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I hereby declare that I have read and understood the regulations governing the submission of LAWM03 MASTER OF LAWS (COURSEWORK) dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

INTRODUCTION

There can be little dispute that the levels of sexual violence directed at women and children all over the world is both extraordinary and unacceptably high. The South African government has prioritised resources¹ to support services to combat this violence, and is in the process of revising both the substantive and procedural law pertaining to sexual offences in the hope of providing more protective mechanisms to victims of sexual assault. Other jurisdictions² have enacted similar legislation, commonly referred to as ‘rape-shield’ laws, which are primarily aimed at countering the use of irrelevant evidence by the defence to discredit the complainant in sexual assault trials. This paper explores the disclosure of personal records of the complainant in sexual assault trials as one of the means of the defence in attempting to admit evidence to discredit the complainant.

This paper will investigate the position of disclosure of personal records in other jurisdictions and will discuss the lack of specific legislation on this issue in South Africa. It will also explore legal options available for complainants and record holders to resist the disclosure of this information as well as the rationale of the defence and the courts in admitting this information into evidence as relevant. The paper will attempt to reveal the flawed reasoning of the defence and the courts in justifying the use of personal records of complainants by investigating the myths and stereotypes about women, children and sexual assault that inform this reasoning, and will recommend how government must intervene to combat this phenomenon to ensure real protection of women and children in the criminal justice system.

¹ President Mbeki ‘State of the Nation Address’ February 2005.

² Canada, Namibia, the United States of America, England and Wales, Australia, and New Zealand.

The effects of a sexual assault on a person can be devastating. While the specific reactions of individuals vary, it is common to experience feelings of fear, loneliness, self-blame, and hopelessness. In addition, nightmares, being unable to sleep, not eating, and not wanting to leave the house, also occur as a result of a sexual assault. It is therefore not surprising that victims of sexual assault seek out support and advice from a wide range of services and individuals to assist them through the difficult period following the assault. These services may include rape crisis centres, social workers, psychologists and youth centres. For the purposes of this paper, these groups will be referred to as counsellors, or record holders, and the information that is disclosed by the victim to the counsellor as confidential communications.

In the 1970's the first rape crisis centres were opened to provide support for victims, and to change the public's perceptions about rape³. The type of support that these centres offered was informed by a feminist theory of empowerment, which encouraged the restoration of choice as a primary antidote for rape trauma. This fundamentally challenged the traditional ways of dealing with victims of trauma by giving victims an active role in their healing experience. Using this approach, the counsellor's primary role is to support the victim in making her own decisions, and reminding her of her options in relation to issues such as the criminal justice process⁴. The relationship that exists between victim and counsellor is based on trust and confidentiality as the subject matter of the communications is of a highly sensitive and intimate nature. In order for the counselling process to be effective, open and honest communication is required, and cannot potentially be disclosed to outside parties.

³ The first rape crisis centre in South Africa was established in Cape Town in 1976.

⁴ J Bruno 'Pitfalls for the Unwary: How Sexual Assault Counsellor-Victim Privileges May Fall Short of Their Intended Protections' (2002) 5 *University of Illinois Law Review* 1373 at 1378.

Effects of Disclosure of Personal Records on Victims, Counsellors and the Criminal Justice System

There are serious dangers associated with the disclosure and unrestricted use of information that is communicated by a sexual assault victim to her counsellor. The issues that face the victim are the infringement of privacy and confidentiality, threats to her process of recovery, fears of retribution from the accused, and facing the conflict of having to decide between counselling and reporting or proceeding with a criminal case against the accused⁵. By allowing the victim's records to be disclosed to the defence, feelings of revictimisation are experienced, reinforcing the experience of powerlessness and invasion felt at the time of the sexual assault⁶.

The issues facing counsellors whose records are being sought by the defence include ethical dilemmas - namely, the conflict between legal and ethical obligations - the adverse effect of disclosure on the counselling relationship, the reduction of reporting of sexual assault to sexual assault services, and the adequacy of methods of record keeping⁷. The effect of victims knowing that their confidential communications may be disclosed to the defence makes full recovery difficult, and in some cases, impossible. A potential breach of privacy and trust by the counsellor (forced to do so by law) means that victims may censor themselves during the counselling process, or not attend counselling at all. Alternatively, victims' willingness to report may erode, impairing the administration of justice⁸. Counsellors who are unwilling to disclose victims' records may face the consequence of imprisonment for not complying with a court order. With the competing interests of justice and the protection of victims in mind, counsellors have been known to 'disguise' records by keeping cryptic

⁵ A Cossins & R Pikinton 'Balancing the Scales: The Case for the Inadmissibility of Counselling Records in Sexual Assault Trial' (1996) 19(2) *University of New South Wales Law Journal* 222 at 224.

⁶ Ibid.

⁷ Ibid at 227.

⁸ Ibid at 230.

notes or dummy files that contain very limited information about the victim⁹, her personal history or the psychological effects of the sexual assault on the victim.

Many of the above effects necessarily impinge on the proper administration of justice. As will be discussed below, when canvassing the different jurisdictions and the effect of disclosure in those jurisdictions, the broad effects on the administration of justice include the reinforcement of a *de facto* presumption of guilt on complainants, the infringement of the public interest of protecting victims of crime, and the prevention of reporting of sexual assaults.

Relevance

The basic tenant of the argument in favour of admitting personal records of a sexual assault complainant is that the records may contain evidence that is relevant to the truth-finding process. Most jurisdictions contain the rule that irrelevant evidence is inadmissible, with the South African version contained in s 210 of the Criminal Procedure Act 51 of 1977. Some relevant evidence however may be deemed inadmissible as a result of a rule of evidence that excludes it¹⁰.

Broadly, evidence is then either excluded or inadmissible on the basis of being irrelevant, or being subject to another rule of evidence such as privilege. For the purposes of the paper, the concept of relevance will be discussed briefly and how it relates to disclosure of personal records. Some introductory statements on privilege will also be made. It is submitted that the issue of disclosure of records must be seen in the light of the above, as it is in terms of either irrelevance or privilege that foreign jurisdictions have attempted to regulate disclosure.

⁹ Ibid at 231.

¹⁰ *R v Schaube-Kuffler* 1969 2 SA 40 (RA) 50B in PJ Schwikkard and S Van der Merwe *Principles of Evidence* 2ed (2002) at 45.

Relevance has been defined in a number of different ways¹¹. Evidence that is 'logically probative or disprobative'¹² is considered to be relevant. It is founded on the notion of common sense¹³. Arguably, victims' personal records could be considered relevant based on the hypothetical premise that they may reveal evidence that the accused did not commit the sexual assault. This evidence may come in the form of a statement to that effect to a third party and may reveal that she consented, or that she has motive against the accused to lie, or that it was due to influence from the third party that the victim believes that she has been sexual assaulted (commonly referred to as 'false memory syndrome'). It is submitted that this reasoning can only be sustained by the myths and stereotypes surrounding sexual assault that women are prone to lying about sexual assault and make false claims to protect their reputations or out of malice against the accused¹⁴.

If relevance is based on common sense, it is questionable whose common sense is being used. It is also naïve to think that, in the decision making process, a court (judicial officer) does not decide what is relevant based upon what he or she believes to be common sense. In the context of disclosure, common sense is informed by her or his views of women and children. If those views include that women are unreliable, dishonest and morally unworthy, it would be a logical step to deem personal records of the complainant as relevant to determining the lack of credibility of the complainant. Any relevancy decision would be dependent on the court's experience, common sense and logic¹⁵. The conscious or unconscious beliefs that women are inherently less credible and more untrustworthy will lead to decisions ruling that this evidence is admissible. An

¹¹ Ibid at 46-47.

¹² *DPP v Kilbourne* 1973 AC 729 756 in Schwikkard et al op cit at 47.

¹³ See generally M MacCrimmon 'What is "Common" About Common Sense?: Cautionary Tales for Travellers Crossing Disciplinary Boundaries' (2001) 22 *Cardozo Law Review* 1433, PJ Schwikkard 'Silence and Common Sense' (2003) *Acta Juridica* 92, Cossins op cit at 245.

¹⁴ Ibid at 246.

¹⁵ Ibid.

excellent example of these beliefs is found in the Canadian case of *R v Oslin*¹⁶ where Cory J of the Canadian Supreme Court stated:

[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 [counselling notes], 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 a sexual assault or with regard to her conduct which might have led the appellant to believe that she was consenting to sexual advances*¹⁷.

