CONTEMPT *or* Confidentiality?

Annie Cossins

Counselling records, relevance and sexual assault trials

Experience from America and Canada has shown that counselling records are sought by defence counsel in sexual assault trials as an alternative way of obtaining access to the same type of 'bad character' evidence that rape shield provisions were designed to address, and as a tactic for intimidating complainants into withdrawing their complaints. In recent years, this tactic has caught on throughout much of Australia with several sexual assault services in NSW and other States reporting an increase in the numbers of subpoenas received in relation to counselling records.[1]

In NSW, the issue of protecting the confidentiality of counselling records in response to defence subpoenas may well have remained out of the political spotlight if it had not been for the stand that the Canberra Rape Crisis Centre took and the subsequent imprisonment of their administrator for contempt of court, since, as a direct response, the NSW Attorney-General announced that the NSW Government would draft legislation to address the situation that led to her imprisonment. (See box by Angela Jones for an insider's view of the Canberra Rape Crisis situation.)

Unfortunately, the *Evidence Amendment (Confidential Communications) Bill 1996,* which has been the NSW Government's response to the legal and ethical dilemmas faced by sexual assault counsellors, is severely limited in its ability to protect the confidential communications between a complainant in a sexual assault trial and her counsellor. The Bill, which was released for public comment in June 1996, contains a *general,* non-specific judicial discretion which covers any confidential communications that fall within the definition of a 'protected confidence'.[2] The discretion *may* be exercised by a judicial officer if he or she is satisfied that the public interest in protecting the confidentiality of particular confidential communications outweighs the public interest in protecting the rights of the accused to adduce all available evidence. However, the Bill has not been drafted specifically to protect the confidentiality of counselling records.

This is because the *main* impetus for the introduction of a judicial discretion in NSW was, in fact, a perceived need to protect journalists' confidential sources of information[3] and, as a result, the proposed general judicial discretion is broadly drafted, lacks the specificity needed to address the well-documented disadvantage that complainants face in sexual assault trials, and fails to prioritise the public interest in preserving the confidentiality of the complainant/counsellor relationship over the rights of the accused.

In fact, from the Attorney-General Department's discussion paper which accompanied the Bill,[4] it is clear that the issue of disclosure of counselling records in sexual assault trials has only been superficially examined by the NSW Government, since it has failed to see the connection between defence access to these records and the subversion of rape shield provisions, and failed to recognise that the judicial discretion will actually provide *less* protection for counselling records

Annie Cossins teaches law at the University of New South Wales.

The Insider's View

by Angela Jones

'I salute you,' were the comments in one letter of support, 'and encourage you and I want to say thank you and don't give up'. Wrote another, 'What you are doing is outstandingly courageous — and absolutely right'. Such words of solace sustained us at the Canberra Rape Crisis Centre (CRCC) when we chose contempt of court over releasing a client's file to the defense counsel.

We were made starkly aware of this tactic during the First National Conference on Sexual Assault and the Law in Melbourne in November. The keynote speaker spoke of a common Canadian defense counsel habit of subpoenaing the records of sexual assault counsellors. Peculiar timing; whilst hearing of this practice, the CRCC was subpoenaed. We considered this a rather woeful defence ploy, so chose to oppose the subpoena.

And the Queanbeyan magistrate agreed with us. He saw defence counsel on a fishing expedition, hence was not prepared to permit them access to the file. He considered it best, however, if the trial judge ultimately decided the matter and ordered the file be kept at the court house. On this point we disagreed.

One of the primary roles of the CRCC is to provide confidential support and counselling to women who have experienced sexual abuse. In court in December, we merely chose to abide by our policy of confidentiality — any information received in a counselling session remains with the CRCC. Period. This includes access by the court.

While one CRCC worker was incarcerated for contempt, two others hastened from the court room. We departed to defence counsel's bellows of, 'Arrest those women. Arrest them. They have the file.' To which the magistrate proclaimed, 'Just who is it that I should issue the arrest warrants for? Jane Does? Description: two ladies with handbags?'

With legal guidance, a compromise was struck. The CRCC worker was released, but the file remained and still remains in a locked briefcase, unsighted, at the Queanbeyan Court with only CRCC workers knowing the combination.

Our alarm regarding the release of these documents has a number of elements of which I shall note just two. We are concerned that if we produce the documents requested, even more women will be discouraged, not just from reporting the assault to police, which is strewn with its own obstacles, but discouraged from even seeking support to deal with the trauma of their experience.

