



Psychotherapy & Counselling
Federation of Australia

PACFA submission to the Consultation on Sexual Assault Counselling Privilege

**Queensland Government
Department of Justice and Attorney-General**

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PACFA submission endorsed by the
Queensland Counsellors Association,
a Member Association of PACFA

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Executive Summary

This submission is made by the Psychotherapy and Counselling Federation of Australia (PACFA) which is the leading peak body for counsellors and psychotherapists in Australia. The submission is endorsed by the Queensland Counsellors Association, a Member Association of PACFA, which advocates for counsellors and psychotherapists in Queensland and supports the counselling and psychotherapy profession state wide.

In this submission, PACFA advocates for the adoption of strengthened provisions in Queensland around the sexual assault counselling privilege.

Counselling is an essential part of the recovery process for victims and survivors of sexual assault. Changes to the privilege are required in Queensland to ensure that victims and survivors of sexual assault are encouraged to access counselling services to support their recovery, mental health and wellbeing. These services should be accessible to all who need them, without fear that their confidentiality will be breached during criminal proceedings. This is consistent with best practice in counselling and psychotherapy as detailed in the [PACFA Code of Ethics](#) (PACFA, 2015).

In this submission PACFA advocates for a consistent application of the sexual assault counselling privilege in Queensland, largely reflecting the approach already adopted in NSW.

Background to PACFA and QCA

PACFA represents the self-regulating profession of counselling and psychotherapy. Regulation for the profession is provided by PACFA through our Professional Training Standards, the PACFA Code of Ethics and complaints handling process, the PACFA National Register for suitably qualified practitioners, and requirements for practitioners to undertake clinical supervision and professional development. This is in addition to the regulation provided in some states, including Queensland, by the Codes of Conduct for Health Care Workers.

PACFA is a federation of twenty-five Member Associations (which have their own membership base). From 2016, PACFA is also a professional association for individual members who are counsellors, psychotherapists and educators in the counselling and psychotherapy field. PACFA represents a range of therapy modalities with a strong evidence-base, including integrative counselling and psychotherapy, family therapy, experiential therapies, psychodynamic psychotherapy and psychoanalysis.

Queensland Counsellors' Association (QCA) is a leading Professional Association for counsellors and psychotherapists in Queensland. It is dedicated to enhancing quality counselling services for the community. It has members throughout Queensland and has been serving the counselling profession since 1973. QCA Clinical and Provisional members meet the required standards of training and experience, and are required to practice in accordance with the [QCA Code of Ethics](#) (QCA, 2012). QCA members have the option to be listed on the PACFA National Register which requires them to also practice in accordance with the PACFA Code of Ethics.

Submission

Question 1: Is it appropriate for sexual assault in the context of the privilege to be defined to mean any offence of a sexual nature (including rape, attempt to commit rape, assault with intent to commit rape and sexual assaults as defined by section 352 of the Criminal Code)?

Yes. PACFA supports the use of the broadest possible definition of sexual assault for the application of the privilege in Queensland. The definition as drafted is sufficiently broad.

Question 2: Should the privilege protect counselling communications between a victim of a sexual assault and a counsellor about any harm the victim has suffered and regardless of whether the counselling occurred before or after the sexual assault?

Yes. The implication of releasing counselling communications that have taken place prior to a complaint of sexual assault being made is that seeking counselling will appear unsafe to the public, particularly women, as their confidentiality is potentially under threat. Given the incidence of sexual assault as described in the Minister's foreword to the Consultation paper, this is a substantial threat to confidentiality which undermines the safety provided by counsellors.

The principles of confidentiality as outlined in the PACFA Code of Ethics, together with the expected standards of ethical practice for counsellors and psychotherapists, are:

3.2 Ethical Principles of Counselling and Psychotherapy

3.2.1 Fidelity: honouring the trust placed in the practitioner

Being trustworthy is regarded as fundamental to understanding and resolving ethical challenges and dilemmas. Practitioners who adopt this principle act in accordance with the trust placed in them; regard confidentiality as an obligation arising from the client's trust; and restrict any disclosure of confidential information about clients to furthering the purposes for which it was originally disclosed.

4.1.2 Keeping trust

A. The practice of counselling and psychotherapy depends on gaining and honouring the trust of clients. Keeping trust requires:

- *attentiveness to the quality of listening and respect offered to clients*
- *culturally appropriate ways of communicating that are courteous and clear*
- *respect for privacy and dignity*
- *careful attention to client consent and confidentiality*
- *Carefully monitoring risks to clients and others and reporting to statutory authorities when necessary*

D. Respecting client confidentiality is a fundamental requirement for keeping trust. The professional management of confidentiality concerns the protection of

personally identifiable and sensitive information from unauthorised disclosure. Disclosure may be authorised by client consent, risks to safety, or the law. Any disclosures should be undertaken in ways that best protect the client's trust. Practitioners are accountable to their clients and to their profession for their management of confidentiality in general and particularly for disclosures made without their client's consent.

Clients expect confidentiality when seeking counselling services. This expectation is reflected in the PACFA Code of Ethics. Training in counselling and psychotherapy also emphasises the central importance of confidentiality in the provision of counselling services.