This judge reveals the influence of the myth that women are prone to make false allegations of sexual assault in his assessment of the relevance of the counselling notes of the complainant. It is submitted by some writers¹⁸, and supported by this writer, that to admit evidence of this nature is to distort the sexual assault trial into an enquiry into the moral worth of the complainant.

Privilege

Privilege will be discussed at various stages of this paper, and in detail in the South African section. Broadly, privilege is a legal rule that allows for the exclusion of otherwise relevant, or possibly relevant, evidence. In order to justify this practice, the public interest that is protected by the privilege must outweigh the public interest in having the evidence admitted¹⁹. The question in relation to the production of personal records is whether the public interest in protecting the confidentiality of the counsellor-victim relationship is sufficient to outweigh the public's interest in the accused's right to adduce all available evidence²⁰.

¹⁶ (1994) 109 DLR (4th) 478.

¹⁷ *Ibid* at 522, own emphasis added.

¹⁸ *Ibid*.

¹⁹ Schwikkard et al op cit at 115.

²⁰ Cossins op cit at 249.

As will be discussed in detail in this paper, the practice of requesting disclosure of confidential communications by the defence in sexual assault trials in South Africa is not common, and if it does occur, the prosecution generally does not oppose the request. However, this practice is common in other jurisdictions, and has necessitated legislative intervention to regulate this access. Regulation of access is achieved in essentially two ways: deeming that the evidence is irrelevant and therefore inadmissible, unless the accused can show how and why the evidence is relevant; or secondly, by creating a protection of privilege for the evidence, again with the limitation that the evidence may be adduced by the accused in certain circumstances where he can show relevance.

No jurisdiction in the world has legislated for an absolute exclusion of information that is communicated by victims of a sexual assault to a third party.

CANADA

In 1991 the case of *R v Stinchcombe*²¹ an obligation was placed on Crown Attorneys to disclose “all information in its possession or control”²² unless it is privileged or irrelevant. As stated by Sopinka J in this case “I am confident that disputes over disclosure will arise infrequently when it is made clear that counsel for the Crown is under a general duty to disclose *all* relevant information”²³. It is important to distinguish this ‘type’ of disclosure from applications for third party records. The *Stinchcombe* disclosure rule involved actual witness statements in the possession of the Crown. In most cases, records relating to information about the complainant (other than her statement to the police about the sexual offence incident) would not be in the possession or control of the Crown (or the

²¹ *R v Stinchcombe* [1991] 3 S.C.R. 326.

²² K Busby ‘Discriminatory Uses of Personal Records in Sexual Violence Cases’ (1997) 9 *Canadian Journal of Women and the Law* 148 at 154.

²³ *Stinchcombe* at 340-341.

police). This gave rise to the situation where the defence were not content with the 'fruits of applications for Crown disclosure'²⁴, and sought records relating to the complainant in the hands of third parties.

The history of disclosure of records in Canada is one that is long, complex and painful, and not without its defeats and victories. This section will trace this history, detailing the findings of the Canadian Supreme Court in *R v O'Connor*²⁵, *R v Mills*²⁶, and more recent decisions, the response of the Canadian legislature, and comments and analysis from feminist academics and practitioners involved in and observing these developments. It is important to firstly explore the context of disclosure of records, that is, why and how the seeking of these records by the defence came about.

As recorded by numerous Canadian authors²⁷ violence against women and children occurs at an alarming rate in Canadian society. This violence remains a reflection and a reproduction of inequality in this society. Koshan²⁸ states that while women in Canada have long sought the protection of the law in response to sexual violence, the criminal justice system revictimises victims of this violence by placing little value on the place of the victim in a system that is characterized by discriminatory practices, attitudes and laws. In an attempt to challenge and limit this discrimination, the Canadian legislature engaged in a rape law reform process that limited the mechanisms available to defence counsel for making the case a trial of the complainant's credibility²⁹. It is largely the tactic of the defence in sexual offences trials the world over to attack the credibility of the complainant, which, linked with the myths surrounding sexual offences, often lead to the acquittal of the accused.

²⁴ J Koshan 'Disclosure and Production in Sexual Violence Cases: Situating *Stinchcombe*' (2002) 40(3) *Alberta Law Review* 655 at 658.

²⁵ [1995] 4 S.C.R. 411.

²⁶ [1999] 3 S.C.R. 668.

²⁷ Busby (1997) op cit, Koshan op cit, K Kelly "'You must be crazy if you think you were raped": Reflections on the Use of Complainants' Personal and Therapy Records in Sexual Assault Trials" 9 *Canadian Journal of Women and the Law* (1997) 178.

²⁸ Op cit at 657.

²⁹ Kelly op cit at 180.

In 1983 the doctrine of the recent complaint was repealed. This doctrine, which is also operative in South Africa, presumes that if a victim does not complain at the first reasonable opportunity there is a likelihood that she had not been sexually assaulted. In other words, a negative inference may be drawn by the court if this 'immediate' report is not made. This presumption is traditionally based upon the work of John Wigmore³⁰, who believed that women and children have a proclivity to lie about sexual assault and that this must be guarded against³¹. The effect of repealing this rule meant that people who had not reported the sexual assault 'immediately' could come forward more easily, especially adult victims of childhood sexual abuse.

The second reform was the prohibition of the collaboration rule in 1983. Although it was repealed in 1976, the use of this caution was not prohibited until 1983, which until then had cautioned juries that it was unwise to convict solely on the testimony of the complainant³².

The third change involved restrictions on the defence of the use of the previous sexual history of the complainant³³. The purpose of this paper is not to discuss the issues of previous sexual history, suffice to say that the limitation of leading evidence of this nature and the cross-examination of the complainant on her history of sexual conduct severely limited a popular defence strategy which sought to define the complainant as not 'rapeable' because of that history³⁴.

It is in the above context that the issue of use of personal records will be examined. As Kelly³⁵ explains, defence strategies are not only shaped by law. Rape trials to a large extent are about the character or credibility of the

³⁰ Wigmore *Evidence in Trials at Common Law* (1940).

³¹ Kelly op cit at 180.

³² Ibid.

³³ Ibid at 181.

³⁴ Ibid.

³⁵ Ibid.

complainant, and not necessarily about the conduct of the accused. The defence would not be able to make use of strategies aimed at discrediting the complainant based on certain beliefs about women and children (and those to whom they turn for assistance and support) if the 'system' itself did not hold those very beliefs. The 'system' is comprised of members of a society who impose and exercise those beliefs in the course of sexual assault investigations, prosecutions and judicial decision making. For example, the strategy of constructing a woman as not 'rapeable' because she is a prostitute is only effective if the judicial officer holds the belief that prostitutes are always sexually available³⁶. Other examples include that reports of the sexual assault made some time after the incident are more likely to be fabricated, and that therapists produce false memories of child sexual abuse for adult complainants as women are mentally vulnerable to this type of influence³⁷. Law does indeed play an essential role in the protection of vulnerable groups, but the power of the social context in which it is operating cannot be underestimated. Unless attitudes and belief systems about sexual assault change fundamentally, laws will continue to provide little protection.

It is in this context (that of the limitations placed upon the defence to introduce myth based evidence into trials) that a new defence tactic flourished (particularly in Ontario and British Columbia) - the defence seeking access to complainants' personal records in sexual offence matters³⁸. Another influencing factor for this tactic was the increase in interest by the public and the judiciary in 'false memory syndrome'³⁹, which will be discussed in some detail below. In the cases of *R v O'Connor* and *A.B. v L.L.A.*⁴⁰ the majority of the Canadian Supreme Court endorsed permitting the defence access to complainants' personal records. As Kelly insightfully notes, the use of personal records marks a change of defence strategy, continuing the widespread belief in patriarchal myths about sexual assault. These records are used to discredit complainants' accounts of the

³⁶ Ibid.

³⁷ Ibid.

³⁸ Busby (1997) op cit at 148.

³⁹ Ibid.

⁴⁰ [1996], 44 C.R.(4) 91 (S.C.C.).

assault by reintroducing myths and the corroboration requirement under the guise of introducing material relevant to the complainant's ability to testify⁴¹.

This paper will now discuss these judgments, the legislative response to these cases contained in Bill C-46⁴², and the constitutional challenge to this Bill decided on in *R v Mills*⁴³. It is important to discuss the Canadian developments in detail from a South African perspective, as there is currently no law or law reform proposals governing this particular phenomenon. Given the similarity of the human rights framework of these two countries, an understanding of the Canadian process may give some insight and prediction as to how our courts, and in particular the Constitutional Court, may ultimately rule on this issue, and how Parliament may chose to intervene and pass regulating legislation.

