Counselling Notes and Subpoenas Workshop

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What notes do you take and why? Have your notes ever been subpoenaed? Have you ever had a subpoena set aside? Learn about the different laws in operation throughout Australia and other countries. How far does confidentiality go now? Discuss current practices and consider possible legal reform.

Background

Over the past couple of years it has become apparent that counselling and other case notes are being frequently subpoenaed for production in courts in Queensland. It is occurring in criminal law cases - particularly sexual offences (usually in the District and Magistrates Courts), domestic violence proceedings (Magistrates Courts), child protection proceedings (Children's Court) and family law proceedings (Family Court and Federal Magistrates Service).

As a result of this the Southside Domestic Violence Action Group (SDVAG) and Women's Legal Service (WLS) considered that it may be useful to undertake some research into the situation. In November, 2002, SDVAG hosted a forum on counselling notes and service providers were invited to share information and concerns. It was made clear that the intention of the research was to focus on subpoenas issued under Queensland state law. Unfortunately this means that family law proceedings could not be included, although it was recognized that this is an area of significant concern to service providers.

The invitation to the forum suggested possible purposes of any research:

- Producing written material detailing the rights and responsibilities of organizations, counsellors and clients with respect to case notes and the legal system;
- Providing practical strategies around procedures for taking and retaining case notes;
- Formulating some recommendations for legal reform.
- The invitation also asked invitees 3 questions:
- Is this a significant issue for your organization?
- Has your organization ever had notes subpoenaed?
- Have you been required to attend court as an expert witness?

Introduction

For the purpose of this report we have used the description "counsellor" to cover a range of service providers whose case notes may be subpoenaed.

- 85% saw the subpoenaing of documents as being a significant issue for their organization;
- 30% had been subpoenaed in respect of case files; and
- 15% had been required to attend court in answer to a subpoena.

The practice of subpoenaing counselling notes raised a number of concerns for counsellors, agencies and their clients. There are also implications for the operation of services and larger questions of public policy.

Some of these issues are:

- In nearly all cases where case notes are subpoenaed, they are subpoenaed by or on behalf of the person whom the client perceives as their abuser. If the court allows an inspection of the documents they are seen by that person, or at the very least by his lawyer. This can completely destroy the trust developed by the client and the counsellor.

- In family law cases where children are going on contact visits with their abuser, allowing the abuser or his lawyer to see the case notes could place the child at increased risk of abuse.

- The subpoenaing of case files causes stress for the counsellors as they observe the impact on the client. The process can also be time-consuming and affect the counsellor's availability for their other work.
- There is an impact on agencies in terms of staff time, energy and stress - and potentially legal costs.

These issues could cause agencies and private counsellors to consider not doing work which could result in their notes being subpoenaed - but this may then exclude many children and adults in need of and desirous of receiving counselling.

Outline of the Law
Catherine Cuthbert, barrister-at-law, presented the forum with legal information about subpoenas.

TYPES OF SUBPOENAS
The information focused on state criminal law. Counsellors were most likely to be subpoenaed to the District Court for a trial or to the Magistrates Court for a committal hearing. In Magistrates Court proceedings the term used is "summons".

There are two types of subpoenas:

1. to produce documents – this is one most often of concern to counsellors

2. to give evidence – this is commonly served on eye witnesses and lay persons who are required to give evidence in court cases

A subpoena may require a witness to both produce documents and give evidence.

A subpoena is issued by the Court at the request of a party (i.e. the defence or the prosecution). It bears a court seal and has the authority of the court. Failure to respond in any way (i.e. if the subpoena is just ignored) can be treated as contempt of court.

PROCESS WHICH FOLLOWS RECEIVING A SUBPOENA
A subpoena to produce documents usually has a "return date" by which the documents should be at the court. This is usually a date some time before the day of the relevant hearing. This allows any party to the proceedings to request the court for permission to inspect the documents. Anything learned by any party in the process of that inspection can be used by them in the way they conduct the case.

The mere fact that documents have been subpoenaed and are at the court does not mean they are evidence. They only become evidence if they are tendered as an exhibit through a witness who is called to give evidence. Usually they can only be tendered through the author – i.e. the counsellor who made the notes.

WHAT COMMUNICATIONS ARE PRIVILEGED AT LAW?
The law allows only for very limited types of communications to be privileged – i.e. protected from production in court. The main form of privilege is "legal professional privilege" which allows protection of communications between a person and their lawyer.

Counselling notes have no privilege attached to them. Some states (NSW, Vic, Tasmania and SA at least) have enacted statutory protection to counselling notes but the courts have interpreted these very narrowly. In NSW the privilege really only extends to notes of a "qualified" counsellor (e.g. a psychologist or social worker).

PURPOSE OF SUBPOENAS

The legal basis for subpoenas is that a Court is always entitled to have before it all information, which will assist in a full exploration of the issues. In fact, if the lawyer for an accused person knew that the complainant had received counselling and did not pursue information regarding that, s/he would not be doing a thorough job for their client.

However, there is a more sinister purpose for which the defence subpoenas counselling notes. This is to arm themselves with information, which they will be able to use to attack the credibility of the complainant. Once the notes have been subpoenaed and deposited at the Court, all parties to the proceedings are entitled to ask the Court for permission to inspect the documents. If the Court grants this permission (which will automatically happen unless there is some objection) the parties can examine the documents and make copies. The defence lawyer then uses the information gleaned from the notes during cross-examination of the complainant and possibly other witnesses.

