

Counselling Notes Protect

A legal service for sexual assault counselling notes privilege

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Women's
Legal Service Qld



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Overview

1. History of legislative reform/ QLD Legislation.
2. Whose records might be affected.
3. Legal Definitions:
 - Protected Counselling Communication.
 - Counselling;
 - Counselling person
5. Originating Steps during the transitional period Criminal, DVFP, Civil.
6. Types of privilege – Absolute and Qualified.
7. Leave – legislative pathway.
8. How is privilege waived?
9. How to respond to party seeking disclosure.
10. What about – Mandatory reporting? Preliminary Complaint? s93A Evidence?

How did we get here:

- **Qld is the last state** to introduce a statutory protection (privilege) which limits the use of counselling records during legal proceedings where a complaint of sexual assault is made.
- **Recommendation 130** of the *Not Now Not Ever* Report, 2015.
- A response to increased awareness that:
 - **counselling assists in recovery** and in encouraging reports of sexual assault;
 - the use of counselling records in court is an impediment complainants accessing counselling.

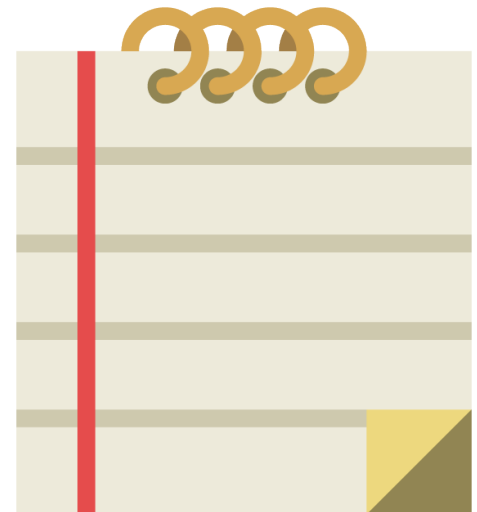
Sexual Assault Counselling Privilege.

A legal protection (privilege) over the counselling records of victims sexual assault offences in certain criminal, domestic violence and civil proceedings came into effect on 1 December 2017.

The legislation was based upon similar NSW legislation.

Whose records may be determined to be “protected counselling communication”?

- sexual assault counsellors
- domestic violence counselling/ support services
- **social workers**
- **psychologists**
- **supported youth accommodation services**
- **refuge accommodation services and Dept of Housing**
- **Doctors**
- **psychiatrists**
- **nurses**
- **physiotherapists**
- alternative health professionals
- **school & financial counsellors**
- ambulance officers
- drug and alcohol services.



Definition of a “protected counselling communication” :

It is an oral or written communication:

- made in confidence;
- by counselled person to a counsellor; or
- by a counsellor to or about a counselled person to further the counselling process; or
- about a counselled person by a parent, carer or support person of a counselled person, who attends with or on behalf of the counselled person,



Definition cont.

It doesn't matter whether the counselled person's communication was made:

- before or after the act or omission which forms the basis of an alleged sexual assault offence;
- **in connection** with the alleged sexual assault offence; or
- **about a condition** arising from the alleged sexual assault offence.

It **does not include** communication to a health practitioner about a physical examination of the counselled person as part of the alleged sexual assault offence investigation.

Definition of a counsellor

A **counsellor** is a person who has:

- undertaken **training**; or
- is undertaking **study**; or
- has **experience** that is relevant to the counselling process

AND

- Provides counselling in either a **paid or voluntary** capacity.

s14B *Evidence Act 1977*

Definition of counselling

Counselling is:

- Listening to and giving verbal or other support, help or encouragement; or
- Advising, giving therapy or treatment.

Counselling can occur individually (**one-on-one**) or in a group.

s14B Evidence Act 1977

Definition of counselled person

A “**counselled person**” is someone who

-has at any time been, counselled by a counsellor; and

-is, or has at any time been, a victim or alleged victim of a sexual assault offence.

(s14 B *Evidence Act 1977*)

The privilege is *enlivened* when a victim of a sexual assault offence:

- makes a complaint of a sexual assault offence to the Police; **or**
- raises a complaint of a sexual assault offence in domestic violence application; **and**
- **Legal Proceedings have commenced.**

When does the privilege apply?

The privilege applies after an originating step for the legal proceeding is taken.