The types of records sought by the defence were not limited to counselling, therapy, and psychiatric records. They also included records from abortion and birth control clinics, child welfare agencies, adoption agencies, residential and public schools, drug and alcohol abuse rehabilitation centres, doctors, employers, the military, psychiatric hospitals, records of previous charges laid by the complainant unrelated to the current charge, previous charges against the complainant, criminal records, personal diaries, Young Offender records, records from victim/witness assistance programmes, criminal injuries compensation boards, prison and youth detention centres, social welfare agencies, and immigration offices. In most cases the accused and victim knew each other, therefore the accused not only knew that the record existed but also knew that it contained sensitive information about the complainant⁴⁴.

In some cases, such as *O'Connor*, the accused was responsible for creating the record. Busby's research has shown that although personal records could be

⁴¹ Kelly op cit at 179.

⁴² Statutes of Canada 1997 An Act to amend the Criminal Code (production of records in sexual offence proceedings) Assented to 25th April, 1997.

⁴³ Op cit.

⁴⁴ Busby (1997) op cit at 150-151.

sought in any criminal case, records are sought mainly in sexual offences cases⁴⁵. This was a phenomenon recognized by the minority in both *O'Connor* and *A.B.*⁴⁶. Research by Kelly⁴⁷ also clearly indicated that not only were applications for records almost the exclusive domain of sexual assault trials, but that the extent of the records sought and used was startling. Her research corroborates that of Busby in relation to the types of records sought, from medical records including information on medication prescribed to the complainant following the assault, to files from Child Protective Services, files of social workers, and personal letters of the complainant. She observed that all women have some kind of record, be they medical records or records of her seeking assistance from a rape crisis centre or victim assistance programme following the assault. Her research showed that where no records exist, the defence may 'generate' records by requesting that the complainant be assessed by a psychologist and/or gynaecologist selected by the defence. A particularly vulnerable group were those adult victims of childhood abuse who attended counselling as adults. The intention behind the obtaining of the records was to seek evidence that would question the 'believability' of the complainant generally. For instance evidence of 'false memory syndrome' whereby information about the assault is created by the counsellor or therapist or other investigations such as past criminal behaviour, a history of victim being unreliable, lying, operating 'outside of the system' or not being an 'upstanding' member of society. The main reason for the defence seeking personal records of the complainant was to attack her credibility, motive and character⁴⁸.

O'Connor and A.B.

Prior to *O'Connor* the lower courts were inconsistent with cases where records were sought by the defence. The issue finally came before the Supreme Court in

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ Kelly op cit at 183.

⁴⁸ Busby (1997) op cit at 151.

O'Connor where the accused had sought the records of the complainants including medical, counselling, school and employment records⁴⁹. At the outset, it is of concern that the majority did not mention or comment on the relative inherent power discrepancies between the accused and the complainants: the complainants were Aboriginal women in the employee of the accused, a white man⁵⁰. There were several interveners⁵¹ who made submissions to the Supreme Court, as well as a coalition comprised of the Aboriginal Women's Council, DAWN Canada, the Canadian Association of Sexual Assault Centres, and LEAF⁵². The argument forwarded by the coalition stated that personal records were irrelevant, or very rarely relevant, and that the arguments supporting relevancy were based on myths and stereotypes about women, children and sexual assault, including the 'original myth' that 'women are prone to lie about rape and to fabricate rape charges that place innocent men at risk'⁵³. The coalition went on to argue that the effect of disclosure would deter women from reporting sexual assaults to the police, and would have a disproportionate effect on particular groups who are vulnerable to sexual assault and having records made about them: Aboriginal women, those who are poor, disabled, and racialised⁵⁴. The coalition stated:

[U]ntil the devaluation of women and children, their word, and their integrity are addressed instead of reinforced by law, this Court should hold that disclosure of complainants' personal records is so likely to reinstate sexism in the administration of criminal law, to deter reporting, to distort the fact finding process and to violate victims' integrity that affirmation of complainants' constitutional rights, no less than the integrity of the justice system, requires that no personal records be disclosed in any sexual offence proceeding⁵⁵.

⁴⁹ *Koshan* op cit at 658.

⁵⁰ *Busby* (1997) op cit at 152.

⁵¹ Included the Canadian Mental Health Association, and the Attorneys General of Ontario and Canada.

⁵² *Koshan* op cit at 659.

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ *O'Connor* *ibid* at para. 65.

The Supreme Court heard the case of *A.B.* at the same time as *O'Connor*, a case that involved an allegation of sexual assault of a six year old that had taken place some ten years prior to the matter being reported. The accused was a family friend, who wanted access to the counselling records of the complainant⁵⁶.

A two-step procedure was developed by the Supreme Court to dispose of applications for third party records. First, the defence has to satisfy the judge that the third party records were 'likely relevant' or had a 'reasonable possibility of being logically probative to an issue at trial or the competence of a witness to testify'. If this was achieved, the records were to be produced to the judge. The second part of the application procedure required the judge to review the records and evaluate several factors to determine whether the evidentiary value of the records outweighed their negative effects, in which case the records were to be produced to the accused. The factors to be evaluated included the extent to which the accused needed the records to make a full answer and defence, the probative value of the records, the reasonable expectation of privacy that the complainant may have in relation to the records, whether the request for production and the actual production was premised upon discriminatory beliefs, and the potential prejudice that the production of the record may have on the dignity, privacy and security of the person of the complainant⁵⁷.

In both cases, none of the records that were sought by the defence formed part of the Crown's case, and were not relied on by the state to prove its case. The majority however commented on the situation where records may be in the control of the Crown by holding that *Stinchcombe* had placed an obligation on the Crown to disclose all relevant information 'in its possession or control'⁵⁸. The majority held that records that were held by governmental or quasi-governmental agencies fell into the Crown's 'possession or control', even if the Crown was not aware of their existence. A duty was placed on the Crown to learn about the

⁵⁶ Busby (1997) op cit at 153.

⁵⁷ Koshan op cit at 660.

⁵⁸ Op cit at 167.

existence of any of these records and disclose them to the defence. This would include records from counselling centres, such as some rape crisis centres, that receive state funding⁵⁹. Factors, such as privacy interests of the complainant, would not be considered, as records in the possession of the Crown were assumed to be relevant and to have been subject to a waiver of confidentiality.

With regard to records not in the possession or control of the state, the majority held that ‘by way of illustration only, were of the view that there are a number of ways in which information contained in third party records may be relevant, for example, in sexual assault cases’⁶⁰ and disagreed with the minority position that records would only be relevant to the defence in rare cases⁶¹. The majority then gave examples of situations where records would meet the test of ‘likely relevant’ – where the records concerned the credibility of the complainant, an account of the alleged sexual assault, or the use of therapy or counselling which may have influenced the memory of the complainant⁶². The effect of this ruling is that counselling records that may touch on the assault or any other abuse must be disclosed to the judge⁶³.

The minority on the other hand, disagreed with the majority, holding that disclosure should not be ordered based on assertions of credibility generally, recent complaint, prior inconsistent statements, character, sexual abuse by other people, or simply having seen a counsellor⁶⁴. The minority, although in agreement with the two-stage procedure that should be followed to determine disclosure, disagreed on the factors that should be considered, recognising that the equality rights of both the complainant and the accused must play a central role⁶⁵.

⁵⁹ Busby (1997) *op cit* at 155.

⁶⁰ *O'Connor ibid* at 176.

⁶¹ *Ibid* at 177.

⁶² *Ibid* at 177.

⁶³ Busby (1997) *ibid* at 157.

⁶⁴ *O'Connor ibid* at 217.

⁶⁵ *Ibid*.

Traditionally, complainants in sexual offences trials have no *locus standi* as they are considered third parties, or witnesses for the prosecution, with no legal interest in the outcome of the trial. While this paper does not allow for any further discussion on this issue generally, it is important to note that the case of *A.B.* established an important principle that complainants and other parties that hold records that have been requested by the defence to disclose records have standing to make submissions, be heard, and appeal the outcome of such applications⁶⁶.

Although the Canadian legislature responded to these cases by passing Bill C-46 which addressed a number of the concerns raised by academics and practitioners working with sexual offences, it is opportune at this juncture to discuss some of these concerns as they are of relevance and importance to the current situation in South Africa. It is also submitted that although Bill C-26 does go along way in addressing these concerns, the legislation does not effectively counter them all, making the comments of the authors discussed below still relevant, and of particular importance for South African legal reform process should Parliament chose to legislate on this issue, as is recommended by this writer.

