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Law Commission review of evidence in sexual offences prosecutions: counselling records

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Introduction

In May 2023 the Law Commission published a consultation paper reviewing the law, guidance, and practice regarding the use of evidence in sexual offences prosecutions.[2] This piece serves as the second in a series of three articles outlining the Commission's provisional proposals targeted at countering the effects of rape myths, improving the treatment of complainants, and ensuring that defendants receive a fair trial.

This article explains how the Commission has approached a topic that has been the subject of considerable debate: the access, disclosure, and admissibility at trial of complainants' personal records held by third parties.[3] These may include, for example, medical, school, and social services records. This article looks specifically at the position regarding complainants' counselling records.

Counselling records can include any information stored by a counselling or therapy professional regarding a complainant during their period of treatment. Such records contain deeply personal—and often private—material concerning the complainant and their most intimate thoughts, and experiences. Owing to their innately personal nature, the use of complainants' counselling records during sexual offences trials has led to significant controversy.

The piece begins by explaining the current law surrounding the access, disclosure, and admissibility at trial of counselling records. It then outlines the case for reform in this area. The third section sets out the Commission's provisional proposals for a bespoke regime governing the use of complainants' personal records in sexual offences prosecutions.

Current legal framework

There is currently no specific legal regime that governs the use of counselling records in sexual offences cases. Instead, the current legal framework regarding personal records is derived from a wide combination of sources, including statute, common law, and government guidance. This piecemeal legislative framework is shaped around the three actions which lead to the use of complainants' counselling records at trial: access, disclosure, and admissibility.

Access

Prior to a suspect being charged, police and prosecution may only access a complainant's counselling records with the consent of the third-party record holder. The record holder's decision may depend on whether the complainant has agreed to the release of the records, so police may also seek the consent of the complainant. Under the Criminal Procedure and Investigations Act 1996 (CPIA), police can seek to access personal records where they may contain "relevant" material to pursue a reasonable line of inquiry.[4] The *Attorney General's Guidelines on Disclosure* set out a list of factors for the police and prosecution to consider when determining whether records will likely contain "relevant" material.[5] In making this determination, investigators must also be aware of the complainant's art.8 right to privacy and only obtain personal records where it is strictly necessary and proportionate in accordance with the law.[6]

Once a suspect has been charged, the police and prosecution can also seek to access counselling records by applying for a witness summons ordering the production of the records, the Commission refer to this as "compelled production"'. A witness summons can only be ordered if it is "in the interests of justice", and the records are "likely to be material evidence".[7] There is therefore a different, higher, threshold for accessing records by compelled production than by consent, and only the former is subject to judicial scrutiny.

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2 *Evidence in Sexual Offences Prosecutions (ESOP)* (2023) Law Commission Consultation Paper No.259.

3 See, *ESOP* (2023) Law Commission Consultation Paper No.259, Chapter 3.

4 CPIA 1996, s.23(1), Code of Practice, para.2.1.8.

5 *Attorney General's Guidelines on Disclosure* (2022), para.32.

6 *Attorney General's Guidelines on Disclosure* (2022) at paras 11–13; Judiciary of England and Wales, *Judicial Protocol on the Disclosure of Unused Material in Criminal Cases* (Dec 2013), para.46.

7 Criminal Procedure (Attendance of Witnesses) Act 1965, s.2(1).

Disclosure

Under the CPIA 1996, the prosecution must disclose to the defence all evidence they will rely on to prove their case and any material that meets the CPIA test for disclosure. The CPIA requires the disclosure of any material that "might reasonably be considered capable of undermining the case for the prosecution… or of assisting the case for the accused".[8] The disclosure test in the CPIA 1966, as supplemented by guidelines from the Attorney-General and the CPS,[9] is not wholly subject to judicial scrutiny and serves as another distinct threshold for the use of counselling records.

The prosecution is responsible for deciding what material satisfies the disclosure test. This decision is only subject to judicial scrutiny in two narrow circumstances. First, the court may order disclosure where the defence make an application on the grounds that they have reasonable cause to believe there is material required to be disclosed that has not been.[10] Secondly, the court will make a determination where the prosecution makes a public interest immunity (PII) application for permission to withhold "sensitive material" from the defence on the grounds that, "it is not in the public interest to disclose it".[11] The procedural and substantive thresholds to succeed in a PII application are particularly demanding and it is unclear how often these applications are made in relation to counselling records, or how many succeed.

