible: *KS v Veitch (No 2)* at [37]. This applies at the leave to issue stage as a consequence of s298(1) and part of s298(3).

In *Veitch (No 2)* Basten J discussed the general law in relation to a subpoena and contrasted it with this leave requirement, indicating that:

> 31. Under the general requirements in relation to a subpoena or a notice to produce, it is not necessary that the moving party demonstrate that the material sought will be admissible in evidence; the accepted test of a "legitimate forensic purpose" is undoubtedly broader than that. An accused may well seek access to documents in order to formulate lines of cross-examination, either by suggesting that the applicant has made inconsistent statements to a counsellor in relation to the circumstances of the offence, or by using material in the medical records to suggest that the evidence of the applicant may be unreliable. It may be possible to formulate a line of cross-examination without seeking to admit into evidence the document or the information contained in the document.
>
> 32. It follows that the first limb, requiring that the court be satisfied that the document or evidence "have substantial probative value", before allowing the accused access to it, will constitute a significant reduction in the material which might be made available to the accused under the general law with respect to access to material on subpoena or through a notice to produce (or, indeed, a call for a document in the course of proceedings). This reduction is the result of the inclusion in s 299D(1) of paragraph (a).[10]

However, Basten J also indicated that:

> The concept of "substantive probative value", accepting that it extends to questions or evidence relevant to the credibility of the complainant, must nevertheless be concerned with admissible material.[11]

For a counterpoint, Adams J analysed how material relevant to credibility could be adduced in relation to the fact in issue of whether consent was given for a sexual act.[12]

Reliability and credibility

When records are sought for a credibility purpose they will be an exception to the credibility rule if they "substantially affect the assessment of the credibility of the witness": s103(1) *Evidence Act*. If the material sought has substantial probative value then it should meet that standard.

If seeking records to be used for cross-examination of the complainant, you should consider Basten J's comments in *Veitch* quoted above, as he seems to indicate that he considers this use is restricted by the SACP legislation. While these comments are obiter and not definitive, the legislation does clearly restrict the *speculative* subpoena of such materials.

In relation to a prior definition of the credibility rule which required credibility evidence to have substantial probative value for the exception to apply, Whealy J indicated:

8 *KS v Veitch (No 2)* [2012] NSWCCA 266 at [30]
9 *R v Lockyer (*1996) 89 A Crim R 457 at 459
10 Basten J, *KS v Veitch (No 2)* [2012] NSWCCA 266
11 *Ibid* at [37]
12 *NAR v PPC1* [2013] NSWCCA 25 at [6]

> 17. The word “substantial” is a word that should be given its full import, in my view.
>
> 18. It seems to me that before evidence can have substantial probative value in respect of the credit of a witness, it must have such potential to affect the jury's assessment of the credit of the witness in respect of the evidence he or she has given that the credit of the witness cannot be determined adequately without regard to it. If the probative value of the evidence can be any less than this, there does not appear to me to be any real distinction between the terms "significant probative value" and "substantial probative value" as they are used in the Act.[13]

The CCA has held specifically in relation to SACP and delay or failure to report that

> 87. If counselling records disclosed that the complainant had failed to avail herself of an opportunity to make a disclosure about sexual abuse by the applicant, there would hardly be any probative value given that if evidence of this was before a court at trial, or special hearing, it would invoke a warning pursuant to s 294 of the Act (to the effect that a failure to complain in such a matter is not significant).[14]

As a consequence, the s294 warning is relevant to the probative value of counselling where the counselled person has failed to mention or discuss the sexual assault.