Following the decisions of *O'Connor* and *A.B.* two authors in particular wrote extensively on the effects of the majority judgement, Karen Busby and Katherine Kelly. Karen Busby had been part of the coalition, and represented LEAF in the hearings before the Supreme Court. The authors investigated and analysed the judgements and their effects from different perspectives, reaching the same conclusion, that these cases 'are disastrous for women and children who have been sexually assaulted'⁶⁷.

⁶⁶ *A.B. op cit* at paras 24-28.

⁶⁷ Busby (1997) *op cit* at 176.

Busby first analysed the majority's examples of where records would be considered 'likely relevant'. According to the majority 'if there is a reasonably close connection between the creation of the records and the date of the alleged commission of the offence', or where 'they may contain information concerning the unfolding of events underlying the criminal complaint'⁶⁸, records may be relevant. The rationale behind this is that there may be an inconsistency between what is contained in the notes of the counsellor (based on what the complainant has told the counsellor) and the statement made to the police, or testimony in court. Busby severely criticises this rationale, reasoning that the fundamental purpose of counselling is for support and to deal with the trauma experienced by most victims of sexual assault. Notes taken by a counsellor are likely to be incomplete and inaccurate (as the complainant may not give the details of the assault) and would not have been adopted or ratified by the complainant⁶⁹. The intention of the notes is not to keep an accurate account of the assault. In addition, the notes may contain concerns of the complainant that are typical of victims of sexual assault, such as self blame, which are a result of the complainant's internalisation of rape mythology or a desire to create a predictable world where she believes that rape can be avoided or controlled⁷⁰. Notes may also reflect discriminatory beliefs about women and rape held by the record keeper, for example, that a lack of resistance amounts to consent, or that a disabled woman ought to be happy with whatever sexual attention they get⁷¹. This may result in records that do not in any way accurately reflect the situation of the victim, contradictions or inconsistencies that she will be cross-examined about at trial, which may in turn, unfairly, result in an acquittal.

It is submitted that the above ruling of the majority is fundamentally flawed in a number of ways. It is not the norm in a therapeutic relationship for the counsellor to require the victim to recount the sexual assault in any detail. The content of

⁶⁸ *O'Connor ibid* at 176.

⁶⁹ Busby (1997) *ibid* at 158.

⁷⁰ *Ibid* and writer's own experience of having worked with rape victims in a professional capacity as a state prosecutor for the National Prosecuting Authority.

⁷¹ Busby (1997) *ibid* at 160.

the communication is largely dictated by the victim, who chooses what to tell, and when to tell it. It is not the purpose of the therapeutic process to necessarily focus on the details of the assault, but rather to develop coping or survival mechanisms to be able to deal with the consequences of being so intimately violated. The potential result of this situation is that records kept by a counsellor, in relation to the details of the actual assault, may be sketchy, inaccurate and without any real detail. It must also be noted that it is certainly not the intent of the counsellor to keep a detailed account of the incident (nor is the counsellor necessarily trained and skilled to do so). It is also interesting to note that should the counsellor's records corroborate the version of the victim, the state would be prevented from leading this evidence according to the rules of evidence⁷².

In relation to the majority's decision that records must be disclosed if they contain information that bears on the complainant's credibility, including testimonial factors such as the quality of the complainant's perception of the events of the assault, and their memory since⁷³, the minority had held that the defence should have to show some basis that there is likely to be information that would relate to the complainant's credibility on a particular issue at trial⁷⁴. The effect of the majority position is that complainants that have histories of mental illness, and have taken medication for said illness, have their credibility challenged on the basis that the medication could affect memory. For those complainants with histories of drug abuse, or criminal records, this could be construed as having disrespect for the law, and having a history of discreditable conduct. Women who have been systematically disadvantaged, for example those who have been subject to child welfare systems as children, have become child prostitutes, or have been institutionalised – all events which are disproportionately documented - may have these records used to discredit them as being people who lie and have a flagrant disregard for law and society⁷⁵.

⁷² Busby op cit at 159.

⁷³ O'Connor *ibid* at 173.

⁷⁴ *Ibid* at 217.

⁷⁵ Busby (1997) *ibid* at 162.

As a result of the majority's decision, evidence of prior sexual abuse was used extensively by the defence to attack the credibility of the complainant. In a case⁷⁶ subsequent to *O'Connor* the defence sought this evidence to demonstrate that the complainant came from a dysfunctional background and had a tendency to lie⁷⁷. The evidence contained 'expert' opinion from a paediatrician who stated

'...such persons are a significant risk for establishing lifestyles based on disordered sexual perception, including prostitution. Such persons demonstrate a significant incidence of false reporting or sexual abuse and/or false identification of an individual as having sexually abused them'⁷⁸.

Evidence of such a nature could be effective in convincing the court that the complainant therefore lacks the ability to discern truth from fabrication or fantasy, and acquit the accused.

With regard to the majority's position as to when records would meet the test of 'likely relevant' where therapy or counselling may have influenced the memory of the complainant, the judgement reflects the scepticism concerning the reliability of recovered memories of sexual abuse, and buys into the belief that rape counsellors, influenced by stereotypical feminist doctrine (that all men are rapists) are ideologically committed to forcing their clients into believing that they were abused⁷⁹.

Katherine Kelly's research focussed on the use of personal records in a social and legal context that is still subject to gender-based myths about sexual assault. As noted above, Kelly is of the opinion that the social context is vital to understanding how and why the defence can and does, with success, request personal records of the complainant, and how the courts have accepted and

⁷⁶ *R v Darby* New Westminster Res. No. 35588 (B.C.P.C).

⁷⁷ Busby (1997) *ibid* at 163.

⁷⁸ *Ibid*.

⁷⁹ Busby (1997) *ibid* at 164.

endorsed this practice, finding relevant the most private and sensitive aspects of victims lives in order to discredit them. In this process of understanding, she refers to ‘mundane reason and patriarchal discourses’⁸⁰, which will now be discussed.

In its most simple form, the reason why records are used is because they work⁸¹. Records provide a known mechanism for assessing the competing accounts from the complainant and the accused. This is done within a context of patriarchal discourses about sexual assault, gender and mental illness⁸². The respondents in her research study (who included Crown prosecutors, police, judges and defence counsel) indicated that the records are investigated by both the Crown and the defence to establish whether the case involves a *real* sexual assault. Other issues looked for include therapeutic techniques that may have contaminated the account of the assault, evidence of motives to lie, and evidence of medical or mental problems (use of drugs or history of delusions)⁸³. The research revealed that evidence of ‘mental instability’ was viewed by most respondents as evidence that the complainant had no credibility. Mental instability may be as a result of being an incest survivor, the use of drugs, or having a criminal record of being a prostitute. Any therapeutic treatment that a complainant may have received for mental illness automatically resulted in her credibility being reduced⁸⁴.

Kelly also found that records were used to intimidate and embarrass complainants. Use of personal information, under the guise of relevance, had the effect of women withdrawing charges and refusing to continue with trials⁸⁵. Kelly sees the above manifestations as resonating with the very myths that the legal changes in Canada were meant to counter. She draws on the work of

⁸⁰ Kelly op cit at 186.

⁸¹ Ibid.

⁸² Ibid.

⁸³ Ibid at 187.

⁸⁴ Ibid at 188.

⁸⁵ Ibid.

Smith⁸⁶ who writes that in the social world events are not facts – events are transformed into facts through a process of categorising events. This becomes complex when there are competing accounts of the same event, and a decision must be made as to which account must be chosen. This is the process that a court must enter into to come to a finding in matters of sexual assault. Kelly goes further, illustrating that one must factor in the discursive context in which the accounts are embedded, realising that it is the dominant discourse that ultimately shapes the decision of the judicial officer, which is touted as the fact finding (found) process⁸⁷. These dominant discourses provide informational filters, for example, which type of people are more likely to lie, or are mentally unstable, or have perception problems. A number of factors determine the dominant discourse, such as the status or the gender of the person giving or assessing the account, for example, doctors and lawyers. Any account which coincides with the dominant discourse will be more easily accepted, and those in opposition to the dominant discourse more easily disregarded. This is played out in many sexual assault trials, where feminist experts have attempted to challenge existing social practices and understandings of sexual assault, only to be dismissed as irrelevant or bad⁸⁸.