Admissibility

There are no specific rules regarding the admissibility of counselling records at trial. Accordingly, if counselling records contain material that is relevant to a fact in issue they may be admitted into evidence. Notwithstanding, the law imposes a higher threshold or exclusion for some types of evidence. For example, higher threshold requirements apply for sexual behaviour evidence and character evidence, both of which may be contained within counselling records.[12]

The case for reform

Given the existing piecemeal legal framework—with variations in threshold tests and judicial scrutiny—the consultation paper considers the case for reform to laws governing access, disclosure, and admissibility of personal records in sexual offences cases. The Commission provisionally concluded that there is a strong case for reform, for a number of reasons.

Inconsistencies in current law

The fragmented and disparate nature of the current law and guidance has resulted in gaps and inconsistencies existing throughout the present regime. Most notably, complainants are currently afforded different protections depending on whether or not they consent to the police and prosecution accessing their personal records. As explained above, complainants' records may be obtained through consent-based access or compelled production. Whilst both methods may result in the complainant's records being accessed by police and prosecution, they operate under different statutes, procedures, decision-makers, and thresholds.

If a third-party record holder gives consent to a complainant's records being accessed, there will be no judicial oversight of the police and prosecution's decision to request or produce such records. There will therefore be no oversight to check that the police and prosecution are properly considering the *Attorney General's Guidelines* and the complainant's rights to privacy. Conversely, if a third-party record holder refuses consent to access a complainant's records, then there is judicial scrutiny. Under the witness summons procedure, a judge must decide if the records are likely to contain "material evidence" and if it is "in the interests of justice" to access such records.[13] In deciding whether access is "in the interests of justice", a judge will explicitly consider the complainant's right to privacy. A third-party record holder deciding whether to provide records to police or prosecutors will likely take into account whether the complainant has consented or refused to consent to their production. As explained by stakeholders, what results is ostensibly counterintuitive, with co-operative complainants likely to lose the added protection of judicial oversight by consenting to access.[14] Meanwhile, non-co-operative complainants may be told by police that their case will not be investigated any further if they refuse consent to access their records. Complainants, who may already be traumatised, therefore face a double-edged sword when deciding whether or not to consent to access to their counselling records: co-operate without the benefit of judicial scrutiny or fail to co-operate and risk the police discontinuing their investigations.

Unnecessary and disproportionate intrusions into complainants' privacy

Only some decisions concerning the access and disclosure of complainants' counselling records are subject to judicial scrutiny. Many decisions rest with police or prosecutors. In police efforts to ensure no evidential stone is left unturned, broad requests are being made to access complainants' records in the investigation of sexual offences.[15] A recent Home Office consultation found that the police request third party material in the "vast majority" of sexual offences cases.[16] The consultation also reported that "the majority of respondents indicated that third party material … requests about victims of [rape and serious sexual offences] can sometimes be unnecessary and disproportionate".[17] In tandem, complainants may feel pressured to acquiesce to such requests to access their records for fear their case may not proceed if they do not co-operate.[18]

Sexual offences trials frequently focus on the relative credibility of the complainant and defendant. This has led to a disproportionate level of scrutiny being placed on the complainant's background and their personal records.[19] In *The Decriminalisation of Rape*, a joint report written by four victim-support civil society organisations, it was noted that in sexual offences trials there has been a "normalisation of extremely invasive inquiries which go far beyond what is necessary on the facts of