While there is no similar authority in relation to s293A (the warning in relation to inconsistent accounts), it is likely relevant to probative value, especially as there is Supreme Court authority on the weight to be given to inconsistencies in accounts given to medical professionals:

> 2. …the trial judge was invited to discount the appellant’s oral testimony on the basis of accounts given to various health professionals, which appeared inconsistent with each other, or with her oral testimony, or both. The difficulties attending this kind of exercise should be well-understood; as explained in the *Container Terminals Australia Ltd v Huseyin* [2008] NSWCA 320 at [8], such inconsistencies should, be approached with caution…[15]

Material inadmissible by law

Some material is subject to an absolute bar on admissibility, and leave cannot be granted in relation to this material. Most commonly this will include:

- Material which is subject to s29 of the *Children and Young Persons (Care and Protection) Act*, especially considering Hamill J’s comments about the definition of a “report” in the matter of ZL.[16] This will be relevant where there is a report by a mandatory reporter who is also a counsellor.
- Material subject to s293 which does not fall into one of the exceptions. A court must resolve the s293 question before they can make a determination as to leave.[17]
- Material which is subject to the exclusion in the *Victims Rights and Support Act* 2013, s113. This includes the application for support and supporting documents, as well as “documents furnished to or prepared for” the commissioner – most commonly, update reports from victims support counsellors about progress.

Section 299D(1)(b): evidence otherwise available

There is no significant appellate consideration of this subsection.

13 *Regina v Lodhi* (2006) NSWSC 670 at [18]
14 Hulme J, *Rohan v R* [2018] NSWCCA 89 at [87]
15 *Basten J, Mason v Demasi [*2009] NSWCA 227 at [2]
16 RESTRICTED JUDGEMENT [2019] NSWCCA 135
17 *PPC v Williams* [2013] NSWCCA 286 at [33], [68], [90] and [94]

1. The court cannot grant an application for leave under this Division unless the court is satisfied that—
    b. other documents or evidence concerning the matters to which the protected confidence relates are not available

Of note, the prohibition is **not** directed towards the evidence sought by the application, but the evidence *to which the protected confidences relate*, which may not be the same thing.

You are unlikely to be able to address this element of the test prior to seeing the material. The most useful submissions the defence can make are likely to be:

- If the notes disclose an inconsistent version of events or additional detail about events then they are clearly evidence which is not available elsewhere,
- If the notes record an undisclosed diagnosis that is relevant to credibility then they are evidence which is not available elsewhere.

Section 299D(1)(c): public interest considerations

A court cannot grant leave unless it is satisfied that the public interest in preserving the confidentiality of protected confidences and protecting the principal protected confider from harm is substantially outweighed by the public interest in admitting into evidence information or the contents of a document of substantial probative value.

299D Determining whether to grant leave

1. The court cannot grant an application for leave under this Division unless the court is satisfied that--
    c. the public interest in preserving the confidentiality of protected confidences and protecting the principal protected confider from harm is substantially outweighed by the public interest in admitting into evidence information or the contents of a document of substantial probative value.
2. Without limiting the matters that the court may take into account for the purposes of determining the public interest in preserving the confidentiality of protected confidences and protecting the principal protected confider from harm, the court must take into account the following--
    a. the need to encourage victims of sexual offences to seek counselling,
    b. that the effectiveness of counselling is likely to be dependent on the maintenance of the confidentiality of the counselling relationship,
    c. the public interest in ensuring that victims of sexual offences receive effective counselling,
    d. that the disclosure of the protected confidence is likely to damage or undermine the relationship between the counsellor and the counselled person,
    e. whether disclosure of the protected confidence is sought on the basis of a discriminatory belief or bias,
    f. that the adducing of the evidence is likely to infringe a reasonable expectation of privacy.

The protected confider may make a confidential statement by affidavit which outlines the harm they may suffer if access to the material is granted: s299D(3).

In *R v Bonanno,* Adamson J (Bathurst CJ and Hoeben J concurring) stated (at 14):

> 14. Parliament has clearly expressed its intention in the provisions referred to above. In the second reading speech … the Hon John Hatzistergos (then Attorney General) explained the policy reasons for the new provisions….
>
> **The sexual assault communications privilege is designed to limit the disclosure of protected confidences at the earliest point possible: for a complainant who has gone to a counsellor to discuss the sexual assault, it is little comfort to him or her if the documents are not to be adduced in evidence at the trial if they have already unnecessarily been disclosed to the defence by an order of the court. The privilege** is not just designed to prevent the unnecessary adduction of evidence of protected confidences before a jury, but **is designed to prevent the inappropriate subpoena of such confidences in the first place, and then the inappropriate granting of access to them.**[18] (emphasis added by Adamson J)