There is another matter that we found discouraging. When we said no to defence counsel access and no to the file being held by the court, we did so in opposition to legal advice, from a number of different sources, which recommended we do otherwise. The repeated legal response was 'release the file'. We were advised to operate within the law's existing parameters. Therein lay a problem, for the law conflicts with what we see as a quintessential part of our service. Confidentiality. The files at CRCC are made and kept with this undertaking. Yet the law demands a breach of this promise. We could of course, pursue alternative options in conducting counselling sessions. But when does it come time for the law to avail itself to sexual assault survivors and their counsellors?

As those who are not highly legally trained, we did not know what the best legal path was, nor do we now. And so I echo the challenge of Liz Sheehy, Canadian academic, a challenge to step beyond the confines of legal training and what is currently legally permissible. We want to draw doors where none now exist. Then open them. This we cannot do alone. But if we must, we will paint blue sky on jail walls.

Angela Jones is a former counsellor/advocate at Canberra Rape Crisis Centre and is currently studying law.

compared with the protection presently available in NSW under the common law.

The starting point of the judicial discretion proposed by the NSW Government maintains the rule of evidence that a witness is required to answer any questions or produce any document (where deemed relevant) or face prosecution for contempt of court. This means that, when the discretion is exercised, it is merely a *relaxation* of the rule in particular circumstances, so that the *onus* will be on the witness (either the counsellor or the complainant) to make out a case for being excused from producing any counselling records. Remarkably, the Bill represents a reversal of the present onus on the defence to show a legitimate forensic purpose for counselling records or other documents the subject of a subpoena, in circumstances where a counsellor in receipt of a subpoena decides to challenge its terms.[5]

The judicial discretion in the NSW Bill clearly places too great a burden on a counsellor or complainant to establish why a counsellor should be excused from producing the complainant's counselling file. The burden not only has implications for the likely disadvantage to the complainant in a sexual assault trial, but also has resource implications for counsellors and sexual assault services: are sexual assault services and private counsellors sufficiently resourced to hire legal representation or will counsellors be willing to appear in court themselves? If a counsellor is not willing to make out a case to protect her/his client's confidentiality, will complainants have the resources to hire legal representation themselves?

The fact that the NSW Government has chosen a general judicial discretion as the means by which to protect the confidentiality of the client/counsellor relationship gives rise to these and a number of other serious concerns:

A judicial discretion is only as good as the person exercising it and there is an historical judicial tendency to give great weight to an accused's right to adduce all relevant evidence.

There is a substantial risk that stereotype and myth will affect the exercise of the discretion, since there is suffi-

cient evidence to show that male judges and magistrates (who constitute the vast majority of the judiciary) are likely to adhere to the myths that when a woman says 'no' she often means 'yes', that women often lead men on and then cry rape to protect their reputations and that if a woman has had consensual sex with one man on a casual basis outside of marriage she is likely to consent to sex with any man.

- If disclosure is granted, the records can be used by the defence to prejudice judicial officers and juries against complainants.

  Judicial officers will be required to undertake a new balancing process in every individual case which means that variation in approaches by different judicial officers will give rise to inconsistency and an inability to predict when disclosure will occur.

- No guarantee of confidentiality can be given to victims of sexual assault at the time of counselling, since there will be no way of predicting the circumstances in which the discretion will be exercised in favour of the public interest in protecting a complainant's confidentiality.
- A general judicial discretion does not provide sufficient safeguards to adequately address the specific problems associated with breach of confidentiality and its impact on:

  — the personal safety and recovery of victims of sexual assault;

  — re-victimisation of complainants by the criminal justice system;

  — the introduction of potentially unreliable and inaccurate hearsay evidence of counsellors;[6]

If Only I Didn't... Maybe I Wasn't...

by Patricia Easteal

When she talks to the sexual assault counsellor/advocate, the survivor may express feelings of responsibility for the assault and some self-doubt. Such emotions are the by-product of the false mythology about rape that acts to insidiously impute blame to the victim and to dichotomise sexual assault into 'real' rape with something else perceived as less than genuine or legitimate. The survivor grows up exposed to those fallacious beliefs and internalises them.