It doesn't matter when the sexual assault offence occurred or the ground for making a domestic violence order arose.

ss14P and 153 *Evidence Act 1977*

Originating Step in Criminal Proceedings:

After 1 December 2017:

- arrest of the defendant; or
- making of a complaint; or
- service of a notice to appear on defendant.

s740 Criminal Code and s153 Evidence Act 1977

Originating Step in DV Proceedings:

- an application a domestic violence order after 1 December 2017; or
 - a decision by a court to make the domestic violence order the subject of the proceeding.
- s153 (3)(d) *Evidence Act 1977*

Originating Step in Civil Proceedings.

Previous criminal proceedings or domestic violence proceedings that are in relation to a sexual assault offence

and

where protected counselling communications are privileged.

Two Different Types of Privilege

- **Absolute Privilege** in preliminary criminal proceedings, bail applications or civil proceedings;
- **Qualified Privilege** in other proceedings – DV, criminal trials and sentencing proceedings.

Qualified privilege



Permission from the Court is required to:

- compel a person to produce protected counselling communications to a court
- to speak about or otherwise use, protected counselling communications in court
- to make known, inspect or copy protected counselling communications in court.

See s14F *Evidence Act 1977*.

What are the circumstances where you disclose “protected counselling communication.”

- Mandatory reporting ?
- Police ask?
- Warrant?
- Summons?
- Subpoenas?

Obtaining Counselling Records

A **subpoena** is a written order from the court that tells a person (or organisation) to:

- give evidence
- produce documents, records or things or
- produce documents **and** give evidence.

Also a 'summons' or warrant.

Application for permission to issue a subpoena

At least 14 days notice given with the **notice** to:

- be in writing;
- confirm that an application for leave is going to be made;
- describe the nature and particulars of the counselling records being sought; and
- advise the counsellor or counselled person that they may appear in court.

Waiving the notice requirements

The court can waive the requirements for notice:

s14G(6) *Evidence Act 1977*

Obligations to the complainant

Prosecutions must provide the complainant with a copy of the notice for leave required prior to the issue of a subpoena.

Court's obligation to the parties:

If it appears to the court that a person may have grounds for:

1. applying for leave or
2. objecting to the production of a protected counselling communication

then

the court **must** satisfy itself the person is aware of the sexual assault counselling privilege and has had an opportunity to seek legal advice

s14K Evidence Act 1977



Leave is only granted when the court is satisfied:

There is:

1. substantial probative value; and
2. other documents or evidence about matters in the counselling notes are not available; and
3. the public interest in admitting the communication into evidence substantially outweighs the public interest in preserving confidentiality and protecting the counselled person from harm.

The court must state its reasons for granting or refusing to grant the application.

How the Court determines 'Harm'

- Victim may provide an oral or written statement to the court outlining the harm the person is likely to suffer if the application for leave is granted.
- If an oral statement is made, this must be made in the absence of the jury and any other party.
- Harm includes: physical, emotional or psychological harm, financial loss, stress or shock and damage to reputation.

Waiver or loss of privilege

A counselled person can waive their privilege if:

- They are over 16 years of age;
- They are not a person with impaired capacity;
- They consent to the production of the document or adducing the evidence.

The consent must:

- be in writing;
- expressly state that the counselled person consents;
- make specific reference to the nature of the material to be released; and
- states that the counselled person has had an opportunity to seek legal advice and understands their rights.

A victim should get legal advice to ensure that their consent is fully informed. Counselling Notes Protect can provide a free lawyer to help with this.

What if Police want the records?

- Privilege does not cover the investigation stage that occurs:
before legal proceedings have commenced.

The effect is that if QPS seek disclosure of records before legal proceedings have commenced – the Sexual Assault Counselling Privilege law is not relevant.

- QPS can seek copies of records using a Warrant.
- If you are served with a Warrant at investigation stage then you need to comply.

CALL CNP to get legal advice.



What if Police want the records?

If QPS have a protected counselling communications records:

while they do not have to disclose this to the defendant, they must inform the defendant that:

- they have a protected counselling communication record;
- the details of protected counselling communication record; and
- the accused needs to seek leave of the court to obtain any protected counselling communication records.

Complainants may want to provide part of their counselling records to QPS but should receive independent legal advice first.

CALL CNP

Is a subpoena for 'counselling communication' valid?

Two reasons why a subpoena may not be valid:

1. The subpoena was issued too early during the case (ie during committal and/or bail proceedings) or
2. The court did not give permission ('leave') for the subpoena to be issued.