The CCA has on occasion taken a purposive approach to interpreting the provisions of the sexual assault communications privilege legislation, as well as interpreting it broadly in favour of the rights of the protected confider, on the basis that it is beneficial legislation.[19]

The basis for the balancing test is the right to a fair trial. The fundamental right to a fair trial has been held to include the right to require third parties to "produce relevant documents on subpoena duces tecum".[20]

On the other hand, *KS v Veitch (No 2)* held that "to protect the confidences as between the victim and a counsellor is not to deprive the accused of some source of information to which he is presumptively entitled".[21]

It is this conflict which the court must resolve: s299D(1)(c). The s299D(2) factors are matters which the court must consider in this balancing test. It is important to note that some of these factors are public interest factors and may apply to matters even where they are not directly engaged by the application. Others will depend on the facts of the matter—for example, where the protected confider continues to consult the same counsellor whose notes are sought.

As the leave decision is not remade on appeal, most commentary on this provision is in first instance decisions.[22]

Judicial discretion: ancillary orders under S299B

Section 299B(4) gives a court the authority to make "any orders it thinks fit to facilitate its consideration of a document or evidence under this section". The CCA has accepted that this extends to orders to deliver the material to the court to inspect so it can determine whether leave should be granted, and has considered this section on a number of occasions.[23]

An application for leave to issue and produce can (for example) seek orders that:

- the court make an order under s299B(4) that the documents be delivered to the Court,
- access be granted to the protected confider, and
- the court consider the material before ruling on the application for leave to issue the subpoena and for production.

18 *R v Bonanno, ex parte Protected Confider* (2020) NSWCCA 156
19 *PPC v Stylianou* [2018] at [27], [43-44]
20 Application of Attorney General (NSW) [2014] NSWCCA 251 at [29]
21 *KS v Veitch (No 2)* [2012] NSWCCA 266 at [65]
22 *KS v Veitch (No 2)* [2012] NSWCCA 266 at [34-36]; *R v Joshua Veitch* [2012] NSWDC 174 at [36-50]; *R v Guerra, Nicolino* [2014] NSWDC 347 at [88-92]
23 The case law is reviewed by Hulme J in *Rohan v R* [2018] NSWCCA 89 from [52]-[67]. Consider this if arguing that the court should use this discretion.

There is no statutory or judicial guidance as to the standard that needs to be met in order for a court to use s299B orders, but Beech-Jones J (Hoeben and Adams JJ agreeing) refers to making them if it is "**necessary** to review the material sought…".

The general criteria for exercise of a discretion apply. The discretion is enlivened "If a question arises under this Division": s299B(1).

The exercise of a discretion has a limited number of factors which limit it, primarily being that the court has taken into account relevant information and not taken into account irrelevant information.

Accordingly, it seems likely that unless the parties agree on the exercise of the discretion, the court may only be able to exercise it as part of the hearing of an application (that is, the court has read and listened to submissions on the substantive question before the court). If such an order were made at a mention over the objection of a party and without a hearing it may be subject to appeal.

A court may decline to exercise the discretion to order production of documents if it is not satisfied that the material sought could satisfy one or more of the statutory tests.[24]

The precise procedure with s299B(4) orders is unsettled, including who should serve the order and whether conduct money is payable. These issues can be dealt with by explicit orders. An example order which includes procedural orders is below.

Either the Defence, the Registry or the solicitor for the protected confider may liaise with the intended subpoena recipient to arrange service of any 299B(4) order.