'Since it was my husband, (boy-friend, date, neighbour ...) it wasn't really rape,' the client may cry out in confusion. She doubts her status as a 'real' victim due to her relationship with the perpetrator. She is prey to the same doubts about her victimisation as the one quarter, in a national survey, who disagreed that 'women are more likely to be raped by someone they know than a stranger' and the more than half who did not agree strongly.[1]

'Maybe I shouldn't have gone there with him. Perhaps I should have worn a different dress,' the survivor confesses to the counsellor. Her shame is derived from myths about the nature of sexual assault that include a perception of rape as a sexual act and male sexuality as uncontrollable if aroused. The onus is therefore on the victim for not only not controlling his libido but probably provoking it. Again, her feelings coincide with those held by some in the community. Almost one third in an Australia-wide survey on beliefs about rape were either undecided or agreed that 'women who hitchhike have only themselves to blame if they are raped' and more than one quarter either disagreed or were undecided that 'there is no behaviour on the part of a woman that should be considered justification for rape'.[2]

'Why didn't I run away? Why didn't I struggle more?' These questions come from false beliefs about what sexual assault involves — force, a weapon, penetration of the penis and of course resistance by the woman. If the assault didn't involve physical force, her fighting back, and penile penetration — and many don't — more self-doubt and feelings of being responsible will be engendered.

The counsellor can help her to understand that the assault was not about sex and provocation but about violence and the desire to exert power and humiliate. The counsellor can help her to see that many forms of covert forms of coercion and force may be used in rape. That it was her fear of the assault and its outcome or her history of other sexual abuse or her socialisation that rendered her passive — not compliant and not consenting. The counsellor can also show her the studies which indicate that only one-fifth of rapists are strangers.

To shift from victim to survivor, the women must talk about their shame, self-blame and doubt. Given the low trust levels of those who have been violated, beginning to share about what happened is not easy. Rape crisis services were seen as the best source of support by the women who completed a national survey,[3] better than family who often judged and better than friends who did not know how to deal with the situation. Can a woman, however, trust if the records of counselling are not privileged and confidential? If not, then the best means of helping her closes.

If she does turn to a sexual assault service and the counselling records are admitted as evidence in court, her initial feelings of shame and doubt are replayed acting to blame her and exonerate the perpetrator. Any erroneous views and stereotypes held by jurors and judges are reinforced. Consequently, the cycle of community mythology, victim blaming and women's self-doubt is perpetuated within the courtroom.

References

1. Office of the Status of Women, 'Community Attitudes to Violence Against Women', Canberra, AGPS, 1995.
2. Easteal, Patricia, 'Beliefs About Rape: A National Survey,' in *Without Consent*, Australian Institute of Criminology, Canberra, 1993.
3. See Easteal, Patricia, *Voices of the Survivors*, Spinifex Press, 1994.

Patricia Easteal is a Visiting Fellow at the Faculty of Law, Australian National University.

— the use of confidential communications outside of an understanding of the therapeutic and healing process; and

— a decrease in, and continued under-reporting of sexual assault and consequent under-prosecution of offenders.[7]

Counsellors who are charged with the responsibility of resisting defence access to counselling records are, in fact, engaged in a new battlefront with defence lawyers over the respective rights of the complainant and the accused in a sexual assault trial and face the ethical dilemma of supporting their clients or becoming a *de facto* arm of the criminal justice system.

Although the NSW judicial discretion is the only proposed protection of its kind in Australia today, it is, unfortunately, an inadequate response to serious flaws in the way sexual assault trials have been and continue to be conducted as inquiries into the moral worth of complainants. As noted by the NSW Parliamentary Standing Committee on Social Issues,[8] the judicial response to the NSW rape shield provision[9] shows how judicial officers can undermine the intention of Parliament to remedy the injustice imposed on complainants in sexual assault trials.

If the NSW Government or any other State or Territory Government is serious about creating a remedy for the situation that led to the gaoling of the Canberra Rape Crisis Centre's administrator, the history of judicial interpretation of rape shield provisions shows that governments must consider a more effective law reform option than a judicial discretion to prevent the discretion succumbing to a similar fate.

Any legislative reforms must have as their rationale the same rationale which saw the introduction of rape shield laws in the 1980s, and must be informed by the likelihood that unless adequate legislation is introduced counsellors will resist defence subpoenas and be willing to risk imprisonment for contempt of court.

