.SACPS

Sexual Assault
Communications Privilege
Service

SUBPOENA SURVIVAL GUIDE.

What to do when a court wants
confidential client information in NSW

Acknowledgements

Subpoena Survival Guide is based on the Women's Legal Service NSW 3rd edition (2004) publication Counsellors and Subpoenas, a practical guide for counsellors served with subpoenas. It was substantially revised by Alicia Jillard of Women's Legal Service NSW, with additional contributions by Janet Loughman of Women's Legal Service NSW and Rosemarie Lambert, Meredith Osborne and Catriona Cotton from the Sexual Assault Communications Privilege Service at Legal Aid NSW.

Legal Aid NSW and Women's Legal Service NSW thanks the many people who contributed their comments and feedback on the publication.

Without the excellent work of the lawyers, academics and activists in getting the law to acknowledge and protect the rights of victims to confidentiality, writing a guide such as this would not be possible. In particular, we recognise the efforts of the NSW Working Party Concerning the Confidentiality of Counsellors Notes that secured the creation of the privilege in 1997; and the efforts of Women's Legal Service NSW's partner organisations and all the pro bono lawyers in the 2010 Sexual Assault Communications Privilege Pilot Project[1] that helped realise much-needed amendments to the law and to service delivery for victims of sexual assault in the criminal justice system.

Finally, we acknowledge the resilience and courage of sexual assault survivors and their role in reporting crimes and bringing cases to court.

1 Ashurst (then Blake Dawson), Clayton Utz, Freehills, Louise Goodchild, the Office of the Director of Public Prosecutions and the NSW Bar Association.

Women's Legal Service NSW

PO Box 206
Lidcombe NSW1825
T: + 61 2 8745 6900
F: + 61 2 9749 4433
www.wlsnsw.org.au

Legal Aid NSW

Central Square
323 Castlereagh St
Sydney NSW 2000
T: +61 2 9219 5000 F: +61 2 9219 5333
www.legalaid.nsw.gov.au

SACP Service

T: +61 2 9219 5888
E: sacp@legalaid.nsw.gov.au

Designed by L+L Design
Edited by Sarah Shrubb

ISBN: 978-0-9807517-7-2

TABLE OF CONTENTS

ABOUT THIS GUIDE

Since 2010 there have been major changes to the law that have strengthened privacy protections of client records for victims of sexual assault. There is now a free legal service at Legal Aid NSW that provides lawyers for victims in criminal and AVO cases: the Sexual Assault Communications Privilege (SACP) Service.

This guide summarises the current law and discusses the practical implications for you and your service and how you can protect client confidentiality in NSW.

The guide has a focus on the Sexual Assault Communications Privilege but it also covers other protections relevant to subpoenas such as challenging the validity of subpoenas and tips on using the confidential professional relationship privilege. In all these questions, the law tries to balance respect for client confidentiality with the justice system's need for openness and fairness.

Dealing with a subpoena or other formal request for client records is confronting. Many people feel that they have to release whatever documents they have been asked for. This is a common mistake.

This guide will help you know what to do. It explains how to:

- keep good case notes and records;
- respond to subpoenas;
- protect your clients' right to privacy;
- meet your legal obligations; and
- find out where you and your client can go for legal help.

We have dealt with the situations we think you are most likely to come across in your work, but if you are ever unsure, contact a lawyer. Places where you can get free legal advice are listed on page 55.

A note on language.

Throughout this guide, we use the term 'victim' of sexual assault, consistent with the SACP legislation. However, we acknowledge that 'survivor' is often a preferred term.

Who should read this guide?

This guide is for people working in a health or welfare role (or organisation) in NSW who keep confidential client records. People and services who may find this guide helpful include:

- medical practitioners, psychologists, counsellors (for example, psychotherapists, school counsellors and financial counsellors), health practitioners, social workers, youth workers, case workers, complementary health professionals such as naturopaths, and other allied health professionals, sexual assault services, refuges; and
- records and information management staff in government services, including hospitals, Local Health Districts in NSW, social housing providers, schools and educational institutions.

Dealing with a subpoena or other formal request for client records is confronting. Many people feel that they have to release whatever documents they have been asked for.

This is a common mistake.

LEGAL SYSTEM BASICS

What are the different areas of law?

There are three broad categories of law in Australia: criminal, civil and family. In this guide, most of the law relating to crime and to civil cases is state law, and most of family law is Commonwealth law.

This guide will cover subpoenas and other requests for information in each of these areas of law.

Criminal law. In criminal cases, such as a sexual assault trial, the state takes an accused person to court. The state is represented by the prosecution: the police or the Office of the Director of Public Prosecutions (ODPP).

Civil law is everything that is not criminal law: employment law, personal injury, discrimination, immigration, defamation, contracts, wills and estates, property. Family law is part of civil law, but is usually considered as a separate category.

Family law applies nationally through the *Family Law Act 1975* (Cth). Family law deals with disputes about the division of property and parenting arrangements for children after a marriage or de facto relationship ends.

Care and protection matters are technically in the civil jurisdiction even though the state is one of the parties. Under care and protection law the state is empowered, with checks and balances, to intervene in families to protect children. Although care cases are civil matters, they are often considered as falling within the 'family law' category.

Victims support is part of the civil law system in which applicants seek financial assistance, counselling and/or a recognition payment following acts of violence committed in NSW. Victims Services decides applications "on the papers" using written evidence from sources such as NSW Police, hospitals, general practitioners, psychologists and counsellors and other support services.

Which court?

Most NSW courts deal with both criminal and civil cases. There are also many specialist courts and tribunals.

Criminal courts

Most criminal cases are heard in the Local Court, the Children's Court, the District Court or the Supreme Court. The severity of the crime and the age of the person charged will determine which court.

Civil courts

Civil cases may be heard in any of the following courts, depending on the amount of money at stake and the type of case:

- Local Court
- District Court
- Supreme Court
- Many specialist courts and tribunals.

Family courts

Family law matters are dealt with in the Family Court of Australia, the Federal Circuit Court and (rarely) in state and territory Local Courts.

Children's court

The Children's Court in NSW handles two kinds of cases:

- criminal charges where the accused is under 18 at the time of the alleged crime; and
- 'Care' or 'Care and protection' matters, where Community Services (Family and Community Services [FaCS, formerly DOCS]) has intervened in the care of a child (often related to removing a child from their parents or home) and seeks court orders about the future care of the child.

Sexual assault cases

Adult accused

Sexual assault prosecutions in NSW are divided among the courts in this way:

- Local Court: indecent assault and sexual assault committals
- District Court: all sexual assaults and appeals from the Local Court
- Supreme Court: the most serious of cases (usually involving homicide) and appeals from the District Court (in the Court of Criminal Appeal)

Child accused

Where the accused person is under 18 at the time of the alleged sexual assault offence, and under 21 when charged, the case will start in the Children's Court. As a general rule, most matters are finalised in the Children's Court but very serious charges will be committals to the District or Supreme Court. Appeals from the Children's Court are nearly always heard by the District Court.

Apprehended Violence Orders (AVOs)

AVOs are a special category. An application for an AVO is a civil proceeding but is generally heard along with criminal cases. A breach of an AVO is a criminal offence.

Why would a court want your records?

Courts base their decisions on evidence brought to them by the people (or organisations) involved in the case (called the "parties" to the case). Each party gathers material and information to present as evidence to the court to prove their case. Much of this material comes from people or organisations who are not parties in the case. These people or organisations are called 'third parties'.

If you or your service gets a demand or request for records about a client, you or your service would almost always be a third party.

The laws and rules about requests for material from third parties vary according to whether the case is criminal, civil or family law.

Types of requests

There are several types of requests for documents or information. They are listed below.

- Subpoenas (or in some cases called a summons)
- Letters from lawyers
- Search warrants
- Notices to produce
- Formal requests from authorities
- Requests for statements or affidavits
- Requests for expert reports
- Informal requests

For more information about the different types of information requests and some ideas on how to respond see page 8.

What is a subpoena?

The most common method for collecting material from third parties (such as counsellors and health services) is to issue a subpoena.

> A subpoena is a court order requiring a person to come to court to give evidence and/or to hand over ('produce') material to the court so that the parties can look at it ('inspection' or 'access').

A subpoena is 'issued' by a court, and then delivered to the person (or organisation) named in it, who is at that point 'served' with the subpoena. There are many technical rules about serving subpoenas.

This Guide will help you respond to subpoenas in different types of cases and courts.

TIP / Check with the issuing court if you are not sure of the rules of service for your subpoena.

KEEPING GOOD RECORDS

Why keep records?

People who provide therapeutic services for clients keep file notes and records for all kinds of reasons, including:

- memory aid
- therapeutic purposes
- client progress review and case management
- continuity of service for handover and referrals
- accountability
- professional development
- report writing
- potential evidence.

Most professions have a peak body that sets record-keeping standards and many organisations and services already have policy and guidelines on record keeping. You will need to comply with any such requirements that apply in your workplace.

What to record

In general, file notes should be:

- specific
- factual
- contemporaneous (recorded at the time or immediately after contact with the client)
- accurate.

File notes should include:

- the date
- the name of the client
- your name, your designated position and your signature (or use a computerised identification system).

They should not include:

- your opinions (unless you also include the information or observations that you based them on)
- diagnoses you are not qualified to make
- quotation marks unless you are quoting directly (no paraphrasing).

TIP / Minimise use of informal abbreviations, codes and acronyms. Other people who need to look at your notes may not be able to understand them.

Supported or unsupported opinion

File notes should be specific and record direct observations relevant to the service you are providing.

File notes should only include opinions when they are backed up by observed behaviour or other information (such as diagnostic results).

They should only include diagnoses from those who are qualified to make them. If you are not appropriately qualified, you should only record behaviour and symptoms that you have observed.

The table below gives some examples of good practice.

✔ Supported opinion	✖ Unsupported opinion
The client cried throughout the interview, was shaking, and had to stop several times to collect herself before answering questions: distressed.	The client was distressed.
Rosemary was swaying on her feet, slurring her words, smelled of alcohol. Rosemary presented as intoxicated.	Rosemary was drunk.
Joan reported that when she goes past the place where she was assaulted, she feels numb and sweaty and the memories of the attack come flooding back and she cannot stop them. She feels as if she is being attacked all over again. Above symptoms are common to Post-Traumatic Stress Disorder.	Joan is clearly suffering Post-Traumatic Stress Disorder.

How long should records be stored?

NSW Health sets out requirements for the retention of patient/client records for services within the NSW public health system. Required timeframes vary from 7 to 75 years, and some records are kept indefinitely. All records relating to sexual assault must be kept for 30 years after the client reaches 18 years, or for 30 years after the completion of any legal action or after the last contact for legal access.[2]

Subpoenas and disclosure orders (and any related correspondence) must be kept for 7 years after legal proceedings are finalised, or after the last contact for legal access purposes. This applies to the actual orders and relevant correspondence concerning the order, not to the records (notes) that are the subject of the order.[3]

Services that are not part of NSW Health may have their own requirements. The NSW Health guidelines may serve as a useful benchmark for other organisations.

TIP / It is very common for victims of sexual assault, particularly child sexual assault, to delay reporting to police for many years, often decades. For example, a 2013 case in the Sydney District Court was a prosecution for offences committed against a child in 1961. In 2016 the NSW government removed time limits for commencing civil claims arising from child abuse. In time this may increase requests for older records.

The evidence given to the Royal Commission into Child Sexual Abuse in Institutional Contexts suggests that historical child sexual assault cases may be more common in future. In these cases, even very old records that don't appear to relate to an offence can be crucial. This is because evidence about surrounding details allows a court to cross-check facts. This is very important if no formal complaint has been made and many years have passed.

Flagging sensitive records

Some client records are particularly sensitive: the records of a victim of sexual assault, and any disclosures of sexual assault, for example. Extra care needs to be taken to manage these records to protect the victim's privacy and in case they might be used in later court action to support their story.

It is a good idea to create a customised stamp or pro forma file note to place on documents that are sensitive. This will help you respond to a subpoena, and may also help others to whom you have given client records: for example, if you are a GP who is referring one of your clients to a psychologist. If you set up this sort of system, and the other person (in our example, the psychologist) is later subpoenaed, your client records may be protected.

Also, if you send letters or emails to another professional that contain sensitive documents or information, note this in your communications to help protect the records. You could use a standard paragraph or disclaimer. For example:

'Sensitive documents. May be subject to legal privilege'

OR

'Warning: these notes may be privileged. Do not release without legal advice.'

2 NSW Government Record Keeping Manual, General Retention and Disposal Authorities, Public Health Services Patient/Client Records (GDA 17) 2004 at 1.8.0.

3 NSW Department of Health Information Bulletin 2004/20 (GDA 17).

REQUESTS FOR RECORDS

Identifying the type of request

If you receive a request or demand for information, don't panic. First, read it very carefully and identify what sort of request you have received. The different types of requests/demands are listed below:

Subpoenas

These are court-ordered demands. Subpoenas order you to:

- produce documents; or
- go to court to give evidence; or
- both produce documents and go to court to give evidence.

TIP / The word 'subpoena' comes from the Latin phrase sub poena meaning 'under penalty'. In other words, the order compels you to do something. If you do not comply you can be punished.

Subpoena-like documents

In some courts and tribunals a subpoena is called a summons.

A Notice to Produce and Order to Produce are similar to a subpoena if they come from courts, tribunals, commissions and other statutory authorities.

If you get a subpoena or a subpoena-like demand, go straight to the checklist on page 10.

Search warrants

Police can obtain and 'execute' (carry out) search warrants. This allows police to enter premises and look for and take certain things that may be relevant in a criminal investigation. They are not commonly used against health or community organisations.

In the unlikely event that police present you with a valid search warrant for your records or other items, you must comply. If possible, you can try to negotiate for some time to obtain legal advice or agree on an alternative. Search warrants are sometimes issued without full consideration of the consequences. You can discuss with police what is being sought, why, and the scope of the information required. You may be able to agree with the police on another option (such as partial release of information) that may better protect client confidentiality.

TIP / If the police arrive with a valid search warrant (or an 'occupier's notice'), you need to comply. If possible, talk to the most senior police officer present, who has an overseeing role and ask if the search can be delayed so you can contact your client and a lawyer. Emphasise that you will not hinder police, you are willing to assist, and that you are both aiming to act in the best interests of the client and a proper investigation.

If the police only say they intend to issue a search warrant, you are not required to give them anything. It is, however, still a good idea to try to negotiate a compromise. Where possible, talk to a lawyer and your client before you respond.

Letters from lawyers

Lawyers can send requests for information. A letter, on its own, is not a court order, and you are not required to do anything. What would your (former) client like you to do? Most lawyers will enclose a signed client authority. If the lawyer does not enclose an authority, it is good practice to obtain written consent from your client before releasing the documents.

Letter from your client's lawyer

Check with your client that they understand the request from their lawyer. If they do, in most cases it is OK to send the material. If you are unsure, or if you think you may have conflicting confidentiality obligations, talk to a lawyer before you send anything.

If the client didn't authorise the request, try to clarify the situation with their lawyer.

Letter from someone else's lawyer

Ask your client if they have authorised the request. If they haven't, don't send anything. If they have, but you still have concerns about releasing the material, talk to a lawyer. Remember that disclosing client records without a subpoena or without the informed consent of your client may breach your professional and legal obligations.

Requests for statements or affidavits

Statements and affidavits are ways to bring you into a case as a witness. However, your evidence may not be used, and in many cases you will not need to go to court.

In some cases you may feel that providing a statement or affidavit will help your client, and in some cases your client may ask you to do so. The decision about whether or not to be involved in your client's case in this way is a complex one. Whatever you decide, only disclose what is needed. Do not attach or include originals or copies of any of your records.

If the Police ask you for a statement, and you do not wish to make a statement, for whatever reason, you are not required to. Usually, your only legal obligation is to provide your name and address to the Police. If you are in this situation, it's a good idea to seek legal advice.