Additionally, without appropriate privilege arrangements in Queensland for sexual assault counselling communications, a barrier remains for victims and survivors of sexual assault who may wish to seek counselling during criminal proceedings for support, or wish to initiate criminal proceedings against a perpetrator.

Question 3: Should the definition for counsellor include people who have no formal training or qualifications but have experience relevant to the process of counselling people who have suffered harm and the person listens to and gives encouragement to a victim?

In order to provide the highest possible protection to the confidentiality of counselling communications by sexual assault victims and survivors, the definition of "counsellor" should be broad. In general, however, PACFA notes that consulting trained counsellors, ideally those who are registered, provides greater safety for the public.

As counselling is a self-regulating profession, there is no mandatory requirement for counsellors to be registered. The registration options provided by the profession include the PACFA National Register, one of the key national registers for counsellors and psychotherapists in Australia.

It is therefore possible that unqualified practitioners, or others with skills and experience related to counselling, may be providing counselling services to victims and survivors of sexual assault. These practitioners should all be covered by the Sexual Assault Counselling Privilege so that victims and survivors are not in any way prejudiced because of the training or professional status of the practitioner that they choose for counselling services or support.

Question 4: Is it appropriate that an absolute privilege should apply to committal proceedings and proceedings relating to bail (including proceedings during the trial or sentencing of a person)? Are there any potential issues or problems with this approach?

Absolute privilege should apply to committal proceedings and bail hearings. The legal justifications for this, as set out in the Consultation paper, are supported by PACFA.

From the perspective of the victim or survivor of sexual assault, at this preliminary stage in the criminal proceedings, the victim or survivor may be very vulnerable to re-traumatisation in engaging with the legal process. A high level of support may be required from counsellors, and

victims and survivors may not be willing to proceed with criminal proceedings if counselling communications were to be disclosed at this early stage in the proceedings.

Question 5: Is it appropriate that the qualified privilege apply to all criminal proceedings (that is trials or sentences of a person for any offence, not just offences of a sexual nature)? Is it appropriate that the qualified privilege should extend to proceedings relating to domestic violence orders under the Domestic and Family Violence Protection Act 2012 and to other civil proceedings if substantially the same acts are in issue as the acts that were in issue in relation to a criminal proceeding?

Yes, it is appropriate that the qualified privilege apply to all criminal proceedings (that is trials or sentences of a person for any offence), not just offences of a sexual nature. The principles underpinning the need to respect the confidentiality of the counselling relationship apply for any type of offence in the same way as they would apply in sexual offences.

Yes, the qualified privilege should apply to proceedings relating to domestic violence orders and other civil proceedings for the same reason as detailed above.

PACFA acknowledges the need to strike a balance between the importance of keeping counselling communications confidential in the public interest, and the right to a fair trial. The court should determine, in accordance with defined statutory criteria, whether or not counselling communications should be disclosed, and whether all or part of counselling communications should be disclosed on the basis of relevance.

Question 6: Is the criteria the court must consider for granting leave to access and use a document containing a protected confidence appropriate? Are there any issues or problems with the proposed approach?

Yes, the proposed criteria that the Queensland court would use to determine an application for leave to access and use confidential counselling documents are appropriate.

It is important to note that counselling records may contain, in some circumstances, details of third parties who have also been subject to sexual abuse by the same offender. Therefore an additional criteria should be added to protect the identity of third parties.

Additionally, counsellors should be able to recommend to the court that sections of the counselling records not relevant to the sexual assault proceedings are not divulged. Rarely does sexual assault counselling focus only on the sexual assault, as all areas of the person's life may be affected.

If counselling predates a sexual assault, the earlier counselling communications should not be disclosed to the defence. Only counselling communications directly relevant to the sexual assault, and made after the assault, should be disclosed. This is necessary and in the public interest to protect the safety and confidentiality of those seeking counselling.

The privacy of third parties such as partners and family members may also be at risk in the case that leave is granted to counselling documents containing protected confidences. Confidential

information about third parties is frequently discussed in counselling. Partners and family members may also have participated in the counselling, for example in couple and relationship counselling and family therapy. All counselling communications relating to third parties not directly relevant to the offence should therefore not be disclosed.

Question 7: Should a child or a person with impaired capacity be able to waive the privilege?

A child under 16 or a person with impaired capacity should not be able to waive privilege, as these victims and survivors of sexual assault are not psychologically or financially independent, and may be subject to pressure to waive privilege without understanding the consequences.

Question 8: In what, if any, circumstances should a court be able to waive the requirement to give notice?

The suggested circumstances are appropriate for the court to waive the requirement to give the victim and the counsellor notice that an application for leave has been made to the court relating to documents containing protected communications.

Question 9: What communications should be expressly exempted from the Queensland privilege?

PACFA has no objection to communications being exempted from privilege if there is strong evidence that they relate to intent to commit a fraud or another offence. However, the rights of third parties to privacy should be considered in any such exemption, as outlined above in response to Question 7.

The PACFA Code of Ethics includes provisions requiring counsellors to disclose counselling communications in certain circumstances. In any of these circumstances, arguably privilege does not apply.