An alternative option for protecting the confidentiality of counselling records

Arguments based on both basic principles of evidence and public policy grounds are sufficient to support major legislative reform to protect records from disclosure in the form of a statutory exclusion. A statutory exclusion is a form of protection which would make counselling records completely inadmissable in pre-trial or trial proceedings and is based on the premise that counselling records are not relevant to the facts in issue or the credibility of the complainant in a sexual assault trial. The statutory exclusion would have the effect of preventing the counsellor of a complainant in a sexual assault matter from disclosing the confidential communications of the complainant. This would mean that, at the time of counselling, counsellors would be able to give an assurance to their clients that all their communications were confidential and protected by law. After canvassing other options, it is my view that a statutory exclusion is the best method for adequately addressing the effects of disclosure of confidential communications on victims of sexual assault, counsellors, sexual assault services and the administration of justice.[10]

Critics of the creation of a statutory exclusion are likely to raise the objection that such a provision would have the general effect of 'depriv[ing] judicial proceedings of information which would be relevant to the determination of issues and to the interests of justice'.[11] In particular, it is likely to be argued that the creation of an exclusion will be detrimental to the administration of justice on the grounds that confidential communications in counselling records may be critical for determining the innocence of an accused person in a sexual assault trial and that, in the absence of such information, an accused may be wrongly convicted. For that reason, critics will argue that such records are, in fact, relevant and that the public interest in the protection of confidential communications within the client/counsellor relationship does not outweigh the public interest in courts having available to them all relevant evidence. But is such an objection well founded?

The concept of relevance in a sexual assault trial

Relevance, as a legal concept, is founded on the notion of commonsense.[12] By way of definition (but not elucidation), evidence at common law will be admissable in court if it is considered to be directly or indirectly relevant to a fact in issue or to the credibility of a witness.[13] The NSW *Evidence Act* defines relevant evidence as that which 'if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding'[14] or the credibility of a witness.[15] However, because of the persistence of rape myths in sexual assault trials, 'the question that must be asked ... is, why are [counselling] records deemed, or more likely to be deemed, both relevant and necessary in sexual assault trials?'[16] (See Box by Patricia Easteal for a discussion of the mythology.) In other words, what makes such records relevant?

Arguably, counselling records are considered to be relevant based on the hypothetical premise that they may reveal a complainant's statement that the accused did not commit the alleged sexual assault, that she consented to sexual relations with the accused or that the records contain a prior inconsistent statement. Except where it might be assumed that the complainant has made a mistake as to identity, this premise can *only* be sustained by the myth that women are prone to making false claims of sexual assault for the purposes of protecting their reputations or seeking revenge. In this way, by using the sense common to Western cultural and legal thought, the records become relevant. That commonsense, however, is founded on masculinist beliefs of women's unreliability, dishonesty and moral unworthiness but to a holder of that commonsense belief, it would be inherently logical to deem that counselling records are relevant to determining the lack of credibility of a particular complainant. In this way, it can be seen that relevance,

> Whatever the test, be it one of experience, common sense or logic ... is a decision particularly vulnerable to the application of private beliefs. Regardless of the definition used, the content of any relevancy decision will be filled by the particular judge's experience, common sense and/or logic.[17]

Relevance in a sexual assault trial has historically been imbued with stereotypical and mythical notions of 'good' and 'bad' women and girls. In fact, disclosure to the defence and admissibility of a complainant's counselling file must be examined in light of the historical common law legacy which stripped a woman of credibility if she had 'engaged' in sexual activity. As a result of this legacy, a *de facto* 'presumption of guilt' is placed on female complainants in sexual assault trials, so that it can be said that it is the complainant who is on trial and must prove her 'innocence' in that she did not consent to sexual relations with the accused. This is not surprising given the fact that:

> The traditional common law position with regard to witnesses who alleged rape, was that women who participated in consensual sex outside marriage could be cross-examined about their sexual activity. *Prior sexual activity was said to be indicative of a propensity to consent to sexual activity at large.* The common law also considered a complainant's sexual activity as relevant to her truthfulness.[18]

In fact,

> Distrust and contempt for the unchaste female accuser was formalised into a set of legal rules unique to rape cases. The most prominent rule allowed the use at trial of evidence of the complainant's unchaste conduct. *These rules combined to shift the usual focus of a criminal trial from an inquiry into the conduct of the offender to that of the moral worth of the complainant.*[19]

That sexual assault trials are still conducted as inquiries into the moral worth of complainants is evidenced by the cases in which 'unchasteness' is considered to be relevant to the issue of consent and a complainant's credibility. Whilst rape shield provisions exist in every Australian jurisdiction to limit the admissibility of a complainant's prior sexual history and, hence, the ability of defence counsel to bring the 'moral worth' of the complainant into question, the increasing limitations of these provisions has been discussed in several reports and papers.[20]