Requests for reports

If you prepare a report you may be subpoenaed at a later stage to give evidence in court and/or to produce your records to the court. The court or parties in a legal proceeding commonly ask to see the primary material (your notes) forming the basis for the report. This is usually to check for any inconsistencies, and/or any material that has been missed, and to support or discredit what you have written. You may also be cross-examined about your report.

For information on where to get legal advice, see page 55.

Informal requests

These can come from anywhere, including from clients who want a copy of their file. You are not required to do anything (unless your records are covered by the GIPA or HRIA legislation), however as a general rule you should be guided by your client's wishes.

TIP / If your client is helping the Police with an investigation, they may feel that they ought to release all records the Police ask for (to support the prosecution case). Make sure your client knows that there may be other options, and that the information asked for may not help the prosecution case in the long run. Encourage them to talk to a lawyer so that they can make an informed decision.

Case study: Jamal

Jamal is a counsellor at a private clinic and has been treating David for 3 years. David was sexually assaulted by his uncle some years ago. Jamal is visited at work by a police detective investigating the sexual assault. The detective tells Jamal that his notes are crucial evidence because David made his first disclosure about the sexual assault to Jamal. This was several years before he made his formal police statement. The detective says he needs a full copy of David's very thick file and will apply for a search warrant if Jamal doesn't hand it over immediately. The detective shows him the application for a search warrant. But since the document is only an application, and not an actual warrant, Jamal decides to ask for some time to discuss the issue with David, and get some help from a lawyer.
Over the next few days, Jamal negotiates with the detective to delay release of any records until the charges are at court, when David can be represented by a lawyer. Later, with the help of a specialist lawyer from Legal Aid NSW, David consents to a very limited release of material from the file. David only agrees to the release of 3 pages of redacted (blacked out) notes, which detail his first sexual assault disclosure to Jamal. All other information about David's emotions and experiences remain private.

When you receive a subpoena

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

1 What type of subpoena is it?

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 What are you being asked to produce?

7 Do you have the information you are being asked to produce?

8 Does the subpoena comply with the formalities?

9 Do you need to contact your client?

10 Could the information be 'privileged'? Does the Sexual Assault Communications Privilege (SACP) apply?

Read on for more detail.

TIP / Never ignore a subpoena. If you fail to comply with a valid subpoena (by doing exactly what it asks or by objecting) you can be charged with contempt of court. This is a criminal charge, and can result in a gaol sentence. However, there are rules that let you object to a subpoena and often there is room to negotiate.

1 What type of subpoena is it?

The subpoena will be to:

- produce documents; and/or
- attend court to give evidence;

2 Who is the subpoena addressed to?

The request will be addressed to an individual, using their name, or to a specific position in a service, such as 'The Director'. Often subpoenas or requests for information in legal proceedings are addressed to 'The Proper Officer' and this is usually ok.

If the subpoena is addressed to the wrong person, it could lead to the subpoena being set aside. In practice, however, it is unlikely this will happen Usually the error will just be corrected.

Take particular care if the subpoena is addressed to an organisation or service that has many parts. For example, the records held by the Community Mental Health Team are far fewer than the entire Local Health District holds. Only return records from the recipient of the subpoena.

3 Who is asking for the material or attendance at court?

Subpoenas can come from many sources. It can be difficult to clearly identify the source of the request, but it is important to do so. You need to work out who has sent the subpoena, as that is the person you will need to contact if you want to discuss their request.

In criminal proceedings, for example, the subpoena can come from the prosecution (Police, Office of the Director of Public Prosecutions) or the defence (defence lawyer – or lawyers in the case of multiple accuseds – or the accused if self-represented).

In family law proceedings the subpoena is likely to come from a party to the proceedings. It could come from one of the parties, or from a lawyer for a party, or from an Independent Children's Lawyer (ICL).

4 What is the subpoena asking for?

If the subpoena is asking for the production of documents, it should include a 'schedule'. It should be clear from the schedule exactly which documents are being requested: for example, there could be a clear date range, or a category of documents, such as 'all clinical notes'.

If it is a subpoena to attend court to give evidence (with or without producing documents as well), the date and time you need to be at court will be specified. You must attend until you are excused by the Judge or Magistrate.

If you have received a *valid* subpoena you have to:

- comply by producing the documents and/or attending court as required; or
- raise a formal objection to the subpoena.

TIP / A subpoena is a court order that will require you to produce documents to court or attend court. Although you can often negotiate with the person who sent you the subpoena, **NEVER SEND DOCUMENTS TO ANYONE EXCEPT THE COURT**. You are accountable to the court, not to anyone else.

5 When do you have to provide the documents or go to court?

The subpoena will tell you the date by which the documents must be produced to the court. If you have questions about this, talk to the person who sent the subpoena or your own lawyer.

There are rules in each jurisdiction about how much time a person must be given to respond to a subpoena. This is often written on the subpoena itself, and you can also check the relevant court's rules.

Can you comply with the subpoena in the time provided?

If the subpoena is served in time but you cannot comply in that timeframe, contact the person who sent you the subpoena and try to negotiate some extra time. If that is unsuccessful or impossible, you can raise an objection with the court. You may be able to claim that the subpoena is 'oppressive'. It is best to talk to a lawyer in this situation.

Are you available on the day?

Being 'available' for court is not the same as whether or not it is 'convenient' for you to attend. Courts will only accept very serious circumstances as reasons for non-attendance, such as a medical emergency.

If the subpoena says you have to attend court (with or without documents), and that will be difficult for you, contact the person who sent the subpoena or the court to see if the date can be changed. If necessary, talk to a lawyer about your options.

6 What are you being asked to produce?

If you are being asked to produce documents, read the schedule carefully. The schedule will specify what documents are 'caught by the subpoena'. You should only ever provide what it asks for. The table below lists some examples of common (but serious) mistakes.

Reading the Schedule – Common Mistakes

The schedule asks for …	But instead you provide …
John Smith's file (DOB 16/4/42)	John Smith's file (DOB 18/10/68)
All school attendance records	The entire student file, including academic results, school reports and counselling notes
All case notes from 4 April 2006 to 20 June 2007	All case notes on the client file from 1986 to 2012
All files held by the Drug & Alcohol Service	All files held by Community Health including Mental Health Team and Child & Baby Early Childhood Nursing notes

If the schedule is unclear, confusing or too difficult to comply with, or you need to use your discretion to work out what is required, the subpoena may be oppressive. If you're not sure about any of this, talk to a lawyer.

7 Do you have the information you are being asked to produce?

If you don't have the material, notify the court that you do not have anything to produce. You must be honest. If you don't have the material because it's been lost or destroyed, for example, say so in writing.

8 Does the subpoena comply with the formalities?

The rules about subpoenas vary from one court to another.

There are time limits for subpoenas, so check with the Registry of the issuing Court to see if the subpoena complies with its required time limits. The courts have the power to reduce the time limits for compliance with subpoenas if there is some urgency. This is called 'short service' (see page 16).

TIP / Sometimes subpoenas have very short timeframes – some even ask for material on the next day! These are called 'short service' subpoenas. Make sure you carefully check the response date and whether the court has allowed such a tight deadline.

9 Do you need to contact your client?

Always contact, or attempt to contact, your client (or former client) when you receive a subpoena for their records. Tell your client about the subpoena and ask them what they want you to do. Let your client know that you will do your best to act according to their wishes but sometimes your legal or professional obligations may prevent you from doing so.

Tell your client that they can get legal help about their rights and whether there are any special rules that protect their privacy, such as the Sexual Assault Communications Privilege (SACP). For detailed information on this, go to page 24.

Who is your client?

Sometimes it can be unclear whose confidentiality will be breached, or whose consent is required, before notes are produced or evidence is given to the court.

In family counselling and child counselling, for example, it may not be easy to distinguish your client from the other people participating in the counselling process. Take time to clarify whose confidentiality may be compromised by disclosure, and do your best to consult each of these people individually.

What if the client asks you for advice?

Some clients may ask you whether or not they should consent to their records being produced. They may place undue weight on any advice you give because of the relationship you have. If you are not a lawyer with experience in this area, you should avoid telling the client whether or not to consent.

You can, however, talk to your client about the general impacts of disclosure of records (see page 21). You could also refer the client to their current therapist or an appropriate counselling service.

Tell your client that they should talk to a lawyer about their options, and offer them appropriate referrals. (See the list on page 55.)

What if you can't find your client?

Make reasonable attempts to contact your client. Write to or telephone your client at their last known address or contacts number, or try an electoral roll search or telephone directory or internet search.

In criminal proceedings, if your client is a complainant or a witness and you cannot find them, contact the police or the ODPP for help.

Where a solicitor is asking for your records, ask the solicitor if they have contact details for the client, even if they don't act for the client. They may not be able to give you those details, but they may be willing to contact the client or their lawyer and ask the client to get in touch with you.

TIP / If you cannot contact your client, it is generally advisable to raise an objection to the subpoena.

Who can consent to the disclosure of confidential information?

Only the client can give you permission to disclose their records or to give evidence about the treatment or counselling in court proceedings. Make sure your client has had an opportunity to get legal advice first.

There are times when the court will require you to disclose information despite your client not giving consent.

If you intend to comply with a subpoena but your client wants to maintain the confidentiality of their records, talk to a lawyer.

If your client consents to producing their records to the court, get the specific consent in writing.

TIP / If a client allows you to disclose confidential records they may be giving up ('waiving') some of their legal rights to privacy. Encourage your client to get independent legal advice before consenting to release of their records. Remember: all parties to a court case are likely to see documents that are released without objection.

Seeking consent where there are multiple clients

Where case notes relate to multiple people, it may not be clear whose consent to disclosure is required. For example, there could be a number of clients, adults and children, involved in a counselling session. Even where it is clear that you have one client, a child for example, an adult may have attended as a support person and provided confidential information.

Try to get consent from anyone who provided confidential information to your service, including children.

Seeking consent from vulnerable clients

Issues around the waiving of confidentiality become complicated where a client is too young, or lacks capacity because of cognitive impairment, to give proper consent.

In these situations you should talk to a lawyer. There are specialist legal services for vulnerable groups, such as the Intellectual Disability Rights Service and the Older Persons Legal Service (see Useful contacts, on page 55).

10 Could the information be 'privileged', and would the Sexual Assault Communications Privilege (SACP) apply?

You need to consider this every time you receive a subpoena. The Sexual Assault Communications Privilege (SACP) is a very broad privacy protection and can apply in any criminal or AVO proceedings whenever the records requested concern someone who has ever been a victim of sexual assault. SACP will apply even if the material has no connection to any alleged sexual assault (for more on the Sexual Assault Communications Privilege, see page 24). If the SACP does not apply then another legal privilege could protect the confidentiality of the client's records.

TIP / You need to make sure you know about and understand the Sexual Assault Communications Privilege: it was strengthened in 2010.

Your organisation's policies

Here are some policies your organisation should have:

- What to do if you are served with a subpoena. Have a subpoena policy and make sure all staff know about it. Include information about handling subpoenas. You can use this Guide as a reference.
- Keep separate records for clients who attend together. For example, if your client is a child and you also take notes about the mother, these should be put in a separate client file.
- Flag clinical, therapeutic or case notes with a warning system (particularly if the client has been a victim of sexual assault). The warning should say something like: *Warning: these notes are confidential and may be privileged. Do not release to other parties without proper client consent and legal advice.*
- Nominate a senior worker who can authorise release of client records. Make sure they get training and have a backup plan in place if the nominated person is not available.

Health NSW Subpoena Policy is available on line at www.health.nsw.gov.au, however the policy predates the 2010 SACP reforms and is currently under review.

Never ignore a subpoena.

If you fail to comply with a valid subpoena you can be charged with contempt of court. This is a criminal charge, and can result in a gaol sentence.

OBJECTING TO A SUBPOENA

If you decide to object to a subpoena, talk to a lawyer. If you cannot get legal advice, use this section as a guide.

There are three kinds of objection:

- The subpoena is not valid for technical reasons
- General objections against a valid subpoena
- Objections based on claims of privilege or specific protections.

Objections to validity

Failure to comply with the technical requirements

Each jurisdiction has its own rules about the technical requirements of a subpoena. They deal with:

- conduct money (supplying subpoena recipients with enough money to comply)
- time for service (delivery) of the subpoena
- manner of service.

Insufficient conduct money

When a person is subpoenaed to give evidence in court he or she must be given 'conduct money', to cover reasonable costs of complying with the subpoena. This is to cover reasonable travel expenses and incidental expenses, such as photocopying.

Conduct money is not generous. But, for example, the NSW District Court Rules require that when a person is subpoenaed to produce documents he/she must receive all reasonable costs of complying with the order. If the request will involve a lot of photocopying, the recall of large amounts of material from archives at significant cost, or long distance travel and accommodation, you can ask for more conduct money.

If you have received insufficient conduct money, contact the person who sent you the subpoena and explain your concerns. They might be willing to narrow their request or pay you more. If you reach a new agreement, get it in writing. If you are unable to resolve the dispute or there is not enough time to do so before court, you can raise an objection in court, but make sure you do this before producing the documents.

If the court agrees with you, the issuing party will usually be ordered to pay the additional conduct money, and you will then have to comply with the subpoena.

Case study: Kim

Kim is giving evidence in a jury trial. During cross-examination the defence lawyer asks her: 'You never told anyone else about this, did you?' Kim says, 'Yes I did. I told the doctor at Langton Hospital.' This is the first time that either the defence or the prosecution has heard about a disclosure to staff at Langton Hospital. A subpoena is then issued for the records held by Langton Hospital about Kim's visit. The Judge approves overnight service because a long expensive jury trial is already underway. The subpoena and attached 'short service order' are given to Langton Hospital at 3:30pm that afternoon and the documents must be produced at court at 10am the next morning.

Time for service

If you have not been given enough time to comply with a subpoena, according to the court rules, you do not have to attend court or produce documents.

For example, the NSW District Court Rules require that a subpoena must be served within a 'reasonable time':

- if served by mail, the subpoena must be properly served 21 days before the hearing;
- if served personally, 5 days is sufficient.

‘Short service’ orders

Courts have the power to order ‘short service’, which means they can override the usual time limitations. A court may order ‘short service’ if it is satisfied that it is in the interests of justice to do so. Any order for short service must be attached to the subpoena.

Subpoena served outside time

The rules around time are designed to ensure that you have enough time to deal with subpoenas properly: you need to consult your client, and you may need to access files, contact former staff members, consult your colleagues, and/or talk to a lawyer.

If a subpoena does not comply with the rules for time of service you need to notify the person who sent the subpoena and the court. The court is likely to allow you more time.

You need more time

If the subpoena complies with the time requirements but you need more time, contact the person who sent it, explain your concerns and see if you can agree on more time. Always ask for confirmation in writing. Notify the court as well. Keep a copy of this correspondence.

If you cannot agree on a time extension, do as much as you can to comply in the time you have, then go to court on the date specified and ask for more time. Talk to a lawyer before you do this.

Subpoena issued without a ‘legitimate forensic purpose’

A ‘legitimate forensic purpose’ means that the subpoena is likely to uncover something that will have a significant impact on the outcome of a case. In short, there needs to be a good reason for issuing the subpoena. The tests for this are:

- Criminal: is it ‘on the cards’ that the documents would materially assist the accused’s defence?
- Civil: is it likely that the documents will materially assist on an identified issue, or is there a reasonable basis (beyond mere speculation) that they will be likely to assist?

A subpoena is only valid if it has a legitimate forensic purpose. The law does not allow subpoenas to be issued for ‘mere fishing expeditions’.

How to object: lacking legitimate forensic purpose

You make an application to the court to set aside the subpoena. The court will look only at the subpoena itself, not at the documents or things requested in the subpoena.