4.1.6 Monitoring risks to clients and others and reporting to statutory authorities

A. Practitioners are responsible for monitoring potential risks to clients and others and for reporting concerns to statutory authorities where a client or third party is at risk of harm.

B. Practitioners take action to protect clients or third parties from harm where the risks of harm are serious enough to warrant such action.

D. Practitioners do not disclose information about clients unless there is an unequivocal overriding and legal obligation to disclose or where failure to do so may involve serious risk of harm to the client, to others or to the Practitioner.

F. Practitioners delivering services to children must understand the requirements of the relevant state authority regarding Mandatory Reporting. Every state has separate and different legislation regarding Mandatory Reporting. This information is available from the Australian Institute of Family Studies.

G. Practitioners report concerns about clients or third parties in accordance with any applicable mandatory reporting requirements.

Question 10: When discharging disclosure obligations under Chapter 62 of the Criminal Code, should the prosecution provide written notice of any documents that have not been disclosed because it is considered the documents contain a protected confidence and that an application to the court is required for leave to disclose?

PACFA supports the qualified privilege as proposed, i.e. before a document containing protected information can be disclosed, either the victim must consent or the leave of the court must be granted. PACFA supports an approach where it would be illegal to disclose documents containing privileged communications unless leave of the court has been granted or the victim has waived the privilege.

Question 11: How should the privilege interact with preliminary complaint evidence?

Where the preliminary complaint of a sexual assault by a victim or survivor occurs during counselling, it is essential that the victim has the right to determine whether evidence of their preliminary complaint is disclosed in evidence.

PACFA supports the adoption of the NSW model where the consent of the victim or survivor, or the leave of the court, must be obtained in order to adduce evidence of the preliminary complaint where the preliminary complaint is made during counselling. This will ensure consistency in the application of the sexual assault counselling privilege.

Question 12: How should a victim, or alleged victim of a sexual assault, be afforded special witness status?

The current situation where a victim or survivor of domestic violence is automatically recognised as a special witness, but a victim or survivor of sexual assault has to make an application to the court to be recognised as a special witness, is grossly unfair. This status in court proceeding does not recognise the severe trauma experienced by victims and survivors of sexual assault, which is the most significant risk factor for developing Posttraumatic Stress Disorder (PTSD) (Knauss & Schofield, 2009) . The Australian National Survey of Mental Health and Well-being found that sexual assault is closely associated with the development of Posttraumatic Stress Disorder for women and men, and that people with PTSD are highly likely to have a concurrent mental disorder (Creamer, Burgess & McFarlane, 2001). Women who have experienced sexual assault are also more likely to experience medical conditions that reduce their quality of life (Taylor, Pugh, Goodwatch & Coles, 2012).

The symptoms of trauma caused by sexual assault involve anxiety, intense fear, and avoidance behaviours, particularly when exposed to reminders of the attack, as in legal proceedings (Boyd, 2011). As a result, criminal proceedings pose a significant risk of re-traumatisation. Therefore, special witness status is required for victims and survivors of sexual assault to be able to give evidence before a court.

The Evidence Act 1977 should be amended so that the victim or survivor of sexual assault automatically has special witness status. This will ensure consistency with the protections provided in domestic violence proceedings and appropriately recognises the severe trauma experienced by victims and survivors of sexual assault, and the risk of re-traumatisation when giving evidence.

Question 13: How should the privilege interact with the protections in Guideline 27 regarding regression therapy or hypnosis?

There is no strong research evidence that hypnosis or hypnotherapy provided by professional practitioners creates false memories of sexual assault; however there is strong evidence that hypnosis is effective for anxiety and reducing pain and anxiety arising from medical conditions (Davis, 2015), is effective for PTSD (Knauss & Schofield, 2009). The Australian Government's recent review of natural therapies (Commonwealth of Australia, 2015) removed hypnosis/hypnotherapy from the scope of the review as there was recognition that hypnosis has a strong evidence base for its effectiveness.

PACFA does not support Guideline 27 and recommends that this guideline be reviewed as a matter of urgency. Given the research evidence for the effectiveness of hypnosis/hypnotherapy and the lack of research evidence that hypnosis creates false memories of sexual assault, there is no reason for evidence to be restricted because hypnosis or hypnotherapy was used.

Victims and survivors of a sexual offence who have undergone hypnosis or hypnotherapy should be covered by exactly the same privilege as victims and survivors who have gone through other forms of therapy. Indeed some interventions common in hypnosis/hypnotherapy such as relaxation therapy are covered by Medicare in the Better Access initiative.

Question 14: Are there any other issues that should be considered in introducing a sexual assault counselling privilege in Queensland?

PACFA is interested in collaborating with the Department of Justice and the Attorney-General to develop *Practice Guidelines on Sexual Assault Counselling Privilege* for counsellors and psychotherapists to help them to inform clients who have been sexually assaulted of the application of the sexual assault counselling privilege. This will support victims and survivors of sexual assault to understand their rights to confidentiality and the circumstances in which the privilege may or may not apply.

Any practice guidelines developed could be of benefit to other jurisdictions with similar legislative frameworks around the sexual assault counselling privilege.

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