IN THE DISTRICT COURT
OF NEW SOUTH WALES
(CRIMINAL LAW DIVISION)
AT
CASE NO:

R v

Date:

The Court orders

1. pursuant to section 299B(4) of the *Criminal Procedure Act 1986*, that _____ (subpoena recipient) deliver the documents identified in the schedule of the attached draft subpoena to_____(court, registry) by _____(date).
2. The defendant is to serve this order by_____ (date).
3. The defendant is to pay the reasonable costs of the named recipients of complying with this order.
4. The protected confider is to have access (including uplift and photocopy) to material produced.
5. The application for leave to issue subpoena is adjourned to _____ for mention to confirm that documents have been delivered to the court.
6. The application for leave to issue subpoenas is adjourned to_____for argument.
7. The defendant is to file and serve written submissions by_____(date)
8. The protected confider is to file and serve written submissions by_____(date)

SO ORDERED

24 *Rohan v R* [2018] NSWCCA 89 at [82]

Once the court receives documents: inspection and access

An application for leave may be:

- refused
- granted, or
- postponed until the court has inspected documents produced in response to a s299B order.

Further subsections of 299B affect the procedure regardless of whether the material arrives in court pursuant to a subpoena or a s299B order.

> **S299B**
>
> 1. If a question arises under this Division relating to a document or evidence, the court may consider the document or evidence.
>
> ….
>
> 3. A court must not make available or disclose to a party (other than a protected confider) any document or evidence to which this section applies (or the contents of any such document) unless:
>
> a) the court determines that the document does not record a protected confidence or that the evidence would not disclose a protected confidence, or
>
> b) a party has been given leave under this Division in relation to the document or evidence and making available or disclosing the document or evidence is consistent with that leave.

Any material which the court inspects as part of the leave process is likely material "to which this section applies" as the power which permits the court to inspect the material is s299B(1).

If leave to issue and produce is granted, this does not entitle the issuer to access the material. While the legislation does not explicitly specify that leave is required to access documents it is clear from s299B(3)(b) that a grant of leave after inspection which specifically contemplates access to the accused is required in order to allow that access (the *implied leave requirement*).

The majority judgement of MacFarlane J in *PPC v Stylianou* [2018] NSWCCA 300 refers to this implied leave requirement in holding that an access application is an application under s299D:

> 27 …The opening words of s 299D(1) ("an application for leave under this Division") should accordingly be understood as embracing an application for access to protected confidence documents produced on subpoena. As the legislative provisions are beneficial, they should be construed broadly in this way.

In obiter, Rothman J took this further and indicated that:

> 47. The leave granted by a court for the issue of a subpoena, or other compulsory process, without an examination of each document and an assessment of the criteria in s 299D of the CP Act, is not leave by which that court is bound in determining an objection to production. Nor is the order to produce, or order for access, "consistent" with the leave to issue a subpoena that has occurred without an examination of each document.
>
> 48. The relevant terms of s 299B(3)(b) of the CP Act refer to "making available or disclosing". The grant of leave under s 298(1) is, usually, if not universally, not concerned with the issue of either the documents' availability or disclosure to anybody other than the relevant court.

If the material is produced pursuant to s299B(4) orders, the court effectively considers the two statutory leave

requirements (issue and production) and the implied requirement (access subsumed in issue) simultaneously. While it may seem artificial, the court agrees to grant leave to issue and produce in relation to material that is already within the possession of the court pursuant to s299B.

Leave to adduce evidence

Even after access has been granted to counselling material, leave is required to adduce evidence of protected confidences recorded in the material. The evidence may be adduced by calling the counsellor, or through cross-examination of the complainant or the counsellor. This leave issue should, if possible, be dealt with pre-trial to avoid fragmentation of cross-examination. If notice is given (as required by s299C), a SACP lawyer will generally attempt to be available on at least the first day of trial to attend to these issues.

Common scenarios and practical guidance

Unexpected privilege claims

SACP claims may arise even if there is no notice that the person whose records are sought has been a victim of a *sexual assault offence*, and the proceedings do not relate to a *sexual assault offence*. The privilege may apply even if the relevant assault has no relationship to the present matter.

One in five women and one in 20 men have experienced sexual violence (defined as the threat, attempt or occurrence of sexual assault) since the age of 15 (ABS Personal Safety Survey 2016).

It is sufficient for a person to *allege* a *sexual assault offence* for the privilege to apply: s296(1). There is no requirement that this has been disclosed previously.

Inadvertently capturing privileged material may occur where there is no notice that the person whose records are sought is a victim of a *sexual assault offence*, or where there is no notice that the record holder may hold records that fall within the definition of *counselling*.