Failure to seek/grant leave

Some subpoenas are subject to stricter rules: they apply in relation to sexual assault victims and in family law cases, and some other courts. These subpoenas are only enforceable if the court has granted ‘leave’ (formal permission) for them to be issued.

If you think that your subpoena is in one of these categories, check whether the court has granted leave to issue it. If you believe the subpoena is invalid because leave has not been granted, notify the court and the person who sent you the subpoena. You should always acknowledge that you have received the subpoena, and let the court know that you will respond if and when the rules have been followed.

Most subpoenas in family law matters, for example, are only issued with the court’s permission. The exception is subpoenas issued by an Independent Children’s Lawyer.

TIP / In any criminal or AVO case, always check whether or not the Sexual Assault Communications Privilege applies (see page 24). If it does, the court must give permission before subpoenas are issued.

Case study: Michaela

Michaela is a physiotherapist who treats Jemima and Emily, who are sisters. Emily is the victim of a sexual assault and a prosecution of the alleged perpetrator is underway. Michaela receives a subpoena for all notes about Jemima’s treatment.

Since Jemima is not at all involved in the court case, and there’s nothing in the case to suggest that Jemima has discussed Emily with Michaela in any way, Michaela can argue that the subpoena for Jemima’s details does not have a legitimate forensic purpose, because there is nothing to suggest that it is ‘on the cards’ that the records about Jemima could materially assist the accused’s defence. Jemima could seek her own legal advice and representation.

Objections to a valid subpoena

Abuse of process

A court may set aside a subpoena: if it decides it is an abuse of process; if the person who is served with the subpoena is unable to produce the material requested; or if the court does not have power to order production of the requested documents.

To object on this ground, you need to go to court on the date specified and ask the court to set aside the subpoena.

Oppressive

If you believe a subpoena is too difficult or too time consuming or too expensive to comply with, you may argue in court that it is 'oppressive'. Keep in mind that 'inconvenient' is not the same as 'oppressive'. If in doubt, seek legal advice. A subpoena may also be oppressive if it is not specific enough about which documents it is seeking or if collecting and producing the documents is unduly onerous. If this is the case, it is a good idea to explain in your objection how it is so onerous. What makes it unusually difficult to comply with?

Objections based on specific protections

Information requested is privileged

The general law on subpoenas includes rules that shield certain types of information from disclosure in court cases. Some examples include:

- Client legal privilege (also known as legal professional privilege)
- Religious confessions privilege
- Self-incrimination privilege
- Public interest immunity
- National security privilege ('matters of state')
- Professional confidential relationship privilege (for example, between a doctor and patient, or social worker and client).
- Sexual Assault Communications Privilege (see page 24)

Whilst the detail is different, these rules generally try to balance the competing interests of open justice, the rights of the parties, and others who might be affected by disclosure of the information.

Professional Confidential Relationship Privilege

If you are a doctor, social worker, counsellor or therapist (or anyone who provides confidential professional services to clients) you can ask the Judge or Magistrate to protect your documents or evidence in any court case. NSW law gives the Judge a discretion to maintain confidentiality if the harms of disclosure outweigh the desirability of the evidence being given. Otherwise, the requested information will be disclosed.

Even when the Court decides to release the information, objecting due to this privilege can give you and your clients reassurance that this really was necessary in the case. The Court can also put more stringent limits on what happens to the documents. For example, no photocopying, or only to be accessed by legal representatives.

This protection is additional to any protection given by the Sexual Assault Communications Privilege and applies in any NSW court case. Claiming privilege does not guarantee that confidentiality will be maintained. See Evidence Act NSW 1995 sections 126A and 126B.

Case study: Sue

Sue is a clinical nurse who assessed a man who was a suicide risk in police custody. The Judge in the criminal trial decided that the professional confidential relationship privilege applied to his conversations with Sue. Evidence of what he said to her was not admitted. The confidential relationship between Sue and the patient was protected. [Based on a real case *R v Leung* [2012 NSWSC 1451]

TIP / If you provide confidential professional services to clients, you can claim Professional Confidential Relationship Privilege in answer to **any** subpoena for your records. But it's up to you to do this. Unless you tell the Court that the items requested by subpoena are sensitive and privileged, they will be treated like any other document.

Objections based on the Court's obligation to ensure the proceedings are fair

Even if the SACP and Professional Confidential Relationship Privilege don't apply, there may still be options available.

If you have privacy or other concerns about releasing information, asking the Court to use its discretion to limit access to material validly produced under subpoena might help.

How does this work?

After the Court has heard earlier objections and has control of documents produced under a subpoena, it still has to decide whether to give anyone else access to them. The Court has a broad power to decide what will best serve the interests of justice, including the 'elucidation of truth'. But this does not automatically mean the disclosure of private information – far from it. For example, in *National Employers Mutual Association Ltd v Waind and Hill* [1978] 1 NSWLR President Moffitt said (at [383]):

There may be good reason why [the Court] may, or indeed, should, refuse inspection of irrelevant material of a private nature, concerning a party to the litigation, or, concerning some other person who is neither a party or a witness.

Similarly, section 26 of the Evidence Act NSW 1995 gives a Court broad powers to control the evidence that is put before it.

Talk to a lawyer if you think these options might apply to you.

Records containing 'child at risk' reports

'Risk of harm' reports made to Family and Community Services cannot be produced in any court except in children's care and protection proceedings, and then only in certain circumstances.

The identity of a person who made a child at risk report (including mandatory reporters) must not be disclosed to any person or body except with the consent of that person.[4] A court may only order the disclosure of the identity of a person making an at risk report if it is of critical importance in the proceedings and a failure to admit the evidence would prejudice the proper administration of justice.

If you are subpoenaed for information that would disclose a child at risk notification or the identity of a maker of such a report, you can object to the subpoena as an abuse of process without confirming or denying the existence of those records.

You may be able to agree to protect the identity of a child at risk report maker and the child at risk report by copying the records requested and blacking out ('redacting') the relevant reports or information. Talk to a lawyer in these circumstances.

TIP / If you use a permanent marker on typed print it is often possible to still read the print underneath. To ensure complete redaction, black out a photocopy of your records then photocopy it again.

Records detailing Victims Support and (statutory) victims compensation claims

Details of victims' claims for counselling and other support are not generally "admissible" evidence. Similarly, the fact that victims compensation and "recognition" payments have been claimed (or made) cannot be used in most cases.

You cannot be required to produce evidence of this type even if it is requested by a subpoena: see Victims Rights and Support Act 2013, Section 113.

The Victims Commissioner can order information to be produced to the Commissioner though, to help in the investigation or assessment of a claim: Victims Rights and Support Act, Section 12.

4 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 29(1)(f).

CONFIDENTIAL RECORDS IN SEXUAL ASSAULT CASES

There are important legal, ethical and professional reasons to protect the private information of sexual assault victims in criminal proceedings.

Sexual violence

While accurate rates of sexual violence are hard to calculate, research indicates that it is an under-reported crime. The Australian Institute of Criminology (AIC) estimated that less than 30 per cent of sexual assaults and related offences are reported to the police.[5] Sexual assault happens to women, men and children of all ages and socio-economic and cultural groups.

Sexual assault is more common against women than men, as was summarised by the Australian Law Reform Commission (ALRC) in its 2010 Report **Family Violence, A National Legal Response**:

> "Sexual violence is strongly gendered with many more women reported as experiencing sexual violence than men. When women and children are sexually assaulted, the perpetrator is likely to be someone well known to them, a current or former partner or family member. While all women and children may be at risk of sexual violence, some are more vulnerable than others, including young women, Indigenous women, women from culturally and linguistically diverse backgrounds (CALD), and women with disabilities."[6]

The Australian Law Reform Commission also summarised some of the barriers faced by women and child victims reporting sexual assault, noting in particular the complexities of intimate partner violence:

> "Women and children may not report or disclose the sexual violence that they have experienced for a range of reasons, including because: they have not identified the act as sexual violence, let alone as a criminal offence; they do not consider the incident serious enough to warrant reporting; they are ashamed, fearful of the perpetrator, do not think that they will be believed, fear how they will be treated by the criminal justice system, and may consider that they can handle it themselves … The failure to recognise or identify an act as sexual violence, or more specifically as a sexual assault, may also be a 'survival strategy' for some women, particularly those who have been sexually assaulted by an intimate partner."

Aboriginal Australians and people from culturally and linguistically diverse backgrounds (CALD) can face additional cultural and socioeconomic barriers to reporting sexual assault to police.

5 2007, the Australian Institute of Criminology (AIC).

6 www.alrc.gov.au/publications/24.23.

Assistance for sexual assault victims

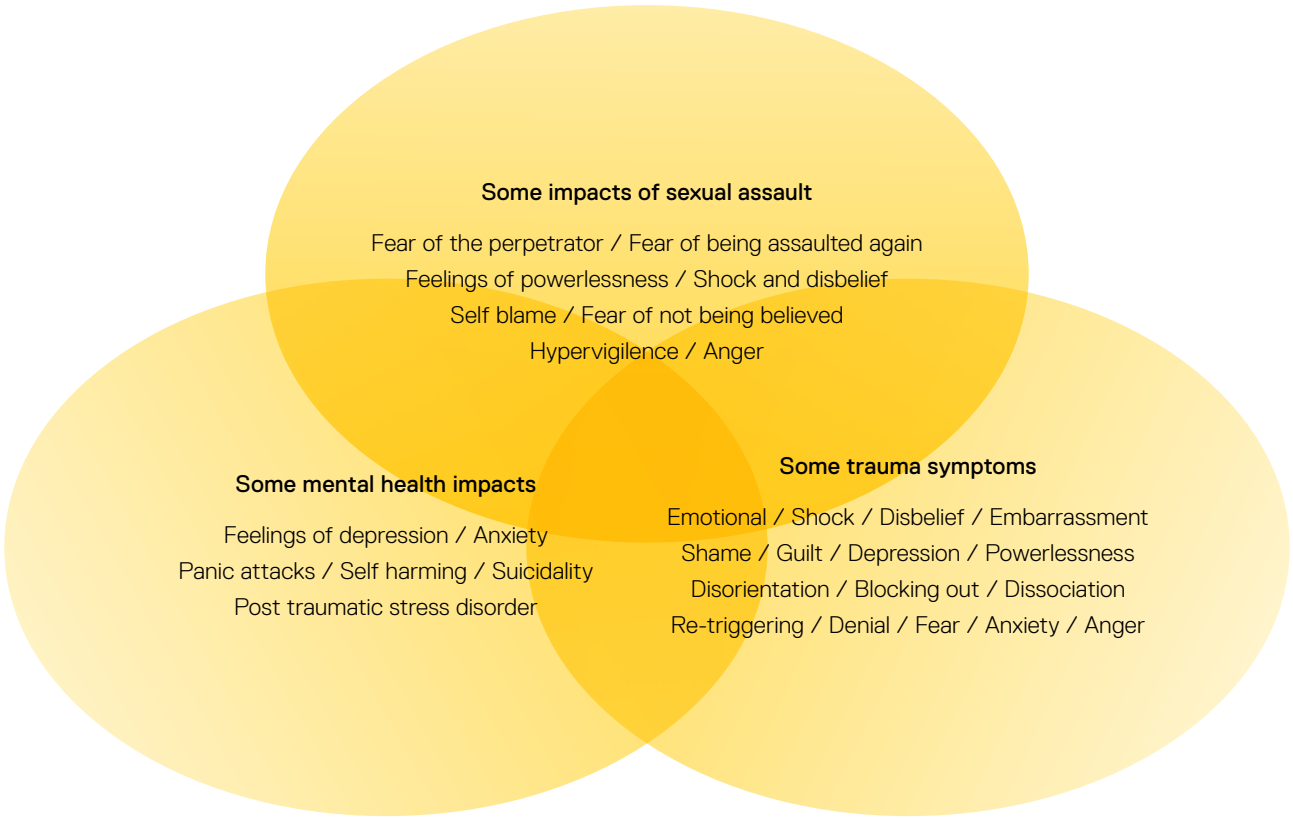
Therapeutic assistance and support services that are be available to victims of sexual assault include:

- counselling: psychiatrists, psychologists, psychotherapists, social workers, counsellors, drug and alcohol workers;
- medical assistance: General Practitioners (GPs), specialists (including gynaecologists), paramedics, nurses;
- refuge and other accommodation assistance; and
- complementary health services: acupuncture, osteopathy, naturopathy, massage.

These types of services are all likely to collect highly sensitive, confidential records about victims, and are subject to special rules about how that information can be disclosed or used in criminal proceedings. This is discussed below and in the Sexual Assault Communications Privilege section on page 24.

Common impacts of sexual assault

Source: NSW Rape Crisis Centre



Reasons for protecting victim records

A recent report by the Australian Institute of Criminology (AIC) found that the:

> "key concerns influencing the decision whether or not to report an assault to the police are confidentiality, fear of the assault becoming public knowledge, and the possibility of a defence lawyer being able to access details of medical and sexual histories."[7]

One woman quoted in the report said:

> "What stopped me was what was going to come out in the trial; knowing that the defence lawyer had researched all about me, like my medical history and employment, and the offender would hear all about me."[8]

Effects on the victims

If the confidentiality of notes is not protected, it can result in:

- the victim feeling further violated and traumatised
- damage to the relationship of trust between practitioner and client
- fear and anger that the offender might find out where the victim lives or works, or other personal details
- heightened sense of shame and guilt or disconnection from community
- reduced willingness of victims to report sexual assault or proceed with the case.

These points can be useful when you are raising an objection to producing or using confidential material in court.

Lack of relevance of the material

Counsellors' notes document a client's emotional response. Other types of therapeutic records, such as those made by a GP or a naturopath, for example, may contain diagnoses and observations of physical ailments and/or a patient's emotional responses.

Such records represent one person's observations of and opinions about the feelings and emotions of another person. The client usually has no opportunity to review the notes to confirm if they are an accurate record. Some therapeutic or counselling records can be relevant to legal proceedings in some cases, but this is a matter for lawyers to assess, so all relevant objections should be raised with the lawyers.

Workers' ethical position

Requiring counsellors, social workers and other allied health professionals to reveal confidential information places them in a difficult position ethically and can be perceived as a breach of trust. Their effectiveness as workers can be compromised if they feel that this aspect of their professional duty is in conflict with their professional responsibility to protect the best interests of the client.

Case study: Shanti

Shanti was sexually assaulted by a friend of her partner, who was charged by police. Even though she could give evidence from a remote witness room, Shanti decided to give evidence in the courtroom. When she arrived at court, she saw the accused looking through a bundle of papers. She saw that the documents were copies of her entire counselling file. Shanti was horrified to see that the accused was able to read all her personal information, and became very distressed. This happened at the worst possible time, because she was about to give evidence and be cross-examined about the sexual assault.

This is a scenario that the Sexual Assault Communications Privilege (SACP) should prevent.

Cultural issues

Responses to sexual assault can be influenced by cultural traditions, histories and intergenerational experiences, including negative experiences with police and other authorities. Disclosure of confidential information may damage a victim's emotional and physical well-being and their connection to their community, or where they belong, in a range of ways. Breaches of confidentiality can undermine a victim's or their family members' willingness to report and assist in the prosecution of sexual assaults, or to gain access to healing services.

7 ALRC Report, *Family Violence – A National Framework*, 2010.

8 ALRC, Report 102, *Uniform Evidence Law*, completed jointly by the ALRC and the NSWLRC, was tabled in the Commonwealth and Victorian parliaments and released in NSW on 8 February 2006.

Counselling and therapeutic records in criminal cases

The way confidential records are used in court will depend on who wants to use that information:

Defence lawyers

Defence lawyers represent the accused. If the accused pleads not guilty, the defence lawyers will challenge the prosecution. Defence lawyers may seek the following information from counselling and therapeutic notes:

- prior inconsistent statements;
- background information about the victim;
- physical descriptions of the accused;
- the time of the alleged sexual assault;
- anything that suggests the victim consented;
- indications that the victim has a motive to lie;
- the victim's state of mind before and after the alleged assault and at the time of reporting;
- suggestions that the counsellor may have put ideas into the victim's head or coached the victim to present a particular story;
- anything that may challenge the credibility of the victim or that may suggest that the victim's complaint is unreliable (for example Drug and Alcohol and Mental Health and some medical material).