Personal records are thus used to establish that the complainant is mentally ill, is mentally unstable, is lying, based on inconsistent information between counsellor notes and statements to the police, and/or to look for motivations of anger and revenge⁸⁹.

Finally, the research showed that the impact of use of personal records is extensive and devastating: fewer women will report the sexual assault; women are constructed as not being credible and thus not rapeable; fewer women will seek support and assistance from counselling groups for fear of their personal

⁸⁶ Smith 'K is Mentally Ill: The Anatomy of a Factual Account' *Text, Facts, and Femininity: Exploring the Relations of Ruling* (1990) Chapter 2 as referred to in Kelly op cit at 189.

⁸⁷ Kelly op cit at 190.

⁸⁸ Ibid at 191.

⁸⁹ Ibid at 192.

records being made public; and the continuation of focus on women in sexual assault trials as opposed to the actions of the accused⁹⁰.

Busby's later research included a close analysis of a number of cases heard subsequent to *O'Connor*, finding a pattern in the defence applications for personal records⁹¹. In most applications it was common for the defence to simply reiterate the grounds set out in *O'Connor*: asserting that the record may contain information about the events comprising the complaint of the assault; reveal the use of therapy which may have influenced the memory of the complainant; or that the record has information that may bear on the credibility of the complainant⁹². After the case of *Carosella*⁹³ the defence included that the records may contain a previous statement that may be inconsistent, may assist in cross-examination, or may disclose other witnesses. In the case of *J.C.B.*⁹⁴ the judge went to great lengths to develop the reasons why records may be disclosed, listing amongst others: the mental condition of the complainant on the night of the assault; her expressed hatred toward men following the assault; her anger, whether it existed before the incident, whether it affected or affects her reliability or testimonial ability; whether something similar had happened before; whether she has had sexual relations with a man; whether she had consumed alcohol in the night of the assault. The judge then goes on to say that these inquiries are not driven by myths and stereotypes regarding females – they are asked to determine if the complainant's recollection could have been affected as a result of treatment or a form of treatment⁹⁵. He held that, on the statements of the complainant herself, it was clear that she had endured experiences that could well affect her credibility or competence⁹⁶.

⁹⁰ *Ibid* at 193.

⁹¹ K Busby 'Third Party Records Cases Since *R v O'Connor*' (2001) 27(3) *Manitoba Law Journal* 356 at 375.

⁹² *Ibid*.

⁹³ [1997] S.C.J. No. 12.

⁹⁴ [1997] P.I.E.J. No.26 (S.C.).

⁹⁵ Busby (2001) *op cit* at 376.

⁹⁶ *Ibid*.

The above review indicates the effect of the majority ruling in *O'Connor* and *A.B.* The discussion will now move to examining the legislation passed post *O'Connor* by the Canadian legislature, its constitutional challenge, and its effects, if any, in protecting complainants' personal records from disclosure to the defence and at trial.

Bill C-46⁹⁷

Bill C-46 (hereinafter referred to as 'the Bill') came into operation on 12 May 1997. It contains underlying principles reflecting the concern of Parliament of the incidence of sexual violence against women and children in Canadian society. Parliament recognised the need to balance both the Charter rights of the accused and victims, and the need to reconcile those rights to the greatest extent possible, while also making clear Parliament's desire to encourage the reporting of sexual violence and the counselling of victims.

Broadly, the legislation differs from the majority decision in *O'Connor* in three respects. Firstly, the two-step procedure from *O'Connor* applies to all records relating to the complainant and not only records that fall outside of the control and possession of the Crown⁹⁸. Secondly, the list of factors that the court must take into consideration before ordering production was expanded to include society's interest in reporting sexual offences, encouraging counselling, and the effect on the integrity of the trial process⁹⁹. These factors must be weighed by the court at the first stage of the process to decide whether to review the records at all. The provisions¹⁰⁰ list examples of what would be considered insufficient to establish 'likely relevance', including mere assertions by the accused that: the record/s exist; the record relates to counselling or treatment; the record may relate to the credibility of the complainant, or the reliability of her testimony

⁹⁷ Op cit.

⁹⁸ Section 278.2(2).

⁹⁹ Section 278.5(2).

¹⁰⁰ Section 278.3(4).

merely because she received counselling; or the record relates to the complainant's sexual activity with another person, or her sexual reputation. And finally, before the judge can order the production of records, the criterion 'necessary interests of justice' must be satisfied.

In summary, the key differences are that the initial test to be met by the accused is more stringent: the production of the document to the judge must not only be "likely relevant" but must also be "necessary in the interests of justice"¹⁰¹. The accused must offer a realistic explanation why the records are sought, and the legislation is clear that mere speculation as to why the record may be relevant is not sufficient. The accused must indicate in what way the record is directly relevant to an issue at trial and must know of the existence of the particular record. It is clear that is not sufficient that situations such as alleging that the record may reveal that the complainant had in the past alleged that she had been sexually assaulted by another party would result in the record being made available. These grounds however do not exclude the possibility of the judge reviewing the material to make a final decision on the relevance of the material. The judge may still then order that the material be made available to the defence.

Women's groups, such as those included in the coalition that participated in the *O'Connor* case, would have preferred that the legislation prohibited the production of records at any time, but did support the Bill as a positive improvement on the Supreme Court case¹⁰².

*R v Mills*¹⁰³

The accused in this case sought the psychiatric, Child and Adolescent Association, and counselling records of a thirteen year old complainant on the grounds that the records might show that the complainant had fabricated the

¹⁰¹ Section 278.5(1).

¹⁰² Koshan op cit at 665.

¹⁰³ [1999] 3 S.C.R. 668.

allegations, that she had motive for doing so, and that she was highly suggestible to the influences of her counsellors. The Bill had just come into effect, resulting in defence counsel challenging the legislation on constitutional grounds.

On appeal to the Supreme Court, the defence identified five problems with the Bill, rendering it unconstitutional. This included the definition of records; the extension of the regime to records in the possession and control of the Crown; the 'insufficient grounds' section; the altered test for the production to the judge at the first stage of the application; and the factors to be considered at the second stage of the application¹⁰⁴. The argument of the complainant was that the provisions should be upheld as they ensured an appropriate balancing of the constitutional rights of the complainant and the accused¹⁰⁵. A similar coalition to that in *O'Connor* submitted an equality based argument in support of the Bill, arguing that the production of records is a practice of inequality. Record production, it was argued, had an adverse impact on women and children, particularly those whose lives are heavily documented. In addition, the overwhelming majority of applications occurred in sexual offences matters. Of serious concern were the new myths that were developing with regard to the influence of counsellors and therapists had over their clients. The coalition requested the Court to set clear guidelines on the interpretation of the Bill so as to ensure an outcome honouring the equality provisions of the Charter¹⁰⁶.

The Supreme Court upheld the constitutionality of the Bill, outlining the rights at issue in the production context: the accused rights to liberty and to make a full answer and defence, and the complainant's rights to privacy and to be free from unreasonable search and seizure, to security of the person, and to equality, including an understanding of how myths and stereotypes may underlie an application for disclosure¹⁰⁷. The Court recognised that privacy was essential to

¹⁰⁴ Koshan op cit at 666.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid at 667.

¹⁰⁷ Ibid at 668.

maintaining relationships of trust and that the counselling or therapeutic relationship was based on trust and confidentiality.

There was however some concerns raised about the judgement by commentators such as Koshan¹⁰⁸. The first relates to waiver. The Court held that waiver is for the complainant to make and not the record holder. *Mills* did not recognise the possibility that a record holder may have an interest in protecting the record even where the complainant waives her right¹⁰⁹. Although *Mills* recognised the right of the record holder procedurally, in that the right to be heard (*locus standi*) was reiterated, the substantial rights of the record holder were not adequately addressed. Although the position of this writer is that the right of disclosure should reside with the complainant (as will be argued later), the above scenario, where a record holder may have an interest in non-disclosure, must be factored in when any court considers whether waiver has indeed occurred. Considerations, such as the administration of justice, may play a role in deciding that the records should not be disclosed to the defence, in addition to interrogating why the complainant waived her right to protect disclosure.

The second concern with *Mills* is the Court's interpretation of the 'insufficient grounds' section¹¹⁰. There are two possible interpretations of the sections. The first being that an assertion along the lines of the grounds listed is impermissible *per se* and will never be sufficient to support an application from the defence to disclose records. The second possible interpretation is that an assertion is insufficient unless supported by evidence¹¹¹. This would allow the defence to produce evidence, for example, that the record contains information about the

¹⁰⁸ Op cit.