If a subpoena recipient is likely to hold privileged material (for example, they are a medical professional or service, counselling service, hospital, psychologist, psychiatrist or school counsellor or welfare service), and you suspect or know that the person whose records you seek is a victim of a sexual assault offence, consider whether you need privileged documents, and if not, how to *clearly identify the **unprivileged** material you seek in a specific schedule*.

I issued a subpoena without leave – what does that mean?

Subpoenas issued without leave have been summarily struck out.

Named persons may refuse to comply with a subpoena issued without leave if in their view it captures protected confidences. It is unlikely that this is contempt as s298(2) prohibits production of material without leave.[25]

Recent case law implies that issue of a subpoena where only inspection by the court is contemplated may cause harm to the complainant.[26] This potential is also implicit in the balancing test in s299D(1)(c).

It is unclear whether such a subpoena could be invalid.

> The consequences of issuing a subpoena without leave and producing documents without leave must be determined as matters of statutory construction of the *Criminal Procedure Act*. Although the question is one of some importance, the answer is not clear. If the subpoena were invalid, if issued without leave, non-compliance might not constitute a contempt of court: *Pelechowski v The Registrar, Court of Appeal (NSW)* [1999] HCA 19; 198 CLR 435 at [55]. Even if the subpoena were valid, the production of documents, without leave of the court, might be "invalid" although what that would mean in circumstances where documents had in fact been produced is by no means clear.[27]

The CCA has held that a court is not required to return documents and re-issue a subpoena with leave if privileged documents have been unexpectedly produced pursuant to a subpoena issued without leave. Basten J held that where material has already been produced to the Court that “in the circumstances” it is open to “disregard the irregularity and consider the documents in determining whether the respondent should have access to them”.[28]

If you have issued a subpoena and been notified of a SACP objection you should liaise with the protected confider’s representative to determine the scope of material objected to—some possibilities are:

25 *PPC v Stylianou* at [13]
26 *R v Bonanno, ex parte Protected Confider* (2020) NSWCCA 156 at [13]
27 *Basten JA, KS v Veitch* [2012] NSWCCA 186 at [31]
28 *KS v Veitch (No 2)* [2012] NSWCCA 266 at [29]

- you have inadvertently captured material and an amended scope will deal with the objection
- there is an objection on the basis that privileged material may be captured and they seek first inspection to raise any objection if the material captured contains protected confidences (for example, school records that may include school counselling records), or
- the material sought essentially engages SACP and the objection will not be withdrawn.

If you have issued the subpoena without leave and it has been objected to, you should file an application for leave as soon as possible, provided you can establish the matters in s299D.

Where there is no application for leave and material has been produced, there may be no option for the court other than to return the material, as there is nothing before the Court that can satisfy the leave conditions in s299D. There is no bar to the issuer filing an application for leave in relation to the same material at some point in the future.

Forensic decisions in seeking SACP material

When there is a possibility that SACP material is required, it should be considered as early as possible.

However, leave cannot be sought prior to indictment. In some instances, waiting until after indictment to seek leave means foregoing a portion of the discount for an early guilty plea.

The requirement to engage with SACP early, and the nature of the leave test requires a refined case theory and supporting evidence. Some disclosure of case theory will be necessary. Beech-Jones J observed in *KS v Veitch (No 2)* at [86] that:

> 86. The second point is that the apparently high threshold presented by the criteria in s 299D may not be as difficult to overcome as first appears if the relevant application was supported by evidence identifying the accused's defence to the relevant allegation, what the accused expects will be obtained from the material sought to be produced or inspected and what other documents or evidence are or are not available relating to those issues and the material sought. That is not to say that those matters must be deposed to before such an application will be granted but, as a practical matter, if they were an application for leave would appear to have a greater chance of success. Of course the decision to disclose those matters cannot be forced upon an accused and the decision to do so would no doubt represent a difficult forensic choice. However, all forms of litigation involve difficult forensic choices and the effect of these provisions may only be to require that they be made earlier if documents are sought in advance of the trial.[29]

The same general rules apply to SACP material as to all subpoenas—the material you receive may be of assistance to the prosecution. The author is aware of matters where the judge, after inspecting the material, has taken the view that they are to make their own assessment of substantial probative value and are not limited by the terms of the application. Access was granted to material that was of significant assistance to the prosecution.