Prosecutors

Prosecutors represent the government and the community. Their job is to prosecute alleged crimes. A prosecutor is not the victim's personal lawyer and is not necessarily on the side of the victim. Prosecutors usually request counselling, health or other therapeutic records as evidence to support the case against the accused. However, in some cases they may also be testing the victim's credibility.

TIP / Victims generally want to assist the prosecution, but they, and you, can object to producing records whether subpoenas come from police prosecutors or the defence.

Police and prosecutor duties of disclosure

In general, both the Office of the Director of Public Prosecutions (ODPP) and the police have a duty to hand over all relevant evidence, including a list of proposed witnesses, to the defence. They must disclose it all, even if it is likely to harm their case and help the defence.

TIP / Remember, the prosecution's duty to disclose means that anything you give the prosecution will almost certainly be given to the defence. This is why you need to make sure your client gets independent legal advice before consenting to the release of their records to police.

Case study: Neil

Neil was sexually assaulted by his tennis coach when he was 12 years old. About 10 years later, when he was 22, he commenced treatment with Penny, a naturopath. Neil disclosed the sexual assault to Penny. When he was 27 years old, Neil made a formal statement to police about the sexual assault that had happened when he was 12. The investigating officer, Senior Constable Roberts, asked Neil if he'd ever disclosed this to anyone else, and Neil said that the only people he told were his sister, who had since passed away, and Penny, his naturopath. Senior Constable Roberts asked Neil to sign a written consent to obtain copies of Penny's records.

Although Neil wants to help the police, he doesn't know what other information about him might be in Penny's records. He decides to get legal advice before giving consent.

Documents released to the police during their investigations

Sexual assault complainants can feel that they have an obligation to assist the police investigation by consenting to the release of their health or counselling records, whether or not there is a subpoena, and sometimes before any court case has started. Police have a duty to conduct thorough investigations and collect all relevant evidence, even if it does not support the police case.

Victims of sexual assault can agree to release their documents to police, but they should seek independent legal advice about their rights and options first. It is also possible to give police partial or conditional consent, for example, to access only some of the medical/counseling material (rather than the whole file) and only on the condition that it is not shared with anyone.

Alternatively, decisions about evidence such as counselling records can be left to the ODPP lawyers, once the case gets to court.

The ODPP can ask police to gather information as further evidence. This is called a 'requisition'. This option allows the ODPP and police to go back and gather information later if it is necessary: not all information needs to be handed over in the investigation stage.

SEXUAL ASSAULT COMMUNICATIONS PRIVILEGE (SACP)

Protections for sexual assault victims' confidentiality in NSW

In 1997, NSW became the first jurisdiction in Australia to protect the confidentiality of sexual assault victims' counselling records in the criminal trial process with the passing of the *Evidence Amendment (Confidential Communications) Act 1997* (NSW). The protection is referred to as the Sexual Assault Communications Privilege (SACP).

There were several reasons for the introduction of this law:

- increase in the number of sexual assault services in Australia in the 1980s and early 1990s;
- increasing activism and law reform around the impact of sexual assault trials on victims;
- increase in defence lawyers obtaining and using counselling records in criminal proceedings;
- international law reform in this area.

The primary aim of the SACP was to protect sexual assault victims from further harm that may be caused if their records were revealed, safeguarding the broader public interest in maintaining the integrity of counselling and to promote the reporting of sexual assault.[9]

Parliament changed the law in 1999 and 2002 in response to narrow interpretations of SACP by the courts. The amendments expanded the scope of records 'caught' by the privilege.

In December 2010, further reforms strengthened the privilege. The 2010 amendments enhance victims' participation in decisions affecting the confidentiality of their counselling and therapeutic records by:

- establishing a new right for victims (or their lawyer) to assert the privilege in court;
- requiring parties to ask permission (leave) from the court before issuing a subpoena;
- expanding the factors a court must consider before granting leave to disclose records;
- allowing the court to consider a 'confidential harm statement'; and
- expanding the range of sexual assault victims who can claim the privilege.

Today, the SACP protections are contained in the *Criminal Procedure Act 1986* (NSW).

Case study: Di Lucas

In December 1995, the Coordinator of the Canberra Rape Crisis Centre, Di Lucas was imprisoned for refusing to comply with a subpoena to provide a client's confidential counselling notes. The case received national media attention and after a hard fought campaign by sexual assault survivors, lawyers, academics, sexual assault counsellors and parliamentarians, the NSW Government announced it would introduce laws to restrict access to counsellors' notes in criminal cases. In 1997, landmark legislation was passed that created the Sexual Assault Communications Privilege. The law has been changed over time to strengthen these protections, most recently in 2010.

9 NSW, *Parliamentary Debates*, Legislative Council, 22 October 1997, 1129 – 1121 (Jeffrey Shaw, Attorney General)

Sexual Assault Communications Privilege Pilot Project

The 2010 reforms were in response to the work of Women's Legal Services NSW and a group of pro bono lawyers at the firms Ashurst,[10] Clayton Utz, and Freehills, the NSW Bar Association and the Office of the Director of Public Prosecutions (ODPP). The lawyers provided free legal advice and representation to sexual assault victims in privilege matters. For the first time in Australia, victims were directly represented in court arguments about subpoenas.

The pilot project showed several things:

- subpoenaed parties rarely raised objections based on the privilege;
- the legal profession and judiciary had limited knowledge of the privilege legislation; and
- sexual assault victims were unaware of the privilege and generally had no access to legal representation to assert their right to confidentiality.

It also uncovered technical gaps in the law.

Legal service for sexual assault victims

In addition to enhancing protections under the Act, the NSW Government funded a new legal service for sexual assault victims claiming the privilege. The Sexual Assault Communications Privilege Service (SACPS) was established at Legal Aid NSW in late 2011. It provides free legal representation for sexual assault victims in privilege matters in NSW. All sexual assault victims, whether child or adult, who need legal help about the privilege can now access a free lawyer.

SACPS lawyers have been specially trained and can go to any criminal court in NSW. SACPS also provides education, legal and policy advice to the health, community and welfare sectors, as well as police and the legal profession, to promote awareness of the privilege.[11]

Policy reasons for the Sexual Assault Communications Privilege (SACP)

A 'privilege' is like a shield that is used to protect certain types of information from disclosure in legal proceedings where it is in the public interest for that information to remain confidential.

Protections for sexual assault victims' privacy are much debated. Some lawyers, particularly those working in the field of criminal defence, argue that the privilege could exclude relevant evidence and interfere with a defendant's right to a fair trial and their ability to fully defend an accusation made against them by a well-resourced state.

On the other hand, some sexual assault counsellors and lawyers argue that there is never a good reason to disclose a sexual assault victim's case notes, as their purpose is therapeutic, not investigative or forensic.

The privilege seeks to strike a middle ground so that a sexual assault victim's confidential counselling or therapeutic records (referred to as 'counselling communications') may only be disclosed in criminal proceedings if the information has significant value as evidence in the case and the public interest in disclosure substantially outweighs the public interest in non-disclosure.

At the time the privilege was introduced in 1997, the Attorney General, the Hon. Jeff Shaw, said in Parliament (NSW):[12]

> "The primary purpose of counselling is not investigative, it is therapeutic. The Government recognises the importance of counselling for a victim of sexual assault, and complainants are referred to a sexual assault counsellor when they complain to the police. As part of the counselling process, the complainant is encouraged to release emotions and talk unhindered, and yet the complainant has no legal right to review the notes to see if they are an accurate reflection of his/her version of the events."

10 Then known as Blake Dawson.

11 Van de Zandt, Pia, 'The Sexual Assault Communications Privilege', *The Judicial Officers Bulletin*, November 2011.

12 Second Reading Speech of the Evidence Amendment (Confidential Communications) Bill 1997

In introducing the latest amendments in 2010, the Attorney General, the Hon. John Hatzistergos, affirmed that 'these reasons are still significant 13 years on',[13] and summarised the purpose of the privilege in these terms:

"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 [used] 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."[14]

13 The Hon. John Hatzistergos, Second Reading Speech, *Courts and Crimes Legislation Further Amendment Act 2010*, NSW Parliament, 24 November 2011.

14 Ibid.

What is SACP?

The Sexual Assault Communications Privilege (SACP) is a special legal rule that limits the disclosure in court of counselling, health and other therapeutic information about a victim of sexual assault. It is set out in the *Criminal Procedure Act 1986* (NSW).[15]

TIP / It is important to understand that SACP does not apply in all areas of law.

This privilege applies in all criminal and Apprehended Violence Order (AVO) cases in NSW. It also applies in some civil cases (see page 38), but only where SACP has been upheld in a criminal proceedings and the civil case is about the same or similar acts.

SACP does not apply in family law. It generally does not apply in child protection cases (see page 42).

15 See Division 2, Part 5, Chapter 6, ss 295–306.

Type of Case	Does SACP apply?
Sexual assault charges	Yes
Other criminal charges	Yes
AVO	Yes
Civil	Occasionally
Family	No : consider public interest immunity, Evidence Act and Family Law Act arguments
Child protection (care and protection cases)	Generally not
Victims Support Scheme	No

What triggers SACP?

SACP is activated when a party to a criminal case (defence, prosecution or police) wants to access or use written or oral communications that have been made in confidential, therapeutic settings. For example, the defence wants access to the victim's mental health records, or the prosecution want to rely on evidence that the victim told their GP about a sexual assault immediately after it happened, many years before it was reported to the police.

In practice, the ODPP usually alerts the victim to their SACP rights so they can get legal advice and representation if they want it. As awareness of the privilege increases, Judges, lawyers and health professionals also identify privilege issues when they arise.

How broad is SACP?

The privilege protects a very broad range of confidential information, not just sexual assault counselling records. Some examples of protected communications are:

- counselling notes
- medical notes
- mental health records
- drug and alcohol records
- financial counsellor records
- letters and referrals between health professionals
- emails from a school counsellor to a parent or teacher
- social worker reports held by Centrelink or Department of Housing.

SACP Terminology

SACP law is complex. It can be confusing because it uses everyday terms that have a special technical meaning in the legislation. Some of these terms are defined below:

Protected confidence

The privilege applies to any information that is a 'protected confidence'.

A 'protected confidence' is defined as:

- a counselling communication
- by, to, or about
- a victim (or alleged victim) of a sexual assault.

There are three things to note about this definition. First, a counselling communication is covered by the privilege even if the sexual assault is only alleged (i.e.. not yet proved to have occurred).

Second, a counselling communication is protected whether it occurred before or after the sexual assault took place.

Third, a counselling communication is privileged even if it does not mention sexual assault or contain any information about a sexual assault.

This means that the SACP creates a special class of witness: anyone who has even been an alleged victim of a sexual assault. Any therapeutic information that relates to a witness in this class will be privileged in all criminal and AVO proceedings.

TIP / Remember, the privilege relates to records even if they were made before the sexual assault and to records that do not refer to the sexual assault or are not, or do not appear to be, directly related to the assault.

Protected confider

A person who makes a protected confidence is known as a 'protected confider'. The sexual assault victim (a complainant or tendency witness) is known as the 'principal protected confider'.

Counselling

The term 'counselling' has a very broad meaning, well beyond everyday usage or typical health sector definitions.

In SACP law, to be a person who 'counsels' another person, a worker (including volunteers) only needs to satisfy the following criteria:

1 **Knowledge or experience.** They have undertaken training or study or have experience relevant to the process of counselling people who have suffered harm (see page 28 for definition of harm).

2 **Action.** Their role requires them to:
   - listen to and give verbal or other support or encouragement, or
   - advise, or
   - provide therapy, or
   - provide treatment.

This assistance can be provided in either a paid or an unpaid role.

Case study: Kari

Kari is about to give evidence in a sexual assault trial. The Defence is trying to get records from her current sexual assault counsellor, as well as her hospital records about recent surgery and case notes from a drug and alcohol counsellor she saw ten years before she was sexually assaulted. All of this material meets the definition of a 'protected confidence' and would be covered by the privilege.

Case study: Tina

Tina volunteers for a telephone support service. Even though her assistance is unpaid, and she has no formal qualifications, communications with Tina in her telephone support role would be protected by the SACP legislation.

In practice, 'counsellors' can include all health professionals (psychologists, counsellors, doctors, nurses, allied and complementary health practitioners, for example), most welfare workers (including youth workers, refuge workers and financial counsellors) and many other professionals, such as social workers, teachers, school counsellors and government or NGO case workers (Centrelink or housing, for instance).

TIP / The types of service providers whose records have been considered privileged by courts include:

- sexual assault counsellors
- psychologists
- supported youth accommodation services
- refuge accommodation
- general practitioners
- medical specialists particularly psychiatrists and emergency department doctors
- nurses
- physiotherapists
- alternative health practitioners such as kinesiologists
- school & financial counsellors
- ambulance officers.

Some examples of records that Courts have protected under SACP include:

- diagnostic medical records including blood tests
- drug and alcohol treatment records
- ambulance records
- hospital and other in-patient records including nursing notes, casualty and emergency records
- letters of referral to specialists (whether or not they treat the client before or after the referral).

Counselling communication

A 'counselling communication' is any information that is confidentially shared during the course of counselling someone.

The process of 'counselling' only needs to be 'in relation to' any harm (see definition of harm below).

This is a broad definition which means that the 'counselling' is not limited to direct treatment for harm. It would include all types of consultations such as ongoing checkups and recovery support. For example, anything discussed with a GP during a general check-up would be a 'counselling communication'.

TIP / 'Counselling' has a very broad meaning in SACP law. It includes the ordinary meaning of counselling used in psychology, social work and therapy BUT it also includes treatment for physical harm. This means that all medical treatment information is protected by the privilege.

The law allows for the presence of support people (such as parents) during counselling and the protection extends to cover anything a support person says or anything that is communicated to them. The sharing of confidential information between counsellors (for example, for referrals or handover) is also protected. In summary, a 'counselling communication' includes anything discussed during or about counselling by anyone involved.

TIP / Counselling communications include: primary sources such as the original file or the oral evidence of the treating practitioner, as well as secondary sources that could indirectly disclose a protected confidence. For example, a report, referral letter or email which includes or refers to confidential information.

Case study: Anna

Anna visits her GP for a general checkup because she is planning a big overseas holiday. During the consultation she mentions sleep difficulties and anxiety she had in the past, but says they are no longer a problem. Even though there is no specific discussion of any current 'harm', these communications would be classified as 'counselling communications' under SACP legislation.

Harm

Harm is defined very broadly to include:

- actual physical bodily harm
- financial loss
- stress or shock
- damage to reputation, or
- emotional or psychological harm (such as shame, humiliation and fear).

Over time, the definition of harm has become more expansive to reflect current understanding of the impact of sexual assault and the therapeutic needs of victims.

Sexual assault

The term 'sexual assault' is defined very broadly, ranging from an act of indecency to very serious offences such as aggravated sexual assault.

Are your files protected by SACP?

Checklist for services

Question	Yes	No
Do you provide a confidential service?	☐	☐
Do you (or your staff or volunteers) have training, experience or study relevant to counselling, treating or supporting people?	☐	☐
Do you assist people who may have suffered any kind of harm?	☐	☐
Do you or your staff listen to, support, advise or give therapy OR provide treatment?	☐	☐
Is there ANY indication (from your file, or the type of court case, or any other source) that the client has ever been a victim of any alleged sexual assault (whether before or since the client saw you)?	☐	☐

If you have answered YES to all of these questions, your files are almost certainly protected by SACP. Do not release any information or documents until you are certain that court has ordered you to do so.