8 CPIA 1996, s.3(1).
9 *Attorney General's Guidelines* (2022), para.84; CPS Legal Guidance, *Rape and Sexual Offences*, Chapter 3: Case Building (15 July 2022) "Reviewing Third Party Material".
10 CPIA 1996, s.8.
11 CPIA 1996, ss.3(6), 7A(8), 8(5); *Blackstone's Criminal Practice*, D9.50.
12 See *ESOP* (2023), Law Commission Consultation Paper No.259, Chapters 4 and 5.
13 Criminal Procedure (Attendance of Witnesses) Act 1965, s.2(1).
14 *ESOP* (2023), Law Commission Consultation Paper No.259, para.3.79.
15 Home Affairs Committee, *Investigation and Prosecution of Rape* (Eighth Report of Session 2021-22, 12 April 2022) HC 193, para.113.
16 Home Office, *Police Requests for Third Party Material* (2022), p.8.
17 Home Office, *Police Requests for Third Party Material* (2022), p.4.
18 R. George and S. Ferguson, *Review into the Criminal Justice System response to adult rape and serious sexual offences across England and Wales Research Report* (HM Government, June 2021) pp.52–53.
19 *ESOP* (2023), Law Commission Consultation Paper No.259, para.3.60.

the case".[20] Consequently, complainants on a wider scale may fear that their most private thoughts, intended only to be revealed within the safety of a counselling session, will be traumatically exposed and used against them at trial. As a result of this legitimate concern, complainants may not pursue counselling help, or feel restricted in the extent they are able to engage in their counselling sessions. Those complainants who have pursued counselling may choose to forego reporting a sexual offence, or proceeding to trial, for fear of exposing their prior counselling records.

However, counselling records may contain vital exculpatory information relevant to the defence and necessary for a fair trial. It is therefore imperative that the law strikes the correct balance between protecting the complainant's right to privacy, and the defendant's right to a fair trial. Increased judicial scrutiny, applied consistently throughout the access, disclosure, and admissibility stages, is essential in safeguarding this balance. As expressed by Chief Constable Sarah Crew, complainants' records should be accessed "only when necessary, only when following a reasonable line of enquiry and in a proportionate and least intrusive way".[21]

Low thresholds and the nature of counselling records

Another critique of the present legal framework is that the thresholds for access, disclosure, and admissibility of personal records are too low. Stakeholders told the Commission that the existing legislation does not provide for sufficient scrutiny of whether the material in personal records is relevant and of sufficient probative value to justify access, disclosure, and admission at trial.[22] Increased judicial oversight could therefore only go so far to safeguard complainants from overly intrusive inquiries into their counselling records.

Beyond exposing complainants to a disproportionate invasion of their privacy, insufficiently high thresholds for admitting personal records risk the introduction of rape myths at trial. Rape myths are beliefs, often derived from stereotypes, that, although sincerely held, are factually incorrect. For example, it is a myth that all rape victims report their assault promptly. Personal records can be easily manipulated to perpetuate various myths regarding how a "real" victim would act. Complainants' counselling records are often dissected for any evidence of inconsistency, self-doubt, or other factors that may inadvertently damage their perceived credibility before the jury, such as the presence of mental illness or drug use.[23]

Records of counselling are also notably gathered at a time when a complainant may be extremely vulnerable, perhaps struggling to understand their emotions, and may talk about feelings of self-blame or guilt. The immensely private, emotive, and exploratory nature of complainants' counselling records means there should be a suitably high threshold for their admission into sexual offences prosecutions.

A bespoke regime

In light of the limitations of the current fragmented legal framework and the case for reform, the Commission provisionally proposed a bespoke, unified regime that governs the access, disclosure, and admissibility of personal records in sexual offences prosecutions.

What records should be in scope?

The Commission considered what records should fall within the scope of a bespoke regime, looking at approaches in other jurisdictions.

Some jurisdictions use a category-based approach in determining what records should fall within the scope of a regime. In New South Wales (NSW), for example, protections apply to any records of "counselling communications", which are classed as "protected confidences".[24] Counselling records might include a multitude of different documents from a variety of sources depending on how "counselling" is defined. In NSW, counselling has been interpreted to include "psychology, social work and therapy BUT it also includes treatment for physical harm".[25] Western Australia takes a similar approach.[26] In Ireland, counselling is described as "listening to and giving verbal or other support or encouragement to a person, or advising or providing therapy or other treatment to a person (whether or not for remuneration)", and must be provided by "a person who has undertaken training or study or has experience relevant to the process of counselling".[27]

Elsewhere, a principled rather than category-based approach is used to delineate what personal records might fall within scope. This approach is taken in Canada, where "any form of record that contains personal information for which there is a reasonable expectation of privacy" will be within scope. The Criminal Code expressly states that psychiatric, therapeutic, and counselling records (among others) are captured by this definition.[28] The Commission prefers the principled Canadian approach because it is rooted in the complainant's right to privacy as opposed to where or by whom the personal information is recorded. The Commission thus provisionally proposed that any regime regulating the access, disclosure, and admissibility of personal records held by third parties should apply to any records in which the complainant has a reasonable expectation of privacy.