In light of the cultural context of sexual assault trials, counselling records are likely to contain a range of information that can be used to invoke the stereotype and myth that plagues sexual assault proceedings, such as the number of past sexual relations, the existence of illegitimate children, drug, alcohol and psychiatric histories, rebellious childhood history and so on. From post-trial interviews with jurors, La Free *et al* have documented that 'a victim's nontraditional behavior may act as a catalyst, causing jurors' attitudes about how women should behave to affect their judgments under certain conditions'.[21] In fact, their findings give weight to the dangers associated with the disclosure of counselling records in sexual assault trials:

> Although any evidence that a woman was forced to submit to a sexual act against her will (including use of a weapon or victim injury) might be expected to persuade jurors of the defendant's guilt, neither variable significantly affected jurors' judgments ... In contrast, jurors were influenced by a victim's 'character'. They were less likely to believe in a defendant's guilt when the victim had reportedly engaged in sex outside marriage, drank or used drugs, or had been acquainted with the defendant — however briefly — prior to the alleged assault.[22]

On the basis of such evidence, it can be expected that there will be a direct correlation between the amount of 'bad character' information that is introduced by the defence about the complainant and rates of conviction, *irrespective of whether the 'bad character' information is confirmed.*[23] More importantly, for the purposes of this article, it can be expected that there will be a direct correlation between the extent to which information from counselling records is used by the defence to establish a complainant's 'bad character' and low rates of conviction for sexual assault.

In relation to determining the relevance of counselling records in a sexual assault trial, L'Heureux-Dube J in *R v Osolin* has suggested that '[T]he best way to examine the question of relevance is to place the proposed use of psychiatric [or therapeutic] evidence in the circumstances of the ordinary trial' (at 500). In other words, will the issue of the relevance of such records be determined differently in other criminal trials? If the view is taken that such records are more relevant in a sexual assault trial, will it be because of the conscious or unconscious myth that victims of sexual assault are inherently less credible and more untrustworthy than other witnesses? In addition, '[t]here is no doubt that any attempt by the Crown to conduct a wide-ranging inquiry into the entire medical [or therapeutic] history of a criminal accused would be met with concerns about prejudice to the accused and irrelevance to the issue at trial' (at 491). In a context where a complainant in a sexual assault trial is required to rebut presumptions about her moral unworthiness and the myths associated with women who are raped, the same concerns of prejudice and lack of relevance should have direct bearing on the disclosure and admissibility of counselling records.

A different commonsense view based on empirical evidence and the experience of complainants is that women who report a sexual assault face the risk of further victimisation by the criminal justice system and the risk that they are *more likely* to be disbelieved than taken seriously. Rather than counselling records containing a mine of information for the defence about the 'bad character' of the complainant, this commonsense view would see them as being peripheral to the trial process and a source of probable misinterpretation and bias. In fact, once the basis of relevancy decisions has been shown to be founded on stereotype and myth, information to do with prior sexual history, drug and/or alcohol history, psychiatric history, relationship with parents, feelings of self-blame and the like can have no bearing on the facts in issue in a sexual assault trial or the complainant's credibility.

Further, 'records concerning statements made in the course of therapy are both hearsay and inherently problematic as regards reliability' (at 496) and cannot be equated with other relevant evidence given in the course of a sexual assault trial, such as police statements from the complainant and other witnesses, medical examinations of the complainant, DNA evidence and the like. The unreliability of counselling records is compounded by the fact that complainants do not have the opportunity, as is the case with a police statement, to read the counselling records to ensure that they are an accurate reflection of their communications. Unless the counselling context and the methods by which information is elicited by the counsellor from the client are clearly understood by the judge and jury, the information in counselling records becomes an unreliable and inaccurate guide for ascertaining the facts in issue in a sexual assault trial.