Even if you have answered NO to one or more of these questions, your files may still be protected by SACP and you should get further information and advice before you disclose anything.

TIP / If you receive a subpoena and you think SACP may apply contact the Sexual Assault Communications Privilege Service (SACPS) at Legal Aid NSW for advice. SACPS can also provide a free lawyer to represent your client in court. Act early to make sure your client's privacy is protected.

Consent to release information

A victim of sexual assault can consent to the release of protected confidences ('waive privilege') during a court case but there are very strict procedures for doing this. The consent must be in writing and make specific reference to the information being released. It must also state that the victim understands their SACP rights.

TIP / Don't assume that standard consent forms or a signature in a police notebook are enough to waive privilege. The law sets a very high threshold and consent needs to be provided in a proper form.

A victim should get legal advice to ensure that their consent is fully informed. The SACP Service at Legal Aid NSW can provide a free lawyer to help with this.

Case study: Bella

Bella is a client of a local community health centre. She has regular appointments with a counsellor, and occasional medical and dental appointments. She has also attended the centre's baby health clinic with her son for general midwife checkups and for assistance with breastfeeding and sleep routines.

A subpoena from the District Court arrives on the desk of Yianni, the coordinator of the centre. The subpoena requests all records about Bella that are held by the centre. Yianni phones the District Court registry and discovers that the subpoena relates to a charge of sexual assault in which Bella is the alleged victim. This means that all of Bella's records would be protected by SACP, including notes made by the counsellor, the doctors, nurses, dentists and midwives. Yianni refers Bella to the SACP Service at Legal Aid and does not disclose the documents.

Case study: Maria

Maria was sexually assaulted by an acquaintance when she was 18 years old. She started counselling about a week later and disclosed the details of the sexual assault to her counsellor. She didn't feel ready to go ahead with a formal complaint to police at that time. When Maria turned 24 she decided to make a formal complaint to police about the sexual assault which had happened six years earlier. Due to the delay the police asked Maria if she had told anyone about the sexual assault at the time it happened. Maria said that she had told her counsellor.

When the matter was before the District Court, the ODPP solicitor applied for a subpoena to Maria's counsellor. At court, Maria was represented by a SACP solicitor, who found the paragraph in the counsellor's notes in which Maria described the sexual assault. Maria signed a formal consent which stated that she was aware that the information would be covered by SACP but consented to it being inspected by the parties in the case. The counsellor's notes from six years earlier very closely matched Maria's formal statement to police. As 'evidence of first complaint', it helped establish that Maria was a credible witness. No other information from the notes was released and Maria's privacy was protected.

How does SACP work?

Leave requirements

In most criminal matters, a party to the proceedings can issue a subpoena without asking for the court's permission ('leave'). This is usually done through the court's 'registry' or office and does not require a Judge or Magistrate's consideration.

However, the process is very different for SACP. If a person wants to subpoena a protected confidence they must first ask for, and be granted, the court's leave to do so.

The law says that anyone who is trying to obtain a 'protected confidence' (usually by way of subpoena), or planning to use a 'protected confidence' in evidence, must give written notice to each 'relevant' protected confider and each party in the case. At least 14 days notice should be given and there are strict rules about what information needs to be in the written notice.

Although the rules for giving notice are strict, the Judge or Magistrate can dispense with them in exceptional circumstances. This practice is currently very common.

Stage of court case

There are different levels of SACP protection for 'protected confidences' depending on the stage of court proceedings. In general, there is total protection in the early stages. In later stages, the degree of SACP protection is decided by the court in each case.

SACP in early stages

During the early stages of a criminal case, there is an 'absolute privilege'. This means there is a total prohibition on protected confidences being subpoenaed or used in evidence. These early stages are called 'preliminary criminal proceedings'. In most cases, this will be when the matter is still in the Local Court, before it is committed for trial and sent to the District Court.

Case study: Stewart

Stewart was sexually assaulted and the charges of sexual intercourse without consent are before the Local Court, awaiting committal to the District Court. The defence solicitor has issued a Local Court subpoena to Stewart's GP asking for all records. The SACP Service at Legal Aid NSW has provided a lawyer to advise and represent Stewart. The lawyer refers the Magistrate to section 297 of the *Criminal Procedure Act 1986*, which contains a total prohibition on attempting to access privileged documents in preliminary proceedings. The Magistrate disallows the subpoena. When the matter is in the District Court, there may be a further application for the records, and Stewart's lawyer will represent him again at that stage.

Is a subpoena valid at this early stage?

If a subpoena is incorrectly issued in the 'preliminary' stages, it is invalid, and you can object.

TIP / A victim can consent to release or use of 'protected confidences' at any stage of court proceedings. But remember, consent in SACP cases must comply with strict rules. See page 29. A SACP lawyer can advise the victim about their options.

SACP in later court stages

Under SACP law, the later stages in a criminal court case are called 'criminal proceedings'. At this point (usually when the case has arrived in the District Court), the privilege becomes 'qualified'. This means that the Judge or Magistrate can override the victim's confidentiality if there are compelling reasons.

AVO proceedings are in this category, regardless of what stage they are at.

Is a subpoena valid at this later stage?

SACP law says that a subpoena for protected confidences can only be issued at this stage if the court has given permission first ('granted leave' under section 298(1) of the *Criminal Procedure Act 1986*). A subpoena at this stage will be invalid if there is no leave.

Make sure you check whether the court has granted leave for the subpoena before you respond. Look for an attached court order or letter from the lawyer who issued the subpoena stating that leave was granted on a particular date.

If you are uncertain, you can contact the court registry 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 it is clear that the subpoena has been issued without the leave of the court, the subpoena will be invalid and you can object.

At the time of writing, many subpoenas are still being incorrectly issued by court registry offices without the proper authorisation of a Judge or Magistrate.

TIP / As SACP is still a fairly new area of law with its own special rules, court staff may not know that a subpoena for protected confidences can only be issued if a Judge or Magistrate has given permission. A subpoena that has been simply stamped by court registry staff, without leave being granted, will be invalid. If you receive a subpoena and you think the SACP might be relevant, always contact the court and ask: 'Has a Judge or Magistrate granted leave for this subpoena?'.

TIP / If you release records based on an invalid subpoena you could breach your client's privacy and their trust.

Case study: Fiona

Fiona is the health information manager at a rural hospital. She received a subpoena from the District Court for all records relating to Nikki, who has attended the hospital on several occasions. Fiona could not see any sexual assault disclosures in the notes. Fiona rang the District Court and asked these 4 questions:

- Is this a criminal or AVO proceeding? YES
- Is there an alleged act of indecency, indecent assault or sexual assault? YES
- Is Nikki the victim of the allegation? YES
- Has leave of the court been granted for the subpoena (as required by section 298 of the *Criminal Procedure Act 1986*)? Fiona makes sure by checking with the registry staff whether there have been any 'notices of motion' for leave to issue the subpoena. NO

Fiona is now confident that the subpoena she received contravenes section 298 and is not a valid subpoena. She sends a letter to the solicitor stating that leave has not been granted for the subpoena, and sends a copy to the Court and the ODPP. Fiona also notifies the SACP Service at Legal Aid NSW so they are aware of the case and can make a lawyer available for Nikki about privilege issues.

A few weeks later, Fiona receives a subpoena with an attached official notification that the District Court Judge has granted leave for the subpoena. She sends a copy of relevant documents requested under the subpoena to the District Court in a sealed envelope, marked 'CONFIDENTIAL PRIVILEGED DOCUMENTS – ONLY TO BE OPENED BY JUDGE', with a copy of the subpoena attached to the front of it, all inside a larger envelope addressed to the court registry.

TIP / In most sexual assault cases, any subpoena issued by the Local Court is likely to be incorrectly issued because the case is still in 'preliminary criminal proceedings' (see below). Subpoenas issued in the District Court are far more likely to be valid because they are issued at the more appropriate, later stage ('criminal proceedings'), but they are still only valid if leave has been granted by the court.

Summary: Is a subpoena for 'protected confidences' valid?

There are two reasons why a subpoena may not be valid under SACP law:

1. The subpoena was issued too early during the case (that is, during 'preliminary criminal 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. Follow the procedures outlined below.

What to do if a subpoena is invalid

If you receive a subpoena that is invalid because the case is still in preliminary criminal proceedings, you can send a letter to the court like the one below, and a copy to the defence and prosecution lawyers.

> Dear Registrar
>
> I acknowledge receipt of the subpoena issued at Taree Local Court, returnable on 24 February 2014. We understand this matter is still in preliminary criminal proceedings stage and therefore the subpoena is invalid pursuant to s297 of the *Criminal Procedure Act 1986*. I await further notice.
>
> Yours sincerely
>
> Millicent Milligan
> Coordinator
> Coast Domestic Violence Service

If you are sure that the subpoena is invalid because leave has not been granted, consider sending a letter like this, and send a copy to the defence and prosecution lawyers as well.

> Dear Registrar
>
> I acknowledge receipt of the subpoena issued at Gundagai Local Court, returnable on 28 March 2014. We understand that leave has not been granted by the court as required by s298 of the *Criminal Procedure Act 1986*. I therefore consider this subpoena to be invalid. I await further notice.
>
> Yours sincerely
>
> Henri Lawson
> Manager
> Counselling Service

What to do if a subpoena is valid

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

Sending documents to court when the subpoena is valid

Even if a subpoena is validly issued, SACP law still provides strong protection for a victim's privacy. To maximize privacy protections and alert the court staff that the subpoenaed information is privileged, follow these simple steps:

1. Make sure you only send what is requested in the subpoena. Be careful about sending too much. Carefully check any dates and the kinds of records requested.
2. Put the privileged documents and a copy of the subpoena in a sealed envelope, marked PRIVILEGED: No access without Judge or Magistrate permission.
3. Attach a second copy of the subpoena to this sealed envelope
4. Send a cover letter, with the subpoena attached to the outside of the sealed envelope:

> 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 confidences and we therefore request that no access be granted to anyone without leave of the Judge (for District Court) or Magistrate (for Local or Children's Court). Kindly return the documents when they are no longer necessary in the court proceedings.
>
> Ursula Underwood
> Health Information Manager
> Community Health Centre

TIP / If you have not contacted the SACP Service at Legal Aid NSW by this stage, now is the time to do so. They can provide a free lawyer for your client / patient at court.

Notice requirements

The law says that anyone who is trying to obtain a 'protected confidence' (usually by way of subpoena), or planning to use a 'protected confidence' in evidence, must give written notice to each 'relevant' protected confider and each party in the case. At least 14 days notice should be given and there are strict rules about what information needs to be in the written notice.

Although the rules for giving notice are strict, the Judge or Magistrate can dispense with them in exceptional circumstances. This practice is currently much more common than it should be.

Unexpected privileged content

Sometimes subpoenas are issued without any expectation that the information will contain 'protected confidences'. In these cases, no one involved would be aware that SACP might apply. It is only when the subpoena is being processed that potential SACP issues arise.

For example, a lawyer may not expect that a person's Department of Housing file would contain sensitive information, so leave for that subpoena is not requested. However when the subpoena is being processed, medical and caseworker reports are found on file. These are privileged under SACP law.

In this situation, the 'protected confidences' that are unexpectedly 'caught' by the subpoena should not be produced to the court. You should notify the Court and lawyers there is privileged material which will not be produced unless leave is formally granted by the Court.

TIP / Remember, if leave has not been granted for the subpoena you should not send any of the documents requested. Only send a letter acknowledging receipt (see above left for a sample).

In some cases, the lawyer who sent the subpoena will simply request that only non-privileged documents be produced, so the privileged information remains private and is never given to the Court. In other cases, the Court might grant leave and the privileged material will have to be sent to the Court.

TIP / Your subpoenaed documents should never be sent to, or handed directly to, the other party.

Who gets a lawyer?

Until recently, SACP was argued by the person or service who received the subpoena. Sometimes this was done by a lawyer, but often the person or service represented themselves in court. This has changed since the SACP Service was set up within Legal Aid NSW in late 2011. Free lawyers are now routinely provided to represent the victim directly. This means that there is now far less need for therapeutic services to take up their client's cause in Court. Some services may still decide to have their own lawyer when the privilege is raised, which can sometimes help, but is less critical.

The new focus for therapeutic services should be to identify and flag potential SACP issues when subpoenas are first received. It is crucial that documents are not incorrectly released to the court or other parties. Once documents are lawfully required to be at Court, the main priority is to ensure the client is given access to a lawyer (which will almost always be through the SACP Service).

Case study: Max

Max works for a large credit union and is responsible for handling all subpoenas. He receives a District Court subpoena for "all records held about Naomi Baker-Cook DOB 1/7/59". Max notices that the subpoena is in a criminal case. He also realizes that the credit union's records include reports from Naomi's psychiatrist related to a mortgage hardship claim she made ten years earlier. The psychiatrist's report includes a diagnosis for PTSD from a history of childhood sexual assault.

Max recently attended a legal conference where he heard about the Sexual Assault Communications Privilege. He realises that the psychiatrist's report is probably covered by SACP and wants to ensure that Naomi's privacy is protected. Max sends the following letter to the court.

> Dear Registrar
>
> I acknowledge receipt of the subpoena issued at Orange District Court, returnable on 14 May 2014. Your subpoena will compel production of 'protected confidences'. I understand that leave has not been granted as required by s 298 of the *Criminal Procedure Act 1986*. I will not produce any documents containing 'protected confidences' unless leave is granted. I await further notice.
>
> Yours sincerely
>
> Max
> Compliance Manager
> Sunshine Credit Union

What can SACPS lawyers do?

For the first time in Australia, victims of sexual assault who want to claim the privilege in Court now have publicly funded lawyers to help them do that. These lawyers have two jobs: to advise the person about their SACP options, so that they make informed decisions about their private information, and, if necessary, to advocate for them in court.

The SACP Service at Legal Aid NSW accepts statewide referrals for any victim of sexual assault who is affected by the privilege. At the time of writing, no means or merits test is applied. The service also provides free advice and information to workers and services in the health and welfare sector who have received a subpoena for client records.

Why would a court override a victim's privacy?

The leave test

The SACP legislation sets a very high bar for the release of private therapeutic information. The court must weigh up the public interest in protecting a victim's confidentiality against the public interest in an accused person's right to a fair trial.

We call this balancing exercise 'the leave test'.[16] The court uses this test at each point in the case where it must decide between confidentiality or disclosure.

Before a court will issue a subpoena or allow a protected confidence to be inspected or used in evidence, three questions must be considered:

1. Does the information have **substantial probative value** in the case?
2. Is the information **not available from another source?** (If the information can come from another source, which doesn't involve a confidential relationship, then it should come from there); and
3. Is the public interest in preserving confidentiality **substantially outweighed** by the public interest in admitting the information into evidence?

'Substantial probative value' is a legal term that means that "something has a greater than significant chance of having a real bearing on an issue in the case.[17]" In other words, the information needs to have crucial evidentiary value, not just a mere chance of being important. For example, in sexual assault trials, the complainant's credibility is often a significant issue, so the question would be: are the documents sought in the subpoena really likely to affect the court or the jury's assessment of the complainant's credibility?

In applying the public interest test, the court must consider these factors:

- the need to encourage victims of sexual offences to seek counselling
- the effectiveness of counselling is likely to be dependent on maintaining confidentiality
- the public interest in ensuring that victims of sexual offences receive effective counselling
- the disclosure of the protected confidence is likely to damage or undermine the relationship between the counsellor and the counselled person
- whether disclosure of the protected confidence is sought on the basis of a discriminatory belief or bias
- whether disclosure of the evidence is likely to infringe a reasonable expectation of privacy.