¹⁰⁹ Koshan op cit at 672.

¹¹⁰ Section 278.3(4).

¹¹¹ Busby (2001) op cit at 380.

incident, and therefore the record must be disclosed. The case law post *Mills* is evenly split on the interpretation of the section¹¹².

The main concern with *Mills* is the broad discretion left to trial judges to interpret the disclosure provisions. Ultimately, the trial judge needs to consider the facts and make a finding that she or he considers to be 'necessary in the interests of justice'. The Court specifically noted and confirmed the discretionary nature of both stages of the production application¹¹³.

It is important to briefly examine the effect of the Bill and *Mills* on production applications in Canada. It is unfortunate to note that a variety of records continue to be sought by the defence, with counselling records the most widely sought. Applications are for multiple kinds of records, showing that 'fishing expeditions' have continued, and the motivation for production by the defence is similar in rationale to the time period before the Bill and *Mills*¹¹⁴. The grounds mirror those presented by the defence prior to the Bill: questioning credibility and reliability of the complainant. Examples include alleging the presence of prior inconsistent statements, motive to fabricate, false memory syndrome, history of lying, and behavioural concerns¹¹⁵. Busby's research in 2001 indicated that judges ordered disclosure in two-thirds of applications by the defence prior to the Bill. In post-Bill applications, half of the disclosure applications resulted in the record being disclosed to the accused. Other research has suggested that there is little in the judgements that order disclosure to indicate the reasoning of the judge as the courts often simply parrot the language of the legislation¹¹⁶. Another concern in post-Bill cases is that although both complainants and record holders have the right to be represented in court during disclosure applications, this occurs in very few cases¹¹⁷. Representation of this nature is essential as it is not possible for

¹¹² Ibid.

¹¹³ Koshan op cit at 673.

¹¹⁴ Ibid at 681.

¹¹⁵ Ibid and Busby (2001) op cit at 382.

¹¹⁶ Koshan op cit at 682.

¹¹⁷ Ibid.

Crown counsel to represent the equality and privacy interests of complainants and record holders.

With regard to missing or destroyed evidence, the Supreme Court in *Carosella*¹¹⁸ ruled that the destruction of records was fatal to the prosecution of the case as they '*might have been able to shed light on the unfolding of events*' or '*might have contained information bearing on the complainant's credibility*'¹¹⁹. The minority however noted that this decision was contrary to previous Supreme Court decisions where the accused had to show prejudice flowing from the lost evidence. On a slightly positive note, later judgements confirmed that *Carosella* was restricted to situations where the destruction the records was deliberate and implicated the state¹²⁰.

While the legal developments in Canada have aspects of real protection for complainants of sexual assault matters, it is submitted that the discretion vested in judicial officers allows for the continued application of myths and stereotypes about women and children under the guise of the 'interests of justice and fair trial'. These are important lessons for South Africa to consider, as the need for legislative intervention and judicial interpretation becomes all the more of a reality.

UNITED STATES OF AMERICA

This section will explore the legal developments in the United States of America (hereinafter the 'US') as relates to disclosure of personal records of sexual assault complainants. Both the federal position as well as the position in a few states will be discussed, including the rationale behind the legislative provisions and judicial interpretations thereof.

¹¹⁸ [1997] 1 S.C.R. 80.

¹¹⁹ *Ibid* at para 44.

¹²⁰ Koshan *op cit* at 687.

Federal

The US generally has recognised that following a sexual assault, complainants are faced with questions and decisions while in a state of trauma. The importance of counsellors in this situation, to act as support persons, and to give advice and information to the victim, has also been recognised. As a result of this recognition, most states have enacted evidentiary privileges to protect information that is exchanged between the victim and her counsellor¹²¹. The approach used by the Americans differs somewhat to that of the Canadians in that the issue of protection of communications between a sexual assault victim and her counsellor is couched in the legal right of privilege. The debates however are basically the same, focussing on a balancing (or not, in the case of an absolute privilege) of the rights of the accused and complainant, and the issue of relevance.

As with most jurisdictions, the US has a fundamental evidentiary rule guiding the introduction of evidence: 'the public has a right to every man's (sic) evidence'¹²². This principle is reflected in Federal Rule of Evidence 402 that declares 'all relevant evidence is admissible'. There are a number of Rules that exclude certain evidence on the grounds that it is irrelevant, unreliable or prejudicial evidence that would detrimentally affect the truth-seeking process. Evidentiary privilege, by contrast, excludes evidence that may well be relevant, reliable and not prejudicial. These privileges elevate other important societal interests and policies above truth seeking, such as privacy interests. In view of the fact that these rules exclude possible relevant evidence, the courts disfavour them¹²³.

¹²¹ MB Bressman & FR Laguarda 'Jaffee v Redmond: Towards Recognition of a Federal Counselor-Battered Woman Privilege' (1997) 30 *Creighton Law Review* 319 at 325; S Arnowitz 'Following the Psychotherapist-Patient Privilege Down the Bumpy Road Paved by *Jaffee v Redmond*' (1998) *Annual Survey of American Law* 307 at 313; Bruno op cit at 1384.

¹²² Bressman et al op cit at 319.

¹²³ Ibid at 320.

However, there are generally accepted privileges, such as spousal and attorney-client.

Federal Rule 501 gave the federal courts guidance in answering the question as to whether new privileges should be recognised by instructing them to follow ‘the principles of common law...in the light of reason and experience’. In addition to this instruction, most courts in considering this question typically consider four criteria formulated by Wigmore: (1) the communication must originate in a confidence that they will not be disclosed; (2) this element of *confidentiality must be essential* to the full and satisfactory maintenance of the relationship between the parties; (3) the *relation* must be one which in the opinion of the community ought to be sedulously *fostered*; and (4) the *injury* that would inure to the relationship by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation¹²⁴. These criteria are important to note as they have been used in many jurisdictions to consider whether communications are privileged, including South Africa, discussed below.

In *Jaffee v Redmond*¹²⁵ the United States Supreme Court held that ‘confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure under Rule 501 of the Federal Rules of Evidence’¹²⁶. This judgment recognised the possibility of the extension of the law of privilege, adopting an evolutionary approach to privilege. Briefly, the Court in coming to its conclusion, examined whether such a privilege ‘promotes sufficiently important interests to outweigh the need for probative evidence’¹²⁷. It examined both the private and public interests that the privilege serves, holding that, in relation to the private interest, the privilege is ‘rooted in the imperative need for confidence and trust’ and that the relationship is dependent on ‘an atmosphere of confidence and trust in which the

¹²⁴ Ibid.

¹²⁵ 518 U.S. 1 (1996).

¹²⁶ Bressman op cit at 321.

¹²⁷ Ibid at 327.

patient discloses sensitive and personal information to her counsellor¹²⁸. In turning to the public interest, the court held that the privilege ‘facilitates the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem’ and that ‘the mental health of our citizenry...is a public good of transcendent importance’¹²⁹. The Court recognised that a denial of the privilege would ‘chill’ conversations between patients and therapists¹³⁰. The Court therefore held that ‘confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure under Rule 501...’¹³¹. The majority also recognised that the privilege be extended to social workers as they essentially provided the same services to patients, and that social workers, as opposed to psychotherapist, are used more often as they are more affordable.

What is most important is that *Jaffee* recognised the privilege as absolute, which is broader than the privilege recognised in most states. The Court rejected the balancing test holding that ‘making a promise of confidentiality contingent on a trial judge’s later evaluation of the relative importance of the patient’s interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege’¹³². Insightfully, the Court held that uncertainty as to whether the privilege would be upheld amounted to little better than no privilege at all¹³³.

The basic criticism of Rule 501 and *Jaffee* is that little guidance is given in extending the privilege in the states. This is mainly due to *Jaffee* creating a vague and ill-defined privilege¹³⁴. There is uncertainty as to what the Court meant by ‘a *licensed* psychotherapist’ (i.e. what groups/professionals are considered psychotherapist) and ‘course of psychotherapy’, the issue of an

¹²⁸ Ibid.

¹²⁹ Ibid.

¹³⁰ Arnowitz op cit at 312

¹³¹ Bressman op cit at 328.

¹³² Arnowitz op cit at 314.

¹³³ Ibid.