The different commonsense views which can inform the concept of relevance are graphically illustrated in *R v Osolin*. Although, one of the majority judges, Cory J, conceded that the defence's purpose for cross-examination on a notation in the complainant's counselling records 'appear[ed] to be the very sort of improper purpose for which evidence cannot be adduced',[24] his Honour found that:

> [I]t is the duty of the trial judge to ensure that the accused's rights with regard to cross-examination, which are so essential to the defence, are protected. The trial judge had before him all the medical records. It would have been appropriate to permit cross-examination with regard to the [notation], particularly to determine if it would throw any light either upon *a possible motive of the complainant to allege that she was the victim of sexual assault or with regard to her conduct which might have led the appellant to believe that she was consenting to sexual advances.* [at 522; emphasis added]

Cory J reveals the influence of the myth that women are prone to make false allegations of sexual assault in his

appraisal of the relevance of the notation in question. Consider the different commonsense view of L'Heureux-Dube J who directly challenges the myths associated with women who allege sexual assault:

> With regard to the ... notation, I am unable to see how this statement, four and a half months after the incident, can be at all relevant to the issues of consent or the appellant's mistaken belief in consent at the time. The complainant's reflections on how the situation might have been avoided, even assuming they are correct, can have no probative value as to whether or not there was consent to the assault or mistaken belief in consent on the part of the appellant. In any event, it is hardly surprising that such statements are to found in medical records; in this, as in other traumatic situations such as the death of a loved one ... it is not uncommon for people to blame themselves for the event. It is well known that victims of sexual assault in particular often feel responsible for not having done enough to prevent the attack. [at 506]

Conclusion

The prejudicial basis of relevancy decisions in sexual assault trials clearly supports the enactment of a statutory exclusion to reflect the need to discard such prejudice in the interests of justice. In fact, for there to be any connection between information in counselling records and the credibility of the complainant or a fact in issue it 'must be bridged by stereotype (that 'unchaste' women lie and 'unchaste' women consent indiscriminately), *otherwise the propositions make no sense'*.[25]

For these reasons, a statutory exclusion is the obvious method for preventing the perpetuation of masculinist notions of 'commonsense' about women and girls who are sexually assaulted. The inescapable conclusion is that a failure to legislate to protect counselling records from being disclosed in sexual assault trials will 'only frustrate further our still inadequate attempts to extend to victims of sexual assault the protection of the justice system to which they are entitled'.[26] Ironically, where a subpoena results in the disclosure of counselling records to defence counsel on the grounds of relevance and the accused's right to a fair trial, this places the criminal justice system's protection of victims of sexual assault at risk and implicates the criminal justice system as 'the means by which offenders escape prosecution'.[27]