Case study: Asha

Asha was sexually assaulted by a stranger on her way home from the train station one night. She managed to get away from her attacker and ran home. She was terrified of leaving her house, and spent the rest of the night in the shower. In the morning she went straight to her GP, who referred her for specialist sexual assault counselling, and ordered some blood tests. Her GP recorded Asha's description of her attacker: very tall, thin, fair skin, blond hair. Asha gave a statement to police the next day. In her statement, Asha gave a distinctly different physical description of the attacker: short, stocky, dark-skinned, black hair.

At court, if there is no other convincing evidence, such as DNA or eyewitness evidence, Asha's disclosure to her GP would probably be held to be of substantial probative value, and if it was not available from any other source (such as a friend Asha had described her attacker to), the court would need to conduct the balancing exercise.

In an extreme example like this where the identification evidence of the accused is so inconsistent, the court would probably allow it into evidence. The rest of Asha's GP records would probably be protected, though, with only the sexual assault disclosure being considered probative. This could be really important to Asha. Her GP records could include all sorts of sensitive things - not just details of that assault.

16 *Criminal Procedure Act 1986* (NSW) s299D.

17 See *R v Lockyer* (1996) 89 A Crim R 457; *AW v The Queen* [2009] NSWCCA 1 at [47]; *R v Fletcher* [2005] NSWCCA 338; (2005) 156 A Crim R 308 at [33]; *R v Zhang* [2005] NSWCCA 437; (2005) A Crim R 504 at [139]; and *R v El-Azzi* [2004] NSWCCA 455 at [179–183].

Confidential harm statement

A court can also consider a 'confidential harm statement' that describes the harm the victim is likely to suffer if the information is released or used. This statement needs to be in the form of an affidavit (see Glossary), and can be written by, or on behalf of, the victim.

Counsellors, service providers and other support people, may sometimes be asked by the victim or their lawyer to prepare a confidential harm statement. It is up to the Judge or Magistrate to decide whether it will accept and consider a statement. But the statement can only be seen by the victim, the victim's lawyer and the Judge or Magistrate. The prosecution, the defence and the accused cannot see it.

Confidential harm statements are extremely useful. They can alert the Judge to highly sensitive information in the documents or a particular vulnerability of the victim. Examples of information that the victim may not want the accused or anyone else to know about might include: a history of childhood sexual abuse, extra marital affairs, pregnancy termination or infectious diseases, recent episodes of self-harm, suicidal ideation or current relationship difficulties.

The confidential harm statement conveys this information directly to the Judge without it being discussed in an open court room.

Confidential harm statements are not necessary in every case, particularly when the likely harm is already obvious. The victim's lawyer will decide if a statement is needed depending on the circumstances of the case.

Case study: Carlos

Carlos is the victim of a sexual assault by a colleague, James. During the prosecution of his colleague, Carlos's counselling records are subpoenaed. His SACP lawyer prepares an affidavit of Carlos's concerns:

1 I don't want James to know anything about me;

2 I don't want James to find out that I was sexually abused when I was a child;

3 I don't want James to find out that I have been having problems with bullying by our other colleague, Margaret;

4 I don't want James to know anything about how his assault on me has affected my relationship with my partner;

5 I don't want James to know that I have nightmares about his assault on me;

6 I don't want James to know that I am now taking anti-anxiety medication, which I blame on his behaviour towards me;

7 I would feel betrayed and devastated if my private counselling records were made available to strangers, particularly James or his lawyer.

Case study: Stella

Stella's counsellor, June, is asked to prepare a harm statement on behalf of her client. In her affidavit June states:

1 I have been counselling Stella for over 3 years;

2 Stella has attended counselling fortnightly, and sometimes weekly, and we have spent over 130 hours in therapy sessions together;

3 Stella has very little trust in other people, or authority, and finds it difficult to be candid about her emotions;

4 Stella and I have spent many hours together gradually building up a trusting relationship within which she feels safe and supported;

5 Over many sessions, Stella has become more articulate and frank about her emotions;

6 My therapeutic relationship with Stella is dependent on her trust in the confidentiality of our communications;

7 Stella has often expressed a strong fear towards the perpetrator, her father;

8 Stella has expressed a belief that her father would seek revenge if Stella ever reported his abuse to police;

9 Stella has expressed a sense of isolation within her family because they would not listen to her experiences;

10 Stella has had episodes of hospitalisation after she has attempted suicide;

11 Stella has told me that she fears that exposure of her private thoughts may set her back in her recovery, and may trigger suicidal thoughts.

When the court orders release

When the court orders the release of a 'protected confidence', generally this does not mean that the whole file or document will be released. Only those sections of the notes which are relevant will be released. In practice, this means that only a few pages of a large file may be released. There may be large white spaces within the document where material has been protected by the court, or blacking out of words or passages ['redaction'].

When the Court has decided that a protected confidence can be used in evidence, strict rules will be imposed about which information can be referred to or not.

TIP / If you have not already done so, contact the SACP Service at Legal Aid NSW now! If ever you are sending privileged material to a Court, ensure you have contacted Legal Aid NSW's SACP Service so you can get information and advice and your client has an opportunity to be represented by a free lawyer at court.

Appeals

Both subpoenaed parties and protected confiders can appeal a court's decision about SACP.[18] Appeals can be made against:

- an order to grant leave to issue subpoenas; or
- a decision about whether or not information is a protected confidence.

Appeals from a District Court decision are usually made to the Court of Criminal Appeal. Appeals from the Local and Children's Courts are made to the Supreme Court in certain circumstances.

If you are considering making an appeal, get legal advice.

Strategies to minimise harm

Although the court will sometimes override the privacy of a victim's information (in the interests of a fair trial), there are still steps that can be taken to minimise any unnecessary harm to your client. This is usually managed by the lawyer representing the victim.

Protecting contact information

Generally a witness in a court case does not have to provide their address or telephone number. An exception would be when these details are needed in the case.[19]

If the court orders information to be released and it will reveal the victim's contact details, you can ask for permission to black out ('redact') these details before you release the documents.

Redaction can only be done with the consent of the parties. If the parties can't consent to redaction, this will need to be argued in court.

Ancillary orders[20]

If the court orders release of information, it may also make some 'ancillary orders' to control who can read and copy any documents. Disobeying these orders would be in contempt of court. Examples of 'ancillary orders' are:

- only those sections of the notes the Judge or Magistrate considers relevant are to be made available;
- the parties are only allowed to read the notes, and not allowed to make copies;
- if the parties are allowed a copy, only one copy of the notes is provided and they are not allowed to make any additional copies;
- only the lawyer can handle the documents (not the accused person);
- all copies of notes are to be returned within 7 days after the end of the case; and
- if a counsellor is to give oral evidence in court, all or some of the evidence is heard 'in camera' – in private, with the general public excluded.

TIP / Remember, you are the custodian of your client's sensitive information. Once a confidential record is disclosed it can be hard to undo the harm. SACP is so broad, you should assume your files are protected. Only release information if you are certain the privilege doesn't apply and speak to a lawyer if you need help.

18 *Criminal Appeal Act 1912* (NSW) ss 5F(3AA) and (3AB).

19 *Criminal Procedure Act 1986* (NSW) s 280(1).

20 *Criminal Procedure Act 1986* (NSW) s 302.

Other claims for privilege in criminal proceedings

If your records are not covered by SACP you may be able to claim another privilege, such as the Professional Confidential Relationship Privilege or you may be able to rely on a "common law" power. See the discussion on page 17 of this Guide. In most cases, these protections are not as strong as SACP protections. Talk to a lawyer if you are considering doing this.

SACP in civil proceedings

The confidentiality of sexual assault victims' counselling and therapeutic records in civil proceedings in NSW is protected by SACP in only very limited circumstances.

In civil proceedings, the privilege applies to communications that:

- were privileged under SACP in criminal proceedings; AND
- the civil proceedings relate to substantially the same issues as the criminal proceedings.[21]

This protection is most likely to be available in personal injury law and sexual harassment claims (under NSW law).

These situations are unusual. If you receive a subpoena in a civil case, and you think you may be able to object on the basis of the privilege, talk to a lawyer and notify your client.

Although family law matters are civil proceedings, SACP does not apply in family law cases. There may be general objections you can raise to limit disclosure of sensitive confidential information. These can be extremely powerful (see page 45).

SACP in other states

The confidentiality of sexual assault victims' counselling records is protected – to varying degrees – by legislation in all Australian jurisdictions except Queensland.[22] In 2006 the Australian Law Reform Commission (ALRC) recommended that a NSW-style privilege should be adopted in the Commonwealth Evidence Act, to apply in both civil and criminal proceedings to all disclosure requests (such as subpoenas and search warrants).[23] At the time of writing, this has not yet been adopted.

If you receive a subpoena from a Court in another state you will need to find out what the privilege law is in that state.

21 *Evidence Act 1995* (NSW) s 126H.

22 There is a comprehensive discussion of the protections for sexual assault victims' confidentiality in Australia in ALRC, Report No.114, *Family Violence – A National Legal Response* [2010] Chapter 27.

23 ALRC, Report 102, *Uniform Evidence Law*, Recommendations 15.4-15.6, 8 February 2006.

Confidential harm statements
can be extremely useful.

They can alert the Judge to highly
sensitive information in the documents or
a particular vulnerability of the victim.

CONFIDENTIALITY AND THE VICTIMS SUPPORT SCHEME

A person injured as a result of an act of violence committed by another person in NSW may be eligible to apply for counselling, financial support and/or a recognition payment through Victims Services.

Types of financial support include financial assistance for immediate needs, financial assistance for economic loss and funeral expenses. A recognition payment is a payment made in recognition of the trauma suffered by a victim of crime.

Applications for victims support are made 'on the papers', which means that the victim does not need to appear at Victims Services to give evidence. This does mean that treatment records are extremely important though. For further information including time limits for making applications go to the Victims Services website.

Documentary evidence required

Applications for victims support must be supported by documentary evidence. The evidence required varies depending on the type of victims support claimed but can require medical, dental or counselling reports detailing that the applicant is a victim of an act of violence and any physical or psychological injury sustained as a result.

Claims for financial assistance for economic loss or recognition payments must also be supported by a report from police or a government agency. The offender is not involved in the victim support application process.

However, if the victim receives victims support or a recognition payment and the offender is found guilty of the relevant offence, the offender will usually be required to pay back Victims Services the amount or part of the amount paid to the victim. This is called restitution. A victim is not involved in restitution proceedings, but there may be confidentiality risks.

What if Victims Services requests information?

Victims Services can require a government agency to provide information and can request any other person to provide information.[24] Unless you are a government agency, you cannot be compelled to respond to the request, but any information you do provide must not be false or misleading. You may also be asked for your records to support a claim by the applicant directly or by their solicitor or representative, with the client's authority.

TIP / Remember that victims support is designed to help victims: your records will usually help your client's claim.

If you are concerned, Victims Services may agree to an alternative: you may be able to provide a report detailing the impact of the crime on your client instead of providing documents such as your case notes. Discuss this option with your client.

Once your report or documents are provided to Victims Services, they will become part of the Victims Services records. There is a risk that Victims Services records may be released (see below).

Can Victims Services records be subpoenaed?

If Victims Services receives a subpoena, it will usually object, because their records are not admissible in any NSW civil or criminal proceedings. An exception is if the accused person in a criminal case was also the applicant for victims support arising out of the same incident.

24 The power to do this comes from section 12 *Victims Rights and Support Act 2013*.

Victims Services will release records if it is satisfied that they will benefit the person the records are about.[25]

Confidentiality and restitution proceedings

A word of caution: Although victims support applications are usually confidential, there is a possibility of disclosure if a convicted offender challenges restitution proceedings. In this situation an offender, or their lawyer, may be able to look at documents from the victims support file. Note that restitution proceedings do not affect the amount provided to the victim, and the victim does not participate in restitution proceedings.

It is a good idea to label any documentation you provide to Victims Services as confidential:

> "SENSITIVE AND CONFIDENTIAL. DISCLOSURE LIKELY TO CAUSE HARM TO THE VICTIM."

This will not guarantee that documents will not be made available to the offender, but it is a safeguard, and should alert Victims Services to the sensitivity of the documents. Victims Services do not release the victim's personal contact details.

25 See case *R v Kremmer* [2000] NSWCCA 529

CONFIDENTIALITY AND CHILD PROTECTION LAW

Child protection proceedings ('care cases') are civil proceedings brought by Family and Community Services (FaCS) in the Children's Court, usually to remove a child from their family where there are serious allegations of abuse or neglect.

The sexual assault communications privilege (SACP) does *not* usually apply in the care and protection jurisdiction of the Children's Court. Other privileges may apply in care cases, but there is no certainty about how the law will work in a particular case. The primary focus of the court in a care case is 'the child's safety, welfare and well-being'. The Children's (care) Court does not need to be bound by the rules of evidence.

Objecting to subpoenas in care cases

The Children's Court has the power to set aside a subpoena, wholly or in part. The person served with the subpoena must apply to have the subpoena set aside and also give notice of the objection to the party requesting the subpoena.[26]

It is always open to the court to exercise its discretion to allow an objection to evidence on proper grounds. Refer to the previous sections on how to object to a valid subpoena, including arguing the public policy reasons behind the sexual assault communications privilege if relevant.

For example, the confidential professional relationship privilege could apply, and the Children's Court magistrate could decide that even though the evidence was important for the 'safety, welfare and well-being' of a child, the evidence could be provided from another less intrusive source. In this way, the legal test for the Magistrate to decide that the harm of disclosure does outweigh the desirability of the evidence being given could be met. You must raise this possibility by indicating your objection to producing the documents or giving the evidence in Court, so that the Magistrate knows to consider this.

TIP / If you are a doctor, social worker, counsellor or therapist (anyone who provides confidential professional services to clients) you can ask the Children's Court magistrate to protect your documents or evidence in a care case. NSW law gives the magistrate a discretion to maintain confidentiality if the harm to the patient or client of disclosure outweighs the need for the evidence being given.

There would be grounds for protecting your records if there are concurrent criminal prosecutions, or where an alleged perpetrator of abuse is involved in the care proceedings:

- material which would be protected by SACP in criminal proceedings should not necessarily be easily obtainable in concurrent care proceedings;

26 s109H *Children and Young Persons (Care and Protection) Act, 1998* NSW

- the public policy considerations that underpin SACP may have some weight in care proceedings. The need for victims of sexual assault to receive counselling is a very real consideration in many care proceedings.
- Alternatively, it could be that a disclosure of sexual assault and related treatment is really not relevant to the care proceedings, but disclosure of it remains sensitive.

It would be a stronger scenario if SACP has been upheld in criminal proceedings. A claim for SACP should be made for the same documents if subpoenaed in a subsequent care case where the same acts are in issue. Whether the claim will succeed will depend on whether the Magistrate decides the Court will not be bound by the rules of evidence (based on the primary focus being 'the child's safety, welfare and well-being' and the extent to which the documents are relevant in the care proceedings).

The Magistrate will always have to be guided by what he or she decides is necessary to protect the safety, welfare and well-being of a child. However, raising confidentiality and the harm that can be done by disclosing confidential communications is possible. If the Magistrate decides he or she needs the evidence, you can ask that only what is essential be used in the case.

TIP / You could attend court with two copies of your files: one version with nothing redacted (blacked out) and one with information that is private and sensitive and irrelevant to the care case redacted so that only information relevant to the care case is readable. You could ask the Magistrate to review your editing (redacting), or suggest that your client's lawyer review the editing first, then ask the court to give the other party access only to the edited version.

Exchange of information: Chapter 16A Care Act

The *Children and Young Persons (Care and Protection) Act 1998* (NSW) (the 'Care Act') authorises FaCS to request and receive information from a wide range of service providers. Many of these services are also 'mandatory reporters': their staff are required to notify FaCS when they reasonably suspect, through their work, that a child is at risk of significant harm.

TIP / If you are making a report to FaCS and revealing information which you believe would be protected by SACP in a criminal case, mark any documents 'Confidential. This material may be privileged in a criminal trial' and include a cover letter to notify FaCS that the information is for child protection purposes only, and is not to be produced in a criminal proceeding because SACP still applies.