¹³⁴ Ibid at 319.

absolute or restricted privilege, whether the privilege covers written records only, whether the balancing test should be used, and finally the issue of waiver of the privilege. This paper does not allow for an extensive analysis of these criticisms, suffice to say that most of these uncertainties have not been clarified, and must be considered closely when making recommendations for the South African situation.

One issue, that of absolute or restricted privilege, however will be canvassed. As stated above, *Jaffee* recognised that relying on an uncertain judge's evaluation would negate the effectiveness of the privilege¹³⁵. However, because the Court left the lower courts to interpret the contours of the privilege, it has become vulnerable to limitation. Despite *Jaffee*'s explicit rejection of the balancing test, cases, for example *Lowe*, a Massachusetts case, held that the constitutional due process rights (similar to the South African rights of the accused to a fair trial) had to be weighed against the privileges of another. This position was justified by the *Lowe* court as it reasoned that the *Jaffee* court had intended a balancing test as *Jaffee* had considered the important public and private interests underlying the privilege outweighed the 'modest' evidentiary benefit that would likely result without the privilege¹³⁶.

Massachusetts

Section 20J of the Massachusetts General Laws, chapter 233, provides an absolute privilege regarding confidential communications between a sexual assault complainant and a sexual assault counsellor¹³⁷, stating that 'a sexual assault counsellor shall not disclose such confidential communications, without the prior written consent of the victim'. The statute makes provision for an

¹³⁵ Ibid at 340.

¹³⁶ Ibid.

¹³⁷ C Burke 'Just How Many Times Does She Have to Say No? The Evolution of a Defendant's Right to Access His Victim's Rape Counselling Records in Massachusetts' (1999) 25 *Criminal and Civil Confinement* 147 at 153.

absolute privilege governing rape counselling records and provides that 'such confidential communications shall not be subject to discovery and shall not be inadmissible in any criminal or civil proceedings without the prior written consent of the victim'. This provision has been challenged by the defence on the grounds that it offends against the accused's constitutional rights to confront witnesses testifying against him¹³⁸, and his right to a fair trial (due process right)¹³⁹. The position of victims was that the privilege was absolute and never warranted disclosure absent of the consent of the victim¹⁴⁰. The courts of Massachusetts have therefore heard a number of cases where it has attempted to balance these competing interests.

In 1986, the Supreme Judicial Court of Massachusetts decided the first case regarding access to privilege records in *Commonwealth v Two Juveniles*¹⁴¹. The court held that in certain circumstances the absolute privilege in section 20J must yield at trial to the constitutional right of a criminal defendant to have access to privilege records¹⁴², with the proviso that the defendant has to show that there was a *legitimate* need for access to the communications. Although the court established this test, it did not define exactly how this standard was to be met. Significantly, the court held that once the legitimate need test had been met the records would be reviewed *in camera* by the judge to look for any evidence that may indicate that the witness had bias or motive to lie, in which case the records would be given to the accused¹⁴³.

The United States Supreme Court endorsed the *in camera* review in *Pennsylvania v Ritchie*¹⁴⁴. This was upheld in consideration of the accused's right to a fair trial (due process), holding that the accused was entitled to

¹³⁸ United States Constitution Amendment VI.

¹³⁹ United States Constitution Amendment XIV s 1.

¹⁴⁰ Burke op cit at 154.

¹⁴¹ 491 N.E.2d 234 (Massachusetts 1986).

¹⁴² Burke op cit at 155.

¹⁴³ Ibid.

¹⁴⁴ 480 US 39 (1987).

'material' evidence¹⁴⁵. The court further held that the right to a fair trial was fully protected by an *in camera* review of the records¹⁴⁶.

In 1991, the case of *Commonwealth v Stockhammer*¹⁴⁷ the court rejected the *in camera* review and allowed the defence direct access to the records. The basis for this decision is that the court found that there was a potential for confusion of roles, as the judge is not in the best position to determine what evidence is necessary to the defence. The court interestingly went to great lengths to say that it recognised the need to assist sexual assault victims, but then contradicted itself by undermining that importance by granting direct access of records to the defence¹⁴⁸. The effect of this decision was devastating, with many victims refusing to access counselling services following a sexual assault, or not wanting to report the matter to the police for fear of their records being disclosed at a later stage in court¹⁴⁹.

*Commonwealth v Bishop*¹⁵⁰ marked a return to the *in camera* review procedure. It held that the defence had to show as a threshold that the 'records privileged by the statute are likely to contain relevant evidence'¹⁵¹. If this test could be met, the records would be reviewed by the judge *in camera*. The court distinguished itself from *Stockhammer* as it would only review information that it had determined 'likely relevant'¹⁵². The court recognised the legislative intent of the statute to protect victims and indicates a return to the balancing of the rights of victims and the accused. The test advanced by the court requires the accused to advance some factual basis for how the record is likely to be relevant¹⁵³. This case did not go far enough, effectively holding that the privilege was qualified and not absolute, as envisaged by the legislature.

¹⁴⁵ Ibid at 54.

¹⁴⁶ Ibid at 60.

¹⁴⁷ 570 N.E2d 992 (Massachusetts 1991).

¹⁴⁸ Burke op cit at 162.

¹⁴⁹ Ibid.

¹⁵⁰ 617 N.E2d 990 (Massachusetts 1993).

¹⁵¹ Ibid at 995.

¹⁵² Ibid at 997.

¹⁵³ Burke op cit at 168.

In 1996, the Supreme Judicial Court upheld a stricter standard to apply to situations where the defence wanted access to the victim's confidential communications. In *Commonwealth v Fuller*¹⁵⁴ the court held that the defence must show a 'good faith, specific and reasonable basis for believing that the records will contain exculpatory evidence which is relevant and material to the issue of his guilt' in order for the judge to order an *in camera* inspection of the records¹⁵⁵. The court held that the 'likely to be relevant' test is too broad and would result in all records being reviewed *in camera*. It went on to recognise that victims needed assurance that their communications would remain privileged in order for victims to access the services of counselling groups and to make full disclosure to the counsellor and benefit from the process. It understood the need for an absolute privilege which not only would allow victims to access these counselling services, but would also support the reporting of rape. But, in certain circumstances, the defence must have access to these records 'so as not to undermine confidence in the outcome of trial'¹⁵⁶. Arguments for the victims and record holders in this case included the point that records should not be disclosed under any circumstances, and if they were, only where the accused could show that the victim had intentionally undertaken to distort the truth-finding process¹⁵⁷.

While *Fuller* went some way to improving the rights of victims in the disclosure of records arena in developing new strict discovery standards, it still falls short of the absolute privilege advocated by many feminist lawyers¹⁵⁸. This case did however formulate the procedural and substantial aspects of the application procedure to be followed in sexual assault trials: the defendant must file a written notice for production explaining his reasons for doing so; the motion must allege

¹⁵⁴ 667 N.E.2d 847 (Massachusetts 1996).

¹⁵⁵ *Ibid* at 847 – 848.

¹⁵⁶ *Ibid* at 853.

¹⁵⁷ *Burke op cit* at 173.

¹⁵⁸ W Murphy 'Gender Bias in the Criminal Justice System' (1997) 20 *Harvard Women's Law Journal* 14.

that thorough research proves that the material is not available elsewhere; the custodian of the records must be given notice and be given an opportunity to be heard; and the defence must show good faith, specific and reasonable basis for believing that the records will contain exculpatory evidence which is relevant and material to the issue of the defendant's guilt¹⁵⁹. Most significantly, the court precisely defined 'materiality' as that which is 'not only likely to meet criteria of admissibility' but which would also 'tend to create a reasonable doubt that does not otherwise exist'¹⁶⁰. Some commentators believe that *Fuller* is a fair decision and in no way compromises the rights of the accused. These commentators also endorsed the strict standard for rape crisis counselling records, supporting the position of the court that its decision was based on the special nature of the counsellor-victim privilege because 'the very circumstances of the communications indicate they are likely to be relevant to an issue in the case'¹⁶¹.

As a general comment on the approach taken by both the federal and state legislatures and courts in relation to the disclosure of personal records of sexual assault victims, it is submitted that it is with circumspection that the reliance on privilege is depended upon to protect the information contained in these records. The very basis of the concept of privilege is that evidence exists that is *prima facie* relevant, evidence that the courts would normally have presented to them to make a just finding making use of the truth-finding process. This privileged evidence becomes inadmissible based upon a legally recognised relationship, the communications emanating from which are deemed by the law and informed by policy considerations to be protected from judicial and public (through evidence in court) scrutiny. It is submitted that a different approach is more appropriate in this context to protect these communications – this information / evidence is not admissible as it is irrelevant *at all times*. To argue that it is relevant is to depend on the myths and stereotypes that inform the prejudiced positions held by most people on women and children and sexual assault. It is

¹⁵⁹ Burke op cit at 176.