References

1. See Cossins, A. and Pilkinton, R., 'Balancing the Scales: The Case for the Inadmissability of Counselling Records in Sexual Assault Trials', (1996) 19 *University of NSW Law Journal* 1.
2. A protected confidence is defined as '(a) a communication made by a person in confidence to another person (... called the confidant) acting in a professional capacity and who, when the communication was made, was under an express or implied obligation not to disclose its contents, whether or not the obligation arises under law or can be inferred from the nature of the relationship between the person and the confidant, or (b) the contents of a document relating to a communication of a kind referred to in paragraph (a), or (c) information about, or enabling a person to ascertain, the identity of the person who made a communication of a kind referred to in paragraph (a) known by the the confidant': *Evidence Amendment (Confidential Communications) Bill 1996*, Schedule 1.
3. Nason, David, 'State Law Reform to Protect Sources', The *Australian*, 11 April 1996; Simper, Errol, 'Source Protection Proposition Draws Fire from all Directions', The *Australian*, 13-14 April 1996. The author has been able to verify that this was the main impetus from NSW Government sources.
4. NSW Attorney-General's Department, 'Protecting Confidential Communications from Disclosure in Court Proceedings', Discussion Paper, 1996.
5. *R v Saleam* (1989) 16 NSWLR 14 at 18, per Hunt J.
6. Even though a counsellor's notes are hearsay evidence, the notes may be held to be admissible as the result of an application of the following provisions of the *Evidence Act 1995* (NSW): s.43 (prior inconsistent statements of witnesses), s.106 (rebutting denials by other evidence), s.97 (exceptions to the tendency rule on the grounds of significant probative value) and exceptions to the hearsay rule, such as ss. 72, 66 and 69. See also Odgers, Stephen, *Uniform Evidence Law*, The Federation Press, Sydney, 1995, pp.90-3; 120-1. However, defence counsel are at liberty to refrain from tendering counselling records should they decide that the records do not assist their client's case. In fact, defence counsel may only intend to use the records to inform their cross-examination of the complainant.
7. These issues are addressed in detail in Cossins and Pilkinton, above.
8. Standing Committee on Social Issues, 'Sexual Violence: Addressing the Crime (Inquiry into the Incidence of Sexual Offences: Part II)', Legislative Council, Parliament of New South Wales, 1996, pp.25-8.
9. Section 409B, *Crimes Act 1900* (NSW).
10. An alternative option which would have the same effect as a statutory exclusion is a statutory client/counsellor privilege akin to common law legal professional privilege. Such a privilege is based on the premise that the public interest in favour of protecting the confidentiality of a particular relationship overrides the public interest in protecting the accused's right to adduce all relevant evidence. The nature of a client privilege is best exemplified by legal professional privilege, in that, where it applies to confidential communications 'there is no question of balancing the considerations favouring the protection of confidentiality against any considerations favouring disclosure in the circumstances of the particular case. The privilege itself represents the outcome of such a balancing process and reflects the common law's verdict that the considerations favouring the 'perfect security' of communications and documents protected by the privilege must prevail': *Carter v Managing Partner, Northmore Hale Davy and Leake* (1995) 183 CLR 121 at 133, per Deane J. For more details, see Cossins and Pilkinton, above. However, the issue of whether counselling/therapeutic records should be subject to a privilege in *all* criminal and civil trials is not within the scope of this article but has been addressed in a recent US Supreme Court case which held that significant private and public interests supported the recognition of a psychotherapist privilege in a civil action for wrongful death: *Jaffee v Redmond*, unreported, Supreme Court of the United States, 13 June 1996. In addition, some form of psychotherapist/patient privilege has been enacted in 50 States in America.
11. Law Reform Commission of Western Australia, 'Report on Professional Privilege for Confidential Communications (Project No. 90)' 1993 p.40-1.
12. *R v Osolin* (1994) 109 DLR (4th) 478 at 499, per L'Heureux-Dube J.
13. Waight, P.K. and Williams, C.R., *Evidence: Commentary and Materials*, Law Book Company Ltd., Sydney, 1995, p.17.
14. Section 55(1) *Evidence Act 1995* (NSW).
15. Section 55(2) *Evidence Act 1995* (NSW). Credibility evidence will be admissible under s.103 of the *Evidence Act 1995* (NSW) if it is of 'substantial probative value'. Odgers observes that the dictionary definition of probative value is the same definition used in s.55(1) of the *Evidence Act* and s.55(2) 'makes it clear that evidence relating only to the credibility of a witness is considered to satisfy this test of relevance': Odgers, above, p.164.
16. *R v Osolin* (1994) 109 DLR (4th) 478 at 499, per L'Heureux-Dube J.
17. *R v Seaboyer* (1991) 83 DLR 193 at 228, per L'Heureux-Dube J.
18. Aronson Mark, and Hunter, Jill, *Litigation: Evidence and Procedure*, Butterworths, Sydney, 1995, p.759; emphasis added.
19. Galvin, H., 'Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade', (1986) 70 *Minnesota Law Review* 763 at 792-3; cited in *R v Seaboyer* (1991) 83 DLR (4th) 193 at 218, per L'Heureux-Dube J; emphasis added.
20. See Bargen J. and Fishwick E. (for the Office of the Status of Women), 'Sexual Assault Law Reform: A National Perspective', Office of the Status of Women, Canberra, 1995, pp.77-93; Law Reform Commission of Victoria, 'Rape: Reform of Law and Procedure', Appendices to Interim Report No. 42, 1991; Heenan, Melanie, 'Factors Affecting the Prosecution of Rape Cases in Victoria: an Evaluation of the Crimes (Rape) Act 1991', paper presented at the Australian and New Zealand Society of Criminology, 11th Annual Conference, 29 January-1 February 1996, Victoria University of Wellington; Bonney, R., 'Crimes (Sexual Assault) Amendment Act 1981 Monitoring and Evaluation', Interim Report No.3, 'Court Procedures', NSW Bureau of Crime Statistics and Research, Sydney, 1987 ; Standing Committee on Social Issues, above ref.8 pp.25-9. The extent to which stereotype and myth still inform sexual assault proceedings in Australia was demonstrated at the recent National Conference on Sexual Assault, 'Balancing the Scales', 20-21 June 1996, Perth in which a number of papers revealed the extent to

which sexual assault law reform has failed to curtail defence counsel strategies which are designed to undermine the credibility of complainants and failed to educate the judiciary about the dangers of reliance on myth and stereotype to inform issues of admissability: Kealley, L. and Killey, C., 'We're Going to Light the Bloody Thing Ourselves'; Taylor, S., 'Understanding the Impact of the Legal Process on the Sexual Assault Victim'; and Easteal, P., 'A Masculocentric Reality: The Limits of Law Reform and Choices for the Future'.