Case study: Harry

Harry was charged with child sexual offences. At his trial, his defence lawyer subpoenaed the mother's (Harry's girlfriend) counselling records. The subpoena was successfully challenged on the basis that the SACP applied. The court decided that the public interest in maintaining the confidentiality of the records was not outweighed by the need for evidence in the case, which was available from another source.
In the care case about whether the child should be removed from the care of the mother the Magistrate was asked to apply s126H Evidence Act which provides that where SACP is upheld in a criminal trial, it attaches to the evidence in a civil proceedings about the same or substantially the same issue. The Magistrate decided that SACP should apply in the care case, because the evidence was not necessary to protect the safety of the child. There was other less intrusive evidence available to the court.

Request for information

Section 245C *Children and Young Persons (Care and Protection) Act 1998* (the 'Care Act') (in Chapter 16A) allows information to be exchanged between prescribed bodies. If you receive a request for information from FaCS under Chapter 16A of the Care Act you are not required to provide the information for a range of reasons including that it is 'not in the public interest' to provide the information. You must provide reasons in writing for refusing the request. You could refer to the public interest considerations underpinning SACP in your response (see page 35).

The Care Act provides protection from liability for breach of ethics or defamation for organisations who provide the information, however it must be provided in good faith and with reasonable care.

Direction for information

Section 248 of the Care Act (in chapter 17) allows FaCS to direct a prescribed body to provide information relating to the safety, welfare and well-being of a child. It is an offence under the Care Act to 'hinder, obstruct, delay ...' , so formal directions should be complied with. Seek legal advice if you are unsure about how to respond.

CONFIDENTIALITY AND FAMILY LAW

Family law cases are about parenting disputes or about property settlements after relationship breakdown. In parenting cases, the court's overriding concern is the best interests of the child, with a focus on safety.

Family law is Commonwealth law and cases are heard mainly in the Federal Circuit Court and the Family Court ("Family Law Courts"). The law encourages parents to agree about parenting without having to go to court and mediation and counselling services are an important part of the family law system. Mediation is called family dispute resolution (FDR) in family law.

If you are subpoenaed your client is probably a party to the proceedings: parties to proceedings have to be notified of all subpoenas that are issued, so your client should already know about it. However, it is still important to seek your client's views on the production of your records about them, especially if the subpoena has been issued by another party or by the Independent Children's Lawyer who is appointed to represent the interests of the child. In some cases your client may not know about the subpoena because they are just a witness, not a party, so it is important to always try to notify your client.

Confidentiality in mediation and counselling

The *Family Law Act* protects the confidentiality of records created by accredited Family Dispute Resolution Practitioners (FDRP) or accredited Family Counsellors (FC), and records created as a result of a referral to an associated professional by an accredited FDRP or accredited FC.

The protections are exceptionally strong: even a Judge does not have the power to compel those services to show their records. The aim is to encourage adults and children to engage in frank and genuine efforts to resolve their family law conflicts and to address personal concerns. But services must disclose a communication made in family counselling or FDR if it is necessary to protect a child at risk or if there is a serious and imminent threat to life or health of a person; and they can disclose if consent of the client is given (but see below).

This is an area of law where there is current discussion about how far the confidentiality provisions apply. For example, an accredited counsellor may choose not to disclose a counselling record even if consent is given;[27] and the confidentiality protection for FDR may not extend to the intake and assessment process for the FDR.[28]

TIP / If you are an accredited family dispute resolution practitioner or family counsellor (or your records were generated from their referral to you) and you are subpoenaed in family law or other type of case, talk to a lawyer.

27 UnitingCare – Unifam Counselling and Mediation & Harkiss & Anor [2011] FamCAFC 159 where the family counsellor was not obliged to disclose communications even where consent was given by the clients.

28 Rastall and Ball [2010] FMCA Fam 1290 and Holden and Holden [2015] FCCA 788.

Draft letter to Court – Family law proceedings
Protections for accredited counsellors and FDRPs

Note: This letter of objection should be adapted and marked 'Attachment A' and attached to the completed 'Notice of Objection – Subpoena'.

> Dear Registrar,
>
> Subpoena to Produce in [Insert case name and number]
>
> Please find attached a Notice of Objection Form for the Subpoena to Produce served on me by [name of party to proceedings].
>
> The documents are not produced for the following reasons:
>
> [Adopt and insert if applicable] I am an accredited Family Counsellor and the documents are records created during the counselling process. The protections of section 10E *Family Law Act* apply (and as interpreted to apply by the case of *Uniting Care-Unifam Counselling and Mediation & Harkiss & Anor* [2011] Fam CAFC 159).
>
> [Adopt and insert if applicable] I am a domestic violence support worker [insert your role], and the documents are records created as a result of a referral from an accredited Family Dispute Resolution Practitioner [insert name]. The protections of section 10 J of the *Family Law Act* apply (and as interpreted to apply by the case of *Uniting Care-Unifam Counselling and Mediation & Harkiss & Anor* [2011] Fam CAFC 159).
>
> I can be contacted on [insert contact details]
>
> Yours sincerely,
>
> [Name]
> [Title]
> [Agency]

Other record holders

Other service providers and record holders do not have specific protections. If they want to maintain the confidentiality of their records, they have to do it by raising general objections to subpoenas (see page 15).

Although the family law courts' focus is the best interests of the child, your objections will help ensure that they are aware of any potential risk of harm to your client caused by unnecessary disclosure of sensitive material. You could refer to the public interest considerations underpinning SACP in your response (see page 35).

When are records relevant?

In parenting cases, the documents requested will be considered relevant if they can help establish what is in the best interests of the child. They could be used, for example, to support or disprove:

- a claim that a child is at risk of harm from one of the parties;
- claims of family violence and sexual abuse;
- allegations of mental or emotional instability in the other party; or
- the fact that a spouse's ability to make financial contributions during the relationship has been affected by family violence.

In some family law cases, producing notes or giving evidence about therapeutic services may help a victim of sexual assault or domestic violence and their family. In those cases the positives of disclosure may outweigh privacy concerns.

TIP / Family violence is one of the considerations the family courts can take into account. Family violence includes physical, emotional, psychological, sexual, financial and socially isolating abusive behaviours.

Reasons to produce records

Assistance to a child victim of family violence

Access to records is often sought by a parent to help the child victim of abuse. Records may help the court determine whether there is a risk of harm to the child if certain parenting orders are made – such as ordering a child to spend time with a parent who is alleged to have sexually abused the child. Sexual assault records are often requested or subpoenaed by the non-offending parent to help support allegations about sexual abuse of the child and demonstrate the unacceptable risk to the child of contact with the other parent. The non-offending parent may have no other objective evidence to support the child's allegations of abuse.

Assistance to an adult victim of family violence

A person who alleges that they were subjected to family violence by their former spouse may not have reported the abuse to the police or may want further evidence to support claims of violence by the former spouse. This might be to establish risk of harm to the child or to negotiate the practicalities of sharing time with the child in a way that avoids opportunities for abuse. The records may be used to provide evidence of abuse.

Children's evidence

Children only rarely give evidence in family law cases, though the court can give special permission for them to do so. Disclosing counselling records can help avoid the need for a child to swear affidavits, give oral evidence or be cross-examined.

Reasons to object to production

Breach of confidentiality

If your records are not protected by the special provisions relating to accredited FDRPs or family counsellors these reasons can be used to object to the production of records based on breach of confidentiality:

- it can damage the relationship of trust between you and your client;
- the perpetrator can learn about the feelings, thoughts and pain experienced by the victim;
- issues raised in the notes can be used to cross-examine the other parent or other witnesses, which may further damage a child's relationship with one parent (or both parents);
- information obtained from the notes may enable ongoing abuse or retribution through emotional blackmail or threats; and
- if there are police investigations into allegations of child sexual abuse which are still open at the time the family law subpoena was issued, producing the records could circumvent the strong protections provided by SACP and potentially prejudice any future criminal proceedings.

TIP / These arguments can be useful anytime you are objecting to producing or using confidential material in the Family Courts if your client has experienced family violence.

General protections

There are some limited protections for third-party records in family law proceedings other than those of accredited family counselling and family dispute resolution providers.

It is important for third parties to be able to raise objections to subpoenas for their records; it is then up to the court to make decisions on objections and make orders for the access and use of the records.

You may raise a general objection to prevent the production of documents or to limit the right to inspect or copy them. Even if the court rejects your objection, it can still refuse to order production.

Consider the general grounds for objection to the validity or substance of a subpoena such as whether the documents are relevant or the technical rules have been complied with (see page 15).

TIP / The sexual assault communications privilege (SACP) does not apply in family law. The professional confidential relationship privilege can apply in family law parenting matters in NSW subject to the best interests of the child being the paramount consideration: Family Law Act Section 69ZX(4)(b).

Who can object to a subpoena?

The following parties may object to a subpoena in family law proceedings:

- a party to proceedings;
- an Independent Children's Lawyer;
- a person who is named in a subpoena; and
- a person with 'sufficient interest' in the subpoena.

One example of a person with a 'sufficient interest in the subpoena' would be a person who is not a party but is the subject of the records requested. The court will decide whether or not a person making an objection has 'sufficient interest in the subpoena' before hearing their objection.

TIP / If someone else objects to the subpoena you received, they must notify you in writing.

How to respond to the subpoena

There are guides for parties served with subpoenas in family law cases. These outline their rights and responsibilities, and options and procedures relating to subpoenas, including steps for objecting. The Family Court requires its guide to be served with each subpoena. Both guides are available online at www.familylawcourts.gov.au in the publications section.

If you are going to comply with the subpoena

In person: go to the Registry on or before the date for production in the subpoena and produce the documents.

By post or delivery: make sure the documents arrive not less than 2 days before the date for production (send by registered post so you have a record of the package's arrival).

TIP / If you have not been able to file a Notice of Objection within the time limit you can still try to file it. Write a note giving your reasons for the delay. Notify the other parties as well.

If you are going to object to the subpoena

Do the specific confidentiality protections apply to you?

Are you:

- an accredited family counsellor under the Family Law Act? OR
- an accredited family dispute resolution practitioner under the Family Law Act? OR
- in possession of records generated by a family counsellor or family dispute resolution practitioner or in the course of family counselling or family dispute resolution by an accredited practitioner as defined in the Family Law Act? OR
- in possession of records created following a referral by an accredited family dispute resolution practitioner or an accredited family counsellor?

If you answer yes to any of these questions then you will probably be covered by one of the protections in the Family Law Act.

Communications with family consultants are not confidential, and may be used in court.[29]

If you think your records are not specifically protected, see the section on reasons to object to production (see page 15).

What happens if you object to the subpoena

In family proceedings, subpoenas are not listed before the court unless an objection is received. When you object, the court will set a future date to hear the objection. You still need to provide the material by the date listed on the subpoena. The court will decide what to do with it after hearing the objection.

Go to court if possible

This is the only way to ensure your arguments against disclosure or inspection are heard and argued before the court in response to arguments by the party seeking production.

Go to court on the date nominated on the subpoena. If you do not have a lawyer to represent you, you can represent yourself. The family law courts often deal with self-represented litigants.

If the proceedings are still in the preliminary stages the objection will probably be heard by a Registrar. If a Judge has already been appointed and proceedings are at a more advanced stage, you may be making your objections to the Judge.

29 www.familylawcourts.gov.au/wps/wcm/connect/FLC/Home/about/Court/Registries/FCOA_Consultants.

The court will hear your objections and will listen to your arguments and will also consider the other parties' arguments. You may be able to narrow the scope of records that are in dispute by negotiating with the parties directly or with the help of the court.

You may agree to partial production.

Where you are considering agreeing to a partial production of the documents, bring two copies of the documents to court: one is the complete and intact set of documents requested under subpoena, and the other is the redacted version,[30] from which everything that you object to producing has been taken out. Providing the redacted version may help narrow the issues in dispute.

The Judge or Registrar can look at the un-redacted version and hear legal argument and make a ruling on access and copying.

Once there is agreement on what is to be produced, ask the Judge or Registrar to make orders for any relevant limitations on inspection (such as no photocopying).

If you cannot go to court

File a written objection. This means sending to the court:

- the documents the subpoena asks for to the court (in a sealed envelope);
- a letter outlining your objection to production and any limitations on access you are seeking (see sample letter above right).
- the relevant notice form ('Form F' in the Family Court of Australia or 'Notice of Objection' in the Federal Circuit Court); and

Place all of this into a second envelope and address it to the court.

30 Redacted means blacked out and re-photocopied so the print or writing cannot be seen.

Draft letter to Court – Family law proceedings General protections

Note: This letter of objection should be adapted and marked 'Attachment A' and attached to the completed 'Notice of Objection – Subpoena'.

> **Subpoena to Produce in [Insert case name and number]**
>
> Please find attached a Notice of Objection Form and a sealed envelope which contains the documents referred to in the Subpoena to Produce served on me by [name of party to proceedings]. I object to the production of these documents for the following reasons:
>
> 1 I am a sexual assault counsellor [insert your role].
>
> 2 The documents in the sealed envelope contain sensitive therapeutic records. Production of these documents would harm my client.
>
> 3 Production would undermine the professional confidential relationship I have established with my client [insert other reasons as relevant].
>
> I understand that the best interest of the child are paramount in family law, however I ask that the issuing party should be required to seek information from other sources.
>
> Alternatively, I ask that only the Judge hearing the case view the material.
>
> I regret I am not able to attend Court to make this request in person because: <Insert here the reasons that you are not able to attend >
>
> Yours sincerely,
>
> [Name]
> [Title]
> [Agency]

Orders a court can make

The court can order:

- disclosure;
- no access to the records by the parties;
- partial access; or
- full access.

Court orders for access and use of the documents

Where the court has ordered the production of subpoenaed documents it can then decide what type of access or inspection it will allow. Common orders restricting access include:

- inspection by lawyers only;
- redaction of witness details;
- right of first inspection; and
- no photocopying.

The return of documents

In both the Federal Circuit Court and the Family Court, the Registry Manager must return all documents provided under subpoena.[31]

If you do not need the documents to be returned, you can give the court permission to securely dispose of them.

In the Federal Circuit Court you can inform the court in writing when you comply with a subpoena.

In the Family Court you must fill out the notice on page 4 of the Family Court form that should be served on you in conjunction with the subpoena.

TIP / Always send documents to the Court. Do not send them directly to the other party.

Can a person use documents produced in court proceedings for some other purpose?

No, a person who inspects or copies documents following orders for production must only use the document for the case, and must not disclose the contents of the documents or give a copy of them to anyone else without the court's permission. Publishing the documents is a contempt of court, punishable by a fine or imprisonment.

Concurrent proceedings

It is possible for family law and criminal proceedings to be running at the same time: for instance where there is an allegation that a parent sexually abused their child and both criminal and family law proceedings follow.

Usually, the Family Courts will adjourn their proceedings until the criminal matter is finalised because the outcome of the criminal proceedings will affect their decision.

There are different rules about the confidentiality of subpoenaed records in these two jurisdictions. This means that material that is protected in the criminal court may not be protected in the Family Courts. In this situation, it may be advisable to indicate to the Family Court that there are criminal proceedings also underway, and to seek the same protections in the Family Court. You should do this by lodging a formal objection.

Such an application will not always be successful, because the Family Court can override state court decisions. His Honour Joe Harman (FMC) described the principle this way:

> "The family court can override state or territory protections of confidentiality if it is consistent with its jurisdiction. This is referred to as the 'paramountcy principle' so, for example, the court in a children's matter would have to consider if the best interests of the child were in conflict with the application or preservation of a state or territory protection. If there is a Commonwealth legislative prohibition such as the confidentiality protections for [family dispute resolution practitioners] and [family counsellors] then the paramountcy principle cannot apply to override statute."[32]

31 For more detail see the Federal Circuit Court, 'Information for persons served with a subpoena or copy of a subpoena', page 2.