If you receive a subpoena that you think is invalid, don't ignore it.

Contact Counselling Notes Protect services at LAQ or WLS.

Subpoena issued too early in proceedings:

You could send a letter to the court like this – and send a copy to defence and prosecution:

*“Dear Registrar
I acknowledge receipt of the subpoena issued at Cairns Magistrates Court, returnable on 2 January 2018. We understand it is still in preliminary criminal proceedings stage and therefore the subpoena is invalid pursuant to S14D of the Evidence Act 1977. I await further notice.*

*Yours sincerely
J A Smith - CEO
Domestic Violence Resource Service*

cc Defence lawyer/ Prosecutions”



Has leave been given for the subpoena?

To find out whether or not leave has been given, to issue a subpoena, contact the court registry staff and ask:

“Has the judge or magistrate made a formal order granting leave to issue this subpoena?”
or “Has there been a notice of motion seeking leave to issue this subpoena?”

If the subpoena has been issued, without the leave of the court, the subpoena will be invalid and you are able to object.

Subpoena issued without leave

- If subpoena is invalid because it has been issued without leave of the court, you could write a letter like this, and send this to all parties:

“Dear Registrar

I acknowledge receipt of the subpoena issued at Mackay District Court, returnable on 25 December 2017. We understand that leave has not been granted by the court as required by s14F of the Evidence Act 1977. I therefore consider this subpoena to be invalid. I await further notice.

Yours sincerely

*J A Smythe – CEO
Mackay Centre Against Sexual Assault*

What to do if a subpoena is valid

If you receive a subpoena which has been issued with formal leave of the court, you need to respond.

Contact CNP services at LAQ or WLS for advice and information about responding to the subpoena.

A lawyer can file a notice to the court which objects to the subpoena based upon the Sexual Assault Counselling Privilege before the date that the material is to be provided to the court.

If you are advised to send documents to court, when the subpoena is valid, follow these steps:

1. Make sure you **ONLY** send what is requested in the subpoena.
2. Put privileged documents and a copy of the subpoena in a sealed envelope, marked “**PRIVILEGED: No access without permission of the court**”.
3. Attach a copy of the subpoena to this sealed envelope.
4. Send a cover letter, with the subpoena attached to the outside of the sealed envelope, like this:

“Dear Registrar

We enclose documents in response to the attached subpoena. Please note that this material is subject to the Sexual Assault Communications Privilege because it contains protected counselling communications and we therefore request that no access be granted to anyone without leave of the Judge (if in District) or Magistrate (if in Magistrates Court – DV). Kindly return the documents when they are no longer necessary in the court proceedings (or) please destroy the documents when they are no longer necessary for the court.*

Kind regards

*J J Cale
Psychologist”*

*please choose your preferred option.



Develop guidelines for files and records that is “subpoena” friendly in your organisation

1. File notes should be: specific, factual, written at the time you are with client or as soon as possible after, accurate.
2. File notes should include date, the name of the client, your name, your position title, and your signature.
3. File notes should not include your opinion (unless you also include what you saw/ heard/ smelt/ tasted) upon which your opinion is based.
4. File notes should not include diagnosis you are not qualified to make.
5. Should not include quotation marks in your records.
6. Keep separate records for clients who attend together, eg. child and mother separate files.
7. File management to flag clinical/ therapeutic/ or case notes with some sort of warning – stamp/ hand writing (eg “Warning: these records may be privileged. Do not release without legal advice” written on the file).

Policy: records and file management should be made with the following in mind

Defence:

1. prior inconsistent statement
2. background information about the victim
3. physical description of the accused
4. the time of the alleged sexual assault
5. anything that suggest the victim consented
6. indications that the victim has a motive to lie
7. the victims state of mind before and after the alleged assault and at the time of reporting
8. suggestions that the counsellor may have put ideas into the victims head
9. anything that may challenge the credibility of the victim or that may suggest that the victims complaint is unreliable (mental health, drugs & alcohol, taking medication).

Initial steps when served with a subpoena

Here is a list of things you need to check when you are served with a subpoena:

1. Which court has the subpoena been issued from?
2. Who is the subpoena addressed to?
3. Who is asking for the material or attendance at court?
4. What is the subpoena asking for?
5. When do you have to provide the documents or go to court?
6. Do you have the information you are being asked to produce?
7. Does the subpoena comply with the formalities?
8. Do you need to contact your client?
9. Could the information be 'privileged'?
10. Does the Sexual Assault Communications Privilege (SACP) apply?