The protected confider is generally not aware of the specific contents of the documents. They will be told about them only in general terms by the SACP lawyer, to maintain the integrity of the complainant's evidence. That said, the protected confider could almost certainly view those documents by request if they wished (as they are their own medical records).

The protected confider's interests also do not necessarily coincide with those of the prosecution. The author has been in several matters where the protected confider has refused to consent to material which would have assisted the prosecution. The protected confider was mostly concerned with their privacy in relation to other issues brought to the counsellor or specialist's attention.

29 *KS v Veitch (No 2)* [2012] NSWCCA 266 at [86]

Consents to Police, inadvertent disclosure and the prosecution duty of disclosure

It is not uncommon for Police to obtain a general consent to access medical records from a victim, usually because the victim has mentioned a counsellor or counsellors in their statement, whether in the context of a first disclosure or later disclosures as part of treatment.

Section 305 provides that material which "cannot be adduced or given" in proceedings is not admissible. Even where material is obtained under general consent or by other means, the material cannot be adduced without leave: s298(3), meaning it remains inadmissible without a grant of leave or a consent which accords with s300 of the Act.

If material is produced without a s300 consent, the court will likely consider it inadvertent production. The parties (prosecutor and defence) are under an ethical obligation to return it: Rule 31 of the Legal Profession Uniform Law Australian Solicitor's Conduct Rules 2015 and Rule 101(a) of the Legal Profession Uniform Conduct (Barristers) Rules 2015.

The sexual assault communications privilege is a statutory privilege which specifies how it may be lost—specifically, via consent: s300, or misconduct: s301.

A consent to police was considered by Beech-Jones J in *NAR v PPC1*:

> 53. Further to satisfy s 300(2) any such consent must expressly relate to the "production of a document or adducing of evidence". This requires, inter alia, the provision of an express written consent to the production of documents at least to, and most probably via, the Court, or the adducing of the documents in evidence. The critical aspect of such a consent is that it is an agreement for both parties to view the material. It is not sufficient that, at the investigative stage, the complainant may have agreed to their production to and copying by only the prosecution or some other entity or organisation such as the police.[30]

Police practice is inconsistent but it is now more common for police to decline to access this material unless it constitutes first complaint or there is some unusual circumstance about the matter, or a significant concern about the mental health of the complainant or witness.

If the police have such records in their possession, the privilege still applies to the records. They should be noted on the 15A disclosure certificate as privileged material obtained and not served on the DPP or Defence.

Where police seek notes on the basis that they are first complaint, they are increasingly referring the complainant to Legal Aid's SACP Service for legal advice and the provision of a consent which is effective for the purposes of s300 of the Act.

The prosecution is not under any general duty to obtain material as part of their duty of disclosure except in an "appropriate case".[31] In *Marwan*, Leeming JA discussed the circumstances which might constitute an "appropriate case" in a speculative sense. Leeming J indicated that mental health indicators such as anxiety and depression do *not* raise a '"sound reason'… to suspect that the complainant's mental health history impinged on her credibility or reliability."[32]

In practice, where the DPP is aware that counselling records exist, their inadmissibility means they are unlikely to be served even if the police have obtained them. If the DPP have a *Marwan* concern then they will generally refer the complainant to a SACP lawyer to review any material held by the Police and give independent legal advice about consent.

30 Beech-Jones J in *NAR v PPC1* [2013] NSWCCA 25 at [52]-[53]
31 *Marwan v Director of Public Prosecutions* [2019] NSWCCA 161
32 *Marwan v Director of Public Prosecutions* [2019] NSWCCA 161at [72]

Schedule drafting: inadvertently capturing protected confidences

Examples which are **unlikely** to capture protected confidences:

- Subpoenas for Medicare PBS summaries and claim summaries
- Subpoenas which **clearly and unambiguously** seek only administrative records

Incautious drafting may inadvertently create a scenario where the schedule appears to seek protected confidences, even though that is not the intention.

