GILSHENAN & LUTON
LEGAL PRACTICE

Legislation update for prosecuting agencies

A new statutory privilege: Sexual Assault Counselling Privilege

August 2018

Amendments to the Evidence Act and Criminal Code[1] have created a new category of statutory privilege – sexual assault counselling privilege. Although the privilege came into force on 1 December 2017, it only applies to proceedings that commenced after that date, and is therefore only now starting to make its presence felt.

Sexual assault counselling privilege seeks to protect the therapeutic relationship between an alleged victim of a sexual assault offence and their counsellor; it will therefore only apply to counselling communications regarding offences of a sexual nature.

Put simply, the privilege exempts counsellors (and those holding counselling records) from the usual requirements of compliance with subpoenas and summonses. The privilege is absolute in preliminary proceedings (such as committal hearings), but may be waived with the court's leave post-committal.

Procedurally, the person subpoenaing the counselling records must give written notice that an application has been made to the other party and the counsellor. Generally, the court cannot make a decision until at least 14 days after the written notice is provided.

Leave cannot be granted unless the court is satisfied (with the onus on the requesting party) that:

1. The communication will have substantial probative value;
2. There are no other available documents containing the same evidence; and
3. The public interest in admitting the communication "substantially outweighs" the public interest in preserving the confidentiality of the communication and protecting the victim from harm.

[1] Division 2A *Evidence Act 1977*, and section 590APA *Criminal Code*

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Whilst the privilege can apply in both criminal and civil proceedings, its impact will be greatest in respect of criminal proceedings involving charges of a sexual nature. It is anticipated that obtaining the court's leave to issue a summons or subpoena for protected counselling records will not be easy. The long-held practice of defence lawyers subpoenaing the medical records of complainants in such matters is therefore effectively over.

If a government agency receives notice that a party has applied for a subpoena for privileged material, it has standing to appear at the application. If it is unclear whether the privilege will attach to certain documents, this should be brought to the court's attention so that there can be argument about whether the material is privileged and if leave should be granted.

For further inquiries or assistance, please contact Glen Cranny, Managing Director, Gilshenan & Luton Legal Practice on 3361 0240 or gcranny@gnl.com.au

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