21. La Free, F., Reskin B. and Visher, C.A., 'Jurors' Responses to Victims' Behavior and Legal Issues in Sexual Assault Trials', (1985) 32 *Social Problems* 389 at 400; cited in *R v Seaboyer* (1991) 83 DLR (4th) 193 at 216, per L'Heureux-Dube J.
22. La Free, F. and others, above, p.397; cited in *R v Seaboyer* (1991) 83 DLR (4th) 193 at 216, per L'Heureux-Dube J.
23. Catton, K., 'Evidence Regarding the Prior Sexual History of an Alleged Rape Victim — Its Effect on the Perceived Guilt of the Accused', (1975) 33 *University of Toronto Faculty Law Review* 165 at 173; cited in *R v Seaboyer* (1991) 83 DLR (4th) 193 at 216, per L'Heureux-Dube J.
24. *R v Osolin* at 522, per Cory J. The notation in question indicated that the complainant was concerned that there may have been some conduct on her part that had led the accused to believe she consented. However, at trial, there had been no dispute that the complainant, a 17-year-old, had been abducted by the accused and a companion, tied up, raped and then found naked and hysterical on a highway at 3.30 a.m. in the morning: *R v Osolin* at 574 per McLachlin J.
25. *R v Seaboyer* at 227, per L'Heureux-Dube J.
26. *R v Osolin* at 500, per L'Heureux-Dube J.
27. *R v Osolin* at 501, per L'Heureux-Dube J.

LEGAL STUDIES

The suggestions for class work and discussions below are based on the article 'Contempt or confidentiality' by Annie Cossins, with additional text by Patricia Easteal and Angela Jones published on p.223 of this issue.

Questions

1. What would be the implications of counsellors not being able to provide guarantees of confidentiality to victims of sexual assault for their counselling sessions?

2. What similarities does the admission of a victim's sexual history have to admission of counselling notes? What can we learn from the rape shield legislation when looking at law reform that limits admission of counselling records?

3. What happened to the Canberra Rape Crisis counsellor? How does Angela Jones believe that the law conflicts with the Service's commitment?

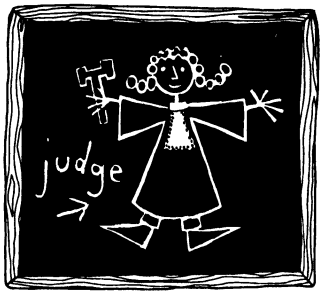
4. What are the limitations of the recent New South Wales Evidence Amendment Bill in dealing with rape crisis counselling notes? What problems (include a discussion of the shifting burden) are associated with the 'judicial discretion' type of option that is outlined in Annie Cossins' article?

5. Explain the connection between rape mythology and the problems that Annie Cossins describes as possible outcomes with a judicial discretion model?

6. What are some of the rape myths which contribute to survivors feeling shame about their experience?

7. Why is counselling vitally important for a survivor of sexual assault and why is confidentiality of the process particularly important?

8. What is some of the damaging (to the victim) information that could be extracted from counsellors records?



9. What model of law reform does Annie Cossins present as an alternative to judicial discretion? What arguments would critics of her approach present.

10. Explain the connection that the article draws between rape mythology and the perception of counselling records as relevant. In other words, explain how 'commonsense' is derived from a gendered reality.

Discussion

The law cannot be seen in isolation from the society in which it is a part. Discuss how the issues involved in admitting counsellors' confidential records in the court and the issues involved in law reform dealing with this subject can be understood in the context of our society. Look at these issues from both historical and current perspectives.

Research

Research sexual assault in Australia and law reform in the last 20 years. Specifically look at:

- The response that victims have received by the police and variation based on the relationship of the perpetrator to the victim.
- The response that victims have received in the court and variation based on the relationship of the perpetrator to the victim.
- The issues related to consent and how different jurisdictions have dealt with it.
- The issues related to admission of sexual history and the rape shield legislation.
- The issues related to delays in reporting the sexual assault and how different jurisdictions have dealt with it.

Debate

Confidential sexual assault counselling notes are relevant to a sexual assault trial and should therefore be admissible.

Patricia Easteal

Patricia Easteal is a Visiting Fellow at the Faculty of Law, the Australian National University.