Always contact the Counselling Notes Protect service if you are unclear about the answers to any of these questions.

Organisation's policy on responding to subpoenas

- Develop a policy for your organisation on “*What to do if you are served with a subpoena*” and ensure all staff are familiar with this policy – they should be informed by suggestions above.
- Nominate a senior staff member who has authority to release client records, and an alternative person if they are unavailable. Provide them with training.
- Use LAQ and WLS – Counselling Notes Protect - Sexual Assault Counselling Privilege Legal Service.

What is the Counselling Notes Protect Service?

The CNP is a state wide service created to provide legal advice and representation to victim/survivors of sexual assault offences who want to protect their counselling records.

The service has two full time solicitors located at:

- **Legal Aid Queensland (Brisbane)**– Helpline number is 1300 267 762, state wide number.
- **Women’s Legal Service (Brisbane)** – Helpline number is 1800 957 957 (1800 WLS WLS), state wide number.



What is the Counselling Notes Protect Service?

For sexual assault victims seeking to prevent disclosure of counselling communications we provide free:

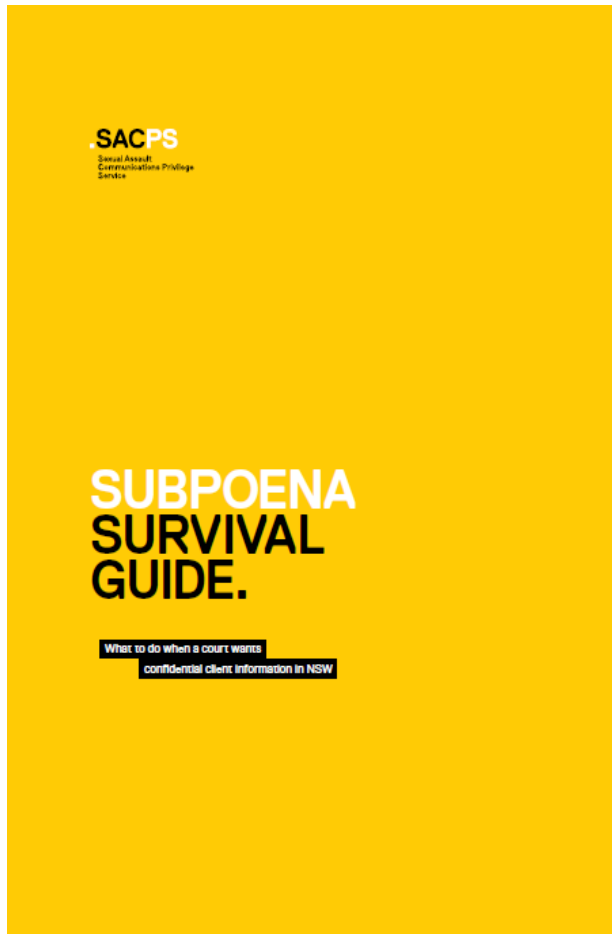
- legal advice;
- task assistance; and
- court representation

For sexual assault services, other services and the legal profession we provide free:

- legal advice;
- task assistance; and
- education.

Grants of legal aid available for court representation are not means tested or merit tested.

NSW Handbook for services on subpoenas.



<https://www.legalaid.nsw.gov.au/what-we-do/civil-law/sexual-assault-communications-privilege-service>

Women's Legal Service

- <https://www.wlsq.org.au/>
- **Helpline**
1800 WLS WLS (1800 957 957)
Monday - Friday: 9am - 3pm
- **Rural, Regional & Remote Legal Advice Line**
1800 457 117
Tuesday: 9.30am - 1.30pm
- **Administration Line**
(07) 3392 0644



Our office locations



- Brisbane (Head Office)
- Bundaberg
- Caboolture
- Cairns
- Inala
- Ipswich
- Mackay
- Maroochydore
- Mount Isa
- Rockhampton
- Southport
- Toowoomba
- Townsville
- Woodridge

Contact us for other services

Legal information and referrals

 **1300 65 11 88**

Indigenous information line

 **1300 65 01 43**

Questions about an application you have already submitted

 **07 3238 3900**





Any questions?