The defence only seeks to tender the notes as evidence in circumstances where there are counselling issues to explore. For example, if it seems that the complaint is based on a "recovered" memory or that the complainant only had a vague memory of events until s/he received counselling, the defence may seek to tender the notes and ask detailed questions of the counsellor in cross-examination.

Defence lawyers are often quite loathe to call witnesses because if they do they lose the right of last address to the jury.

FRESH COMPLAINT

A counsellor could be the "fresh complaint" witness in a sexual offence case. This would occur if the counsellor were the first person to whom the victim told their story and if it were told reasonably shortly after the event.

Normally a person cannot give evidence of what someone else said to them. This is called "hearsay" at law and is not admissible as evidence. Fresh complaint evidence is an exception to the hearsay rule. The law allows a victim's first report of her ordeal to be admissible in criminal proceedings for sexual offences. It is not evidence of the truth of what the complainant says but it is admitted to give weight to her evidence – it strengthens her credibility.

Most fresh complaints are not recorded – they are made to a mother, sibling or friend. Where a counsellor fills this roll, the question arises as to what kind of notes should be taken. There is no correct answer in law to this. On the one hand, detailed notes of such a conversation and observations as to the apparent physical and emotional state of the client could be very useful. On the other hand, if the complainant decides to proceed through the legal system she will have to give a detailed statement to the police. Any inconsistencies between the fresh complaint notes taken by the counsellor and the police statement will be used against the complainant by the defence in cross-examination.

RESISTING A SUBPOENA

When a subpoena has been served on an agency or counsellor, they have the right to resist it. This is done by making an application to the court to resist. The application can either be made at the time stated for the production of the

documents or beforehand by arranging that with the court and putting the other party on notice.

There are three grounds for resisting:
1. the terms of the subpoena are too wide;
2. the defence lacks a legitimate forensic purpose;
3. the defence is fishing.

In respect of ground one – this can be a successful argument, but the defence may simply re-draw the subpoena on narrower grounds. For example, the original subpoena may ask for any documents held by the agency relating to their contact with Ms X. A successful application to resist this on the grounds it is too wide. However, it may result in a new subpoena asking for documents relating to any contact with Ms X concerning alleged sexual assaults by Mr. Y. This may be of little comfort to Ms X.

Ms Cuthbert was recently involved in a case of this nature. The defence, prosecution and judge were surprised to see a barrister at court briefed by the subpoenaed party to resist the subpoena. She argued public interest issues such as damage to the therapeutic relationship and breach of trust. She also took an economic line arguing that many services are funded by the public purse to provide counselling, but the benefits to the community of counselling are being placed at risk by the regular subpoenaing of counselling notes. The public policy arguments were not successful but the defence were required to re-draw their subpoena more narrowly.

Ms Cuthbert advised that in a recent case a judge made it clear that it was not appropriate for the counsellor to "black out" parts of the notes before they were provided to the court on the basis that they were not relevant to the proceedings. It was for the court to decide what should be made available to the defence.

NEED TO PUBLICISE CONCERNS

The issue of subpoenaing counselling notes is becoming standard practice for defence lawyers. The public policy concerns are not well understood in the legal profession and lawyers are surprised when subpoenas are resisted.

It may be useful to generate more public discussion around these issues and encourage interest in the topic amongst lawyers. Until there is more general awareness of the seriousness of the problem there will be no support to change the law or legal processes from the relevant decision-makers.

EXPERIENCE OF GOLD COAST SEXUAL ASSAULT CENTRE

We also had some preliminary information from Di Macleod of the Gold Coast Sexual Assault Centre. That centre has been subpoenaed a number of times. Initially they engaged a solicitor to assist them in resisting the subpoenas – now they handle the situations themselves.

Some suggestions made were:
- always resist a subpoena as a matter of principle
- never voluntarily hand over case notes – they have never experienced a situation where there has been any advantage for a client
- don't dialogue with the defence – just go to court and resist
- the subpoena may just be to "produce" not to "attend and produce". Attend anyway and use this as your chance to argue your position
- never just deliver the documents to the court – they are out of your control then
- general arguments used against producing notes

- terms of subpoena too wide
- no legitimate forensic purpose
- defence should be asked to clarify/specify what they are looking for
- sometimes the counsellor has had to take the witness stand to explain generally what is contained – or perhaps what is not contained - in the notes
- sometimes the magistrate asks to peruse the documents
- courts need to understand the difference between the therapeutic approach of counselling and the investigative approach expected in legal processes – these are underpinned by entirely different purposes
- the service describes the confidentiality that can be offered to clients in a more qualified way now

COMMUNITY EDUCATION

Written material

There needs to be a brochure or booklet, which describes the law and provides information about how to respond to a subpoena.

It should also contain ideas and strategies for organizations as to how to record counselling notes and how to maintain the highest possible levels of clients' confidentiality while being frank and transparent about the possibilities of being subpoenaed. Ideas about style and content of notes.

Training

Counsellors want training about the law and how to deal with being subpoenaed and the likelihood of being subpoenaed.

Lawyers, judges, magistrates and other legal professionals need training and education about the purpose and use of counselling notes and the public policy issues, which are arising in the current climate.

RESEARCH

There was significant support for research into the issue of subpoenaing counselling notes. The research needs to look at legislative reform, statutory privilege and practical outcomes in other jurisdictions. Is there any associated research on the attitude of the professions involved?

Research also has to look at the social issues – damage done to therapeutic relationships, confidentiality, affect on services etc

LEGAL REFORM

There was support for legal reform provided the research established clear benefits to be gained.