32 Harman, J 'Confidentiality in Family Dispute Resolution and Family Counselling Cases and Why they Matter', *Journal of Family Studies*, 2011, Vol. 17, No. 3, pp. 204–12.

OTHER STATES AND TERRITORIES

If you receive a subpoena or another type of request for your records for a court case in another state or territory, talk to a lawyer.

Many lawyers only practise in their own state or territory, so you may need to find a lawyer in the state or territory where the legal proceedings are taking place. For referrals to interstate lawyers, contact the law society or, for women clients, the Women's Legal Service in your state. See the useful contacts section on page 55 for details.

You can also contact whoever sent you the subpoena with any queries about the subpoena.

GLOSSARY

Accused
A person charged with a criminal offence. Also known as a defendant.

Adduce
The term 'adduce' is used in court proceedings to describe the process of putting forward or presenting evidence or arguments for consideration by the court. If a party 'adduces' evidence of a document, it means they are using the document in court as evidence, for example by questioning a witness about the document.

Affidavit
A written statement made by a person who has sworn an oath or made an affirmation to speak the truth in the presence of another person. This other person must be authorised to administer the oath or affirmation; usually a justice of the peace or a lawyer. An affidavit can be used in some legal proceedings as an application or instead of speaking evidence in court as a witness.

Affirmation
A witness in court must promise the court that they will tell the truth before they give evidence. One way of doing this is called making an affirmation. An affirmation is used by witnesses who do not wish to take a religious oath.

Apprehended Violence Order (AVO)
A court order for the protection of one or more people who fear future violence or harassment from another person (the defendant). The court order sets out a number of things the defendant must not do for a period of time. Although an AVO is not a criminal charge or conviction, if the defendant breaches the order, they can be charged with a criminal offence.

Barrister
A barrister is a lawyer who specialises in standing up and arguing in court and providing advice in specialist areas of law. A barrister usually works on a case with a solicitor; the solicitor deals with more of the paperwork and with maintaining contact with the client.

Best interests of the child
The 'bests interests of the child' is the most important principle in family law proceedings about children. It is up to the court to make decisions about who a child will live with or spend time with. The most important consideration is protection from harm, including family violence.

Committal
The formal definition of a committal is a hearing in the Local or Children's Court to decide if the accused should face a jury trial. All serious charges, including most sexual assaults, commence in the Local or Children's Court as 'committals matters' before they go up to the District or Supreme Court.

Complainant
The alleged victim in a criminal case. For example, in a criminal sexual assault case, the person who says they were sexually assaulted by the accused is called a 'sexual assault complainant'.

Confidential harm statement
A written statement by a sexual assault victim (or prepared on their behalf) that outlines the harm that would be suffered if the information was released. A confidential harm statement is only seen by the victim's lawyer and the Judge.

Conduct money
A party who gives a subpoena to another person must pay them a reasonable amount of money to cover the expense of responding to the subpoena.

Consent to release information (waive privilege)
There are strict rules in section 300 of the Criminal Procedure Act 1986 NSW about how a person can consent to the release of information. The consent must be in writing, it must explicitly refer to the material being released and refer to awareness of the Sexual Assault Communications Privilege.

Counselling Communication
Confidential information (either oral or in writing) created during the process of 'counselling' a person. Counselling is defined very broadly and can include activities such as psychology, psychotherapy, medical/hospital treatment, financial counselling and other therapeutic practices.

Credibility and credible witness
If something is 'credible' it is easily believed. Credibility refers to whether or not something is likely to be true or false. A 'credible witness' is someone the court finds is likely to be telling the truth and who is consistent in their version of events.

Crown Prosecutor
A barrister employed by the ODPP to prosecute serious criminal offences. Crown Prosecutors have a duty to act fairly and impartially. They are not the victim's lawyer.

Defendant
A person charged with a criminal offence. Also known as an accused.

Fact in issue
A key factual issue in the legal proceedings that must be proved or disproved for a party to be successful in their case.

Independent Children's Lawyer (ICL)
A lawyer in family court proceedings appointed by the court to represent and promote a child's best interests. The ICL is independent of the court and the parties. Although they represent the child's interests they are not the child's personal lawyer and are not obliged to act on the child's instructions.

Indictable offence
A more serious criminal offence which is usually tried before a jury. Generally these are more serious offences and are prosecuted by the ODPP.

Jurisdiction
The geographical area or subject-matter covered by a legal authority such as a court.

Legitimate forensic purpose
A specific legal phrase often used in relation to subpoenas. In general, there is a 'legitimate forensic purpose' when there is a good reason to ask for a document or information because there is a good chance it might be useful to prove something in the case.

Office of the Director of Public Prosecutions (ODPP)
An independent government authority responsible for prosecuting individuals for criminal offences of a more serious nature (indictable offences). Less serious offences (called 'summary offences') are prosecuted in the Local Court by NSW Police.

Privilege
Special legal protection to protect the confidentiality of information or evidence where it is in the public interest to prevent that information being disclosed. Think of legal privilege as a 'shield' against forced disclosure.

Prior inconsistent statement
Where a person who is a witness in legal proceedings says something happened one way and then later says it happened differently. The later statement is inconsistent with the earlier statement. A prior inconsistent statement can be used by parties in the legal proceedings to support their case that someone is lying or has a poor memory or is confused about what really happened.

Protected confidence
A counselling communication that is made by, to or about a victim or alleged victim of sexual assault. If the person using the service is a victim of sexual assault, it can include medical records and other counselling records that were made before the assault. To be protected, records do not have to be connected to the issue of sexual assault.

Protected confider
A person who has their privacy protected by the Sexual Assault Communications Privilege. Protected confiders include the person who is being counselled, whether or not they are the victim of the sexual assault, and another person or people present to support the victim or to otherwise help the counselling process.

Principal protected confider
The victim or alleged victim of a sexual assault offence whose private information is protected by the Sexual Assault Communications Privilege.

Production/produce
To provide or put forward documents to the court in response to a subpoena.

Redaction
A technique used in legal proceedings to black out certain words or sections of a document.

Registrar
An officer of the court who performs both judicial and administrative functions. They run the court registry, and sit in court to deal with preliminary and procedural matters. They may be legally qualified.

Return of subpoena
The due date for providing documents or appearing at court.

Search warrant
A court-issued authority giving police permission to search a person, place or thing. Search warrants are used to obtain evidence.

Sexual assault
Defined in section 295(1) of the *Criminal Procedure Act 1986* NSW as a "prescribed sexual assault offence" which, broadly speaking, can be anything from an act of indecency or worse. It includes the categories of indecent assault, sexual assault and aggravated sexual assault.

Sexual Assault Communications Privilege
A legal protection (privilege) that protects the confidentiality of therapeutic information for victims of sexual assault. It applies in criminal, AVO and some limited civil cases. It does not apply in family law.

Solicitor
A solicitor is a lawyer who can provide advice, prepare legal documents and represent clients in court. Solicitors are 'officers of the court' and have a high ethical duty to comply with professional standards. Solicitors must be registered (called 'admitted') to practice as lawyers in a legal jurisdiction (state, territory, federal) before they can work in its courts.

Subpoena
A court order requiring a person to attend court to give evidence and/or produce documents.

Substantial probative value
If information, a document or thing has 'substantial probative value' it means it has a more than significant chance of proving a key fact in the case.

Third party
A person who is not a party to a court proceeding.

USEFUL CONTACTS

w Services for Women m Services for Men ch Services for Children

Sexual Assault Communications Privilege Service (SACPS), Legal Aid NSW

A victims' legal service that helps protect the privacy of counselling notes and other confidential therapeutic records in criminal proceedings involving sexual offences. It supports sexual assault victims to claim the privilege when their confidential records are subpoenaed, usually by referring them to private lawyers. It also engages in legal education and policy reform to help prevent disclosure of confidential records.

w m ch

E: sacps@legalaid.nsw.gov.au

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

NSW Health Legal and Legislative Services

NSW Health has a Subpoena Policy which applies to organisations in the public health system including Government Medical Officers, NSW Ambulance Service. NSW Health Legal and Legislative Services can be contacted by public health services for assistance with subpoenas. NB: The NSW Health Subpoena Policy was last updated in 2010, prior to the changes to the SACP.

w m ch

T: (02) 9391 9606

E: legalmail@doh.health.nsw.gov.au

W: www.health.nsw.gov.au

Women's Legal Service NSW

A specialist community legal centre providing women with a range of free community legal services, including legal casework, advice and information, education, training and resources across metropolitan and regional areas of New South Wales. Areas of specialisation include domestic violence, sexual assault, family law and discrimination. WLS is also very active in law reform on a wide range of issues.

w

T: (02) 8745 6900 (Admin)

Advice lines

Indigenous Women's Legal Contact Line: (02) 8745 6977 / 1800 639 784 (Mon: 10am–12.30; Tues: 10am–12.30pm; Thurs: 10am–12.30pm)

Domestic Violence Legal Advice Line: (02) 8745 6999 / 1800 810 784 (Mon: 1.30pm–4.30pm; Tues 9.30am–12.30pm; Thurs: 1.30pm–4.30pm; Fri: 9.30am–12.30pm)

Women's Legal Advice Line: (02) 8745 6988 / 1800 801 501 (Mon: 9.30am–12.30pm; Tues: 1.30pm–4.30pm; Thurs: 9.30am–12.30pm)

F: (02) 9749 4433

E: reception@wlsnsw.org.au (WLS does not provide an email advice service)

W: www.wlsnsw.org.au

P: PO Box 206, Lidcombe, NSW 1825

Law Access NSW

LawAccess NSW is a free government telephone service providing legal information, referrals and in some cases, advice. LawAccess Online is a useful guide for legal information about a broad range of topics.

w m ch

T: 1300 888 529

W: www.lawaccess.nsw.gov.au

New South Wales Bar Association

A voluntary association of practicing barristers in NSW. The Legal Assistance Referral Scheme (LARS) is a section of the Bar Association that manages requests for pro bono assistance by trying to match requests for assistance with a suitable barrister or mediator.

w m ch

T: (02) 9232 4055 (general)

F: (02) 9221 1149

E: legalassist@nswbar.asn.au (LARS)

W: www.nswbar.asn.au

Law Society of NSW

The representative body for solicitors in NSW. It has a private solicitor referral service and pro bono service and the website offers community information about solicitors and professional standards.

w m ch

T: (02) 9926 0300 (private solicitor referral service)
(02) 9926 0364 (pro bono service)

F: (02) 9926 0355 (pro bono service)

E: erefferal@lawsociety.com.au (for private solicitor referral service)

W: www.lawsociety.com.au

Community Legal Centres NSW

Is the peak body for community legal centres in NSW representing 40 member organisations and plays an important law reform role and represents CLCs in a variety of forums. It does not provide legal advice however its website has a useful directory for CLCs in NSW and you can contact the office for help with appropriate referrals to CLCs.

w m ch

T: (02) 9212 7333

F: (02) 9212 7332

E: clcnsw@clc.net.au

W: www.clcnsw.org.au
www.clcnsw.org.au/clc_directory.php (directory of CLCs in NSW)

Victims Services

Part of the NSW Department of Justice. Victims Services provides support and information for victims of crime, including counselling and financial assistance.

w m ch

Victims Access Line:
1800 633 063 or 8688 5511

Aboriginal Contact Line:
1800 019 123

W: www.victimsservices.justice.nsw.gov.au

NSW Courts and Tribunals

NSW Local Courts

T: Variety of phone numbers for each court. To find the number for your local court call Law Access NSW or go to: www.localcourt.justice.nsw.gov.au/localcourts/court_locations.html

W: www.localcourt.justice.nsw.gov.au/localcourts/court_locations.html

NSW District Courts

T: Sydney Registry contacts
1300 679 272 (civil and criminal enquiries)
(02) 9377 5268 (criminal and civil TTY)
(02) 9287 7369 (criminal subpoenas exhibits)
(02) 9377 5857 (civil subpoenas/ exhibits)

Regional and outer Centre:

F: Sydney Registry contacts
(02) 9287 7543 (criminal)
(02) 9377 5831 (civil)

W: www.districtcourt.justice.nsw.gov.au

NSW Supreme Court

T: 1300 679 272 (general inquiries and subpoenas)

F: (02) 9230 8628

E: supremecourt.enquiries@courts.nsw.gov.au

W: www.supremecourt.justice.nsw.gov.au

Interstate

This lists the relevant community legal centre for women, law society and the government department responsible for lawmaking and justice.

Australian Capital Territory

Women's Legal Centre

T: (02) 6257 4499 or 1800 634 669
W: www.womenslegalact.org

Law Society

T: (02) 6274 0300
W: www.actlawsociety.asn.au

ACT Justice and Community Safety Directorate:
www.justice.act.gov.au

Northern Territory

Women's Legal Services

Top End Women's Legal Service

T: (08) 8982 3000 or 1800 234 441
W: www.tewls.org.au (TEWLS)

Central Australian Women's Legal Service

T: (08) 8952 4055
or 1800 684 055
W: www.cawls.org.au

Law Society

T: (08) 8981 5104
W: www.lawsocietynt.asn.au

Northern Territory Department of Justice:
www.justice.nt.gov.au

Queensland

Women's Legal Service

T: (07) 3392 0644 (admin)
1800 957 957 (helpline)
1800 457 117 (rural, regional and remote legal advice line)
W: www.wlsq.org.au

Law Society

T: 1300 367 757
W: www.qls.com.au/Home

Department of Justice and Attorney General:
www.justice.qld.gov.au
(07) 3247 5483

South Australia

Women's Legal Service

T: (08) 8221 5553 or 1800 816 349
W: www.wlssa.org.au

Law Society

T: (08) 8229 0200
W: www.lawsocietysa.asn.au

Attorney-General's Department:
www.agd.sa.gov.au
(08) 8207 1555

Tasmania

Women's Legal Service

T: 1800 682 468
W: www.womenslegaltas.org.au/index.php

Law Society

T: (03) 6234 4133
W: www.lst.org.au

Department of Justice:
www.justice.tas.gov.au
1300 135 513

Victoria

Women's Legal Service

T: (03) 8622 0600 or 1800 133 302
W: www.womenslegal.org.au

Law Institute

T: (03) 9607 9311
W: www.liv.asn.au

Department of Justice:
www.justice.vic.gov.au
(03) 8684 0000

Western Australia

Women's Legal Service

T: (08) 9272 8800 or 1800 625 122
W: www.wlcwa.org.au

Law Society

T: (08) 9324 8600
W: www.lawsocietywa.asn.au

Department of the Attorney General:
www.dotag.wa.gov.au
(08) 9264 1600

Some Professional Associations

Australian Psychological Society

The Australian Psychological Society (APS) is the largest professional association for psychologists in Australia, representing over 20,000 members.

T: (03) 8662 3300
1800 333 497 (toll free)

F: contactus@psychology.org.au

W: www.psychology.org.au

Australian Association of Social Workers

The Australian Association of Social Workers is the professional representative body of Social Workers in Australia, with more than 7,000 members nation-wide.

T: (02) 6232 3900 (NSW branch)
(03) 9320 1044 (Members only ethics consultation services)

E: aaswnsw@aasw.asn.au
(NSW branch)

W: www.aasw.asn.au

Australian Medical Association

The peak membership organisation for registered medical practitioners and medical students of Australia.

T: 9439 8822 (NSW Association)

E: enquiries@nswama.com.au

W: www.amansw.com.au

Royal Australian College of General Practitioners

Professional association supporting GPs, general practice registrars and medical students through education, training and research and by assessing doctors' skills and knowledge and developing professional standards.

T: 9886 4700 (NSW & ACT branch)

E: nswact.faculty@racgp.org.au

W: www.racgp.org.au

INDEX

D

E

F

G

H

I

J

L

T

U

V

W

NOTES

STOP.
THINK.
PROTECT.