CASE STUDY

A subpoena on the Department of Human Services for Medicare claim summary records sought "all Medicare claim item details" and included a further clause with the phrase "any document whatsoever containing the details of any medical practitioners who have attended to …." was considered likely to capture supporting documents such as medical or diagnostic reports from practitioners (should such reports exist).

While no such material was eventually produced, the broad drafting of the clause caused a referral to SACP, the assignment of a SACP lawyer to seek first access to the material, and required two mentions with the associated costs to the defendant and to Legal Aid.

CONSIDERATION

The Medicare section of the Department of Human Services is an administrative unit whose function is payment of federal benefits to practitioners, or reimbursements to patients. They promptly respond to subpoenas and provide Medicare Benefits Payment Summaries in response.

A subpoena to them has the unambiguous forensic purpose of obtaining a list of the treating professionals for the purpose of issuing further subpoenas.

Consider whether that purpose is served by complex and vague schedules that may raise irrelevant legal issues and inadvertently raise SACP.

Schedule drafting: "excluding protected confidences"

One emerging practice is the use of "excluding protected confidences" as a general qualifier to an otherwise complex and comprehensive schedule. This may not be effective as:

- A schedule which specifies "excluding protected confidences" arguably triggers the complainant's standing under s299A. This standing is available where a document is sought to be produced that "may" disclose a protected confidence. It is very likely that a SACP lawyer will become involved and at minimum seek first inspection of the material to ensure the schedule has been followed.
- An otherwise unprivileged document which *contains a protected confidence is privileged*, at least in part. Strictly speaking, a recipient following the legislation should comply with s298(2) by not producing documents that contain any protected confidences, meaning that this approach limits the amount of unprivileged material available.
- This approach also prevents the subpoena issuer from seeking judicial inspection of material or using the discretionary powers within the division (s299B(1) and (4)) to make determinations about whether a particular document does or does not contain a protected confidence. The issuer has effectively delegated that task to the recipient, who will divide the material via whatever processes or standards they choose to use, and the issuer has very limited options to have that decision or process reviewed.

- Finally, the phrase is a legal definition. A subpoena using this term to identify documents may be vulnerable to an objection for oppression on the basis that it requires the recipient to make a legal judgement about whether a document falls within the call. This also implies that the reasonable cost of compliance with such a subpoena requires a lawyer to review the documents, with the associated implications for any conduct money requirement, should the recipient demand legal fees by way of reasonable expenses.

CASE STUDY

One matter included a subpoena directed to a sexual assault service, which specified “all records, including file notes, reports, session notes and all other documents, but excluding protected confidences”

The service responded with a letter indicating that they held no documents which fell within the schedule.

Significant case law

KS & Veitch (No 2) [2012] NSWCCA 266

- Key case
- Constitutional challenge to SACP provisions, extensive discussion and analysis of provisions
- Procedure if subpoena issued without leave

NAR v PPC1 [2013] NSWCCA 25

- Relevance of consent to Police
- Necessity of inspection of documents to determine leave questions (cautionary treatment)

PPC v Williams [2013] NSWCCA 286

- Admissibility requirement for leave
- Admissibility and s293

ER v Khan [2015] NSWCCA 230

- Definition of counselling—qualifications not sufficient to determine whether protected confidences, nature of interaction relevant

Rohan v R [2018] NSWCCA 89

- Key case
- Analysis of s299B(4) discretionary orders
- Discussion of probative value in relation to s294
- Application dismissed without inspection of material

PPC v Stylianou [2018] NSWCCA 300

- Leave necessary but not sufficient condition for access—common law powers also relevant
- Production refers to production to the court (note when reading earlier decisions)
- Courts cannot permit applicant to access material without inspection and considering leave requirements (obiter)
- SACP treated as beneficial legislation for the protected confider
- Adopted purposive reading of legislation

R v Bonanno, ex parte protected confider [2020] NSWCCA 156

- Quotes significant portion of 2nd reading speech—purposive reading of legislation
- Duty of parties to understand and apply legislation, and to assist the court