No complete prohibition on the use of counselling records

Various survivors' rights groups, including Rape Crisis England and Wales, have specifically campaigned for a presumption of non-disclosure for counselling records in prosecutions of sexual offences.[29] However, the question has also arisen as to whether there should be a complete prohibition on their access, disclosure, and admissibility as evidence.

As explained above, the use of counselling records as evidence in sexual offences prosecutions is viewed as particularly troubling because the notes were taken for therapeutic purposes, not for the benefit of a criminal trial. Within counselling sessions complainants often express feelings of self-blame or guilt.[30] While this is a common experience amongst survivors of sexual assault, stakeholders told the

20 Centre for Women's Justice (CWJ), End Violence Against Women Coalition (EVAW), Imkaan and Rape Crisis England and Wales (RCEW), *Decriminalisation of Rape: Why the justice system is failing rape survivors and what needs to change* (November 2020), p.30.
21 Home Affairs Committee, *Investigation and Prosecution of Rape*, para.113.
22 *ESOP* (2023), Law Commission Consultation Paper No.259, paras 3.73–3.75.
23 S. Leahy, "Too much information? Regulating disclosure of complainants' personal records in sexual offence trials" [2016] Crim. L.R. 229.
24 Criminal Procedure Act 1986 (NSW), s.296(1).
25 Sexual Assault Communications Privilege Service, *Subpoena Survival Guide* (Legal Aid NSW and Women's Legal Service NSW, 2016), p.28.
26 Evidence Act 1906 (WA), s.19A; Criminal Law Amendment (Sexual Assault and Other Matters) Act 2004 (WA), s.10.
27 Criminal Evidence Act 1992 (Ireland), s.19A(1).
28 Criminal Code (Canada), s.278.1.
29 RCEW, CWJ and the EVAW, *Keep Counselling Confidential: The Problems and Solutions with Disclosure of Counselling Notes* (October 2022).
30 J. Schwendinger and H. Schwendinger, "Rape victims and the false sense of guilt" (1980) 13 *Crime and Social Justice* 4.

Commission that records of these feelings are regularly deployed at trial to the detriment of the complainant. There are public interest arguments in favour of entirely prohibiting the use of counselling records in sexual offences cases. Notably, complainants will be more likely to pursue counselling without the fear that their records will be used at trial to challenge their credibility. Complainants may also feel more empowered to engage fully in their counselling sessions with the knowledge that the content of sessions will remain confidential. A complete prohibition would additionally prevent the potential trauma complainants experience when their highly private information is revealed and used to undermine them at trial. For these reasons there is a complete prohibition on the use of counselling communications in sexual offences proceedings in Tasmania. This prohibition only applies to counselling communications that occur after the alleged offence has taken place, and to communications about harm arising from the alleged offence.[31]

Tasmania is an outlier in its approach. Canada, Ireland, Scotland, NSW and Western Australia are among the jurisdictions that instead employ enhanced protections for the use of counselling records in sexual offences cases, rather than a blanket prohibition.[32] For example, in NSW counselling communications may only be sought, produced and adduced at trial with leave of the court.[33] NSW adopted this qualified approach because a complete prohibition risked excluding evidence of substantial probative value which would, be "inimical" to the defendant's right to a fair trial.[34] Indeed, there may be circumstances in which counselling records contain evidence of a complainant retracting their allegation against the defendant or an admission that their allegation was false. To exclude such admissions on a blanket basis would pose a significant risk to the fairness of the trial. The Commission's provisional view is therefore that there should not be a complete prohibition on the access, disclosure, or admissibility of counselling records in sexual offences cases. Instead, the Commission provisionally proposed the use of "enhanced relevance" thresholds to ensure that complainants' counselling records are only used in a narrow set of defined circumstances.

Enhanced relevance thresholds

To safeguard against overly intrusive inquiries into complainants' personal records and limit the introduction of myths and misconceptions at trial, the Commission provisionally proposed a unified legislative framework of "enhanced relevance" thresholds, with structured judicial discretion. This approach is based on the Canadian model which allows for judicial scrutiny at each stage of access,[35] disclosure, and admissibility.[36] The level of judicial time necessary to allow for scrutiny at every stage may be significant. However, the Commission's provisional view is that this increase in judicial involvement is necessary to ensure a proper balance between complainants' right to privacy, defendants' right to a fair trial, and the public interest in encouraging victims of sexual offences to pursue counselling help. The Commission also asked consultees for their views on the potential measures that could be put in place to protect complainants who consent to access to their personal records.[37] For example, the provision of independent legal support to complainants when an application is made to access or admit their personal records.[38]

The Commission's provisional proposals adapt the Canadian framework. For compelled production to police or prosecutors, or for disclosure to the defence, the Commission provisionally proposed an enhanced relevance test such that personal records held by third parties:

(1) must be likely relevant to an issue at trial or to the competence of a witness to testify; and
(2) must be necessary in the interests of justice.[39]

In assessing what would be necessary in the interests of justice, the Commission provisionally proposed the following list of factors that the Criminal Code requires the Canadian courts to consider:

(a) the extent to which the record is necessary for the accused to make a full answer and defence;
(b) the probative value of the record;
(c) the nature and extent of the reasonable expectation of privacy with respect to the record;
(d) whether production of the record is based on a discriminatory belief or bias;
(e) the potential prejudice to the personal dignity and right to privacy of any person to whom the record relates;
(f) society's interest in encouraging the reporting of sexual offences;
(g) society's interest in encouraging the obtaining of treatment by complainants of sexual offences; and
(h) the effect of the determination on the integrity of the trial process.[40]

For admissibility, the Commission provisionally proposed an enhanced relevance test such that material in personal records held by third parties would be admissible if:

(1) the evidence is relevant to an issue at trial or to the competence of a witness to testify; and
(2) it has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.[41]

In assessing whether the evidence has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice, the Commission provisionally proposed setting out the list of factors to be considered by the court in Canada. These factors are:

(a) the interests of justice, including the right of the accused to make a full answer and defence;
(b) society's interest in encouraging the reporting of sexual assault offences;
(c) society's interest in encouraging the obtaining of treatment by complainants of sexual offences;
(d) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;

31 Evidence Act 2001 (Tas), s.127B(1), (3)–(5).
32 *ESOP* (2023), Law Commission Consultation Paper No.259, para.3.135.
33 Criminal Procedure Act 1986 (NSW), s.298.
34 *Hansard* (NSW Legislative Council), 22 October 1997, p.1132 (Attorney General Hon J W Shaw).
35 In Canada the term "production" is used to refer to access.
36 Criminal Code (Canada), s.278.2.
37 *ESOP* (2023), Law Commission Consultation Paper No.259, para.3.183.
38 See *ESOP* (2023), Law Commission Consultation Paper No.259, Chapter 8.
39 Criminal Code (Canada).
40 Criminal Code (Canada), s.278.5(2).
41 Criminal Code (Canada), s.278.92(b).

(e) the need to remove from the fact-finding process any discriminatory belief or bias;
(f) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;
(g) the potential prejudice to the complainant's personal dignity and right of privacy;
(h) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and
(i) any other factor that the judge …. considers relevant.[42]

The Commission's provisional view is that this bespoke regime rooted in "enhanced relevance" thresholds, and consistent judicial oversight, will ensure that complainants' counselling records will only be accessed, disclosed, or admitted at trial when it is in the interests of justice to do so.

42 Criminal Code (Canada), s.278.92(2).

Conclusion

The Commission has provisionally proposed moving to a bespoke regime, specific to sexual offences, governing the production, disclosure, and admissibility of personal records held by third parties. A clear, unified regime governed by consistent judicial discretion will be better equipped to handle the delicate balance between the complainant's right to privacy and the defendant's right to a fair trial. The enhanced relevance thresholds would ensure that counselling records would only be used in the narrow set of circumstances where they contain evidence crucial to a fair trial.

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