¹⁶⁰ *Fuller* op cit at 855.

¹⁶¹ Murphy op cit at 21.

these very people, like the court in *Fuller* who believe that communications between a victim and her counsellor are, by default, relevant, and a special 'favour' must be done, an exception made, for victims to prevent disclosure of 'relevant' evidence.

ENGLAND AND WALES

It has become standard practice in England and Wales for the defence to seek access to documentation of the complainant in sexual assault trials as part of a strategy to undermine the credibility of the complainant¹⁶². Documentation that is not ordinarily in the possession of the prosecution is not subject to the normal disclosure rules, necessitating the defence to make use of section 2 of the Criminal Procedure (Attendance of Witnesses) Act 1965, as amended by section 66 of the Criminal Procedure and Investigations Act 1996 (CPIA). This section provides that where the court is satisfied that a person is likely to be able to give material evidence or produce any document or thing likely to be material evidence, and the person will not voluntarily attend court as a witness or produce the document or thing, the court may issue a summons. Section 2 then provides procedural rules, stipulating the need for an application setting out the reasons why the applicant believes that the evidence is material evidence and why the holder will not voluntarily disclose it. The applicant must give notice to the evidence holder, and inform her/him of her/his right to representations in writing and at the hearing. The hearing is held in private¹⁶³.

There are weaknesses with section 2. There is no requirement for the complainant to be notified about the application, and no provision for her to be legally represented. The prosecution is under no obligation to protect her privacy

¹⁶² J Temkin 'Digging the Dirt: Disclosure of Records in Sexual Assault Cases' (2002) 61(1) *Cambridge Law Journal* 126 at 126.

¹⁶³ *Ibid* at 128.

and may not even oppose the application. The holder of the evidence is left to defend the rights of the complainant, which they may or may not do¹⁶⁴.

The critical issue to be decided upon by the court in considering an application for disclosure will be the determination of what is 'material' to the case. In *R v Derby Magistrates Court, ex parte B*¹⁶⁵ the meaning of the word 'material' was discussed in relation to a provision in another piece of legislation¹⁶⁶. This court held that the section could not be used to obtain discovery of documents for use in cross-examination¹⁶⁷. A rigorous distinction was drawn between documents in the possession of the prosecution and those in the possession of a third party. A stringent duty to disclose attaches to the former, while no duty exists in regard to the latter. For evidence to be material evidence it must not only be relevant to the issues raised in the criminal proceedings but also admissible as such in evidence. Evidence requested merely for the purpose of cross-examination is not admissible, and therefore not material¹⁶⁸. The principles of *Derby's* case have been held to apply to section 2. In *R v Azmy*¹⁶⁹ the defence sought to access the counselling records of the complainant, found that the request for disclosure was to equip the accused with material for cross-examination. In determining whether the records were admissible, the court held that the records had to contain material which 'might positively advance the defence case'¹⁷⁰. Temkin¹⁷¹ finds this decision hardly surprising as she contends that rape counselling records will rarely constitute 'material evidence'. She explains this position by maintaining that the context of record making dictates that the counsellor is only marginally concerned with the details of the actual sexual assault, but is rather more concerned with dealing with the victim's state of mind, and her feelings such as distress and fear. The record may also contain

¹⁶⁴ Ibid at 128.

¹⁶⁵ [1996] 1 Cr. App.R 385.

¹⁶⁶ Section 97 of the Magistrates Courts Act 1980.

¹⁶⁷ *Derby* supra at 393.

¹⁶⁸ Temkin op cit at 129.

¹⁶⁹ (1996) 7 Med.L.R. 415.

¹⁷⁰ Ibid at 420.

¹⁷¹ Op cit at 129.

perceptions of the counsellor¹⁷². Therefore the counselling records cannot be regarded as a reliable record of the sexual assault incident. Secondly, the record is not ratified by the victim herself and may therefore be inaccurate. And thirdly, the victim may express self-blame, which is normal for sexual assault victims. These thoughts and feelings relate to the inner world of the victim, and not to the external reality of what has occurred¹⁷³. Temkin is thus of the opinion that parties who contest disclosure will have a good chance of success. It is submitted that this would, once again, be largely dependent on the judicial officer in a particular case, and her or his interpretation of relevance.

A second option available to a third party wanting to resist disclosing the records of a sexual assault victim is to claim public interest immunity on the grounds that a confidential relationship exists and that disclosure would be in breach of some ethical or social value involving public interest¹⁷⁴. The Code of Practice of the CPIA refers to 'material given in confidence' as sensitive material which it may be considered not to be in the public interest to disclose¹⁷⁵. The court in *Azmy* held that public interest immunity applied to counselling records, and in *R v Higgins*¹⁷⁶, the court held that the local authority holding files of a victim had a positive duty to apply for public interest immunity¹⁷⁷. The court must perform a balancing act between the public interest in the absence of disclosure with the interests of justice. The interests of justice in this context are taken to mean the fairness to the accused¹⁷⁸. In *Higgins* the court ordered the disclosure of some of the records on the grounds that they had a bearing on the reliability of the complainant. In the opinion of the court, the documents suggested that the complainant (a child) had a lively imagination, liked to make up stories and that fact and fiction were closely linked in his mind¹⁷⁹.

¹⁷² Ibid.

¹⁷³ Ibid at 130.

¹⁷⁴ *D v NSPCC* [1997] All E.R. 589 at 605, 618.

¹⁷⁵ Code of Practice para 6.12.

¹⁷⁶ (1996) 1 F.L.R. 137.

¹⁷⁷ Temkin op cit at 131.

¹⁷⁸ Ibid.

¹⁷⁹ Ibid.

While the public interest immunity strategy is an option in attempting to protect records, it is submitted that, as with most options other than a blanket or absolute protection of records of sexual assault victims, it is limited in practice, as the same myths and stereotypes continue to inform what is to be produced, ostensibly to protect the rights of the accused and the fair trial objective.

NEW ZEALAND

Recently, defence counsel have been following an overseas trend of seeking access to counselling records of sexual assault victims. The purpose of this is to expose potential exculpatory evidence in favour of the accused¹⁸⁰. New Zealand is currently in a very similar position as South Africa, in that there are no specific legal provisions that regulate requests for access and recognise the competing interests of the complainant and the accused. The current methods of choice in New Zealand will be discussed as well as judicial interpretation thereof, with accompanying criticism, as it is the opinion of New Zealand writers that these methods and judicial rulings are unclear, unwieldy and not reflective of the important interests at stake¹⁸¹.

*R v Dobson*¹⁸² set out the only procedure available for accessing personal material of the complainant in the hands of third parties. The ‘*Dobson* procedure’ makes use of a subpoena or witness summons to compel a third party to bring the material to court or to give evidence at the trial¹⁸³. Once the subpoena is received, the witness may choose to either disclose the material or resist production. With regard to resisting production, there is nothing in New Zealand

¹⁸⁰ A Longdill ‘Regulating Access to the Therapeutic Records of Sexual Assault Complainants: An Analysis and Critique of the Current New Zealand Procedure’ (2000-2003) *Auckland University Law Review* 764 at 764.

¹⁸¹ *Ibid* at 765.

¹⁸² (8 June 1995) unreported, CA 25/95.

¹⁸³ Longdill *op cit* at 766.

law that the witness may rely on, such as a specific privilege protecting medical or counselling records as a general class of documents¹⁸⁴. The only avenue potentially open for a witness to resist production and/or testifying is contained in section 35 of the Evidence Amendment Act (No 2) 1980. This section confers a judicial discretion to excuse any witness from producing a document on the grounds that to do so would constitute a breach of a confidence, having regard to the special relationship that exists between the witness and her or his confidant¹⁸⁵. The judicial officer is required to weigh the public interest in having the evidence disclosed to court, and the public interest in the preservation in keeping confidences and the encouragement of free communications in the 'special relationship'¹⁸⁶. The judge must consider three things: the likely significance of the evidence in resolving issues to be decided at trial; the nature of the confidence and the special relationship between the witness and the confidant; and the effect of disclosure on the confidant or any other person¹⁸⁷. The courts in *R v Secord*¹⁸⁸ defined a 'special relationship' as a 'relationship of a kind that would encourage the imparting of confidences and that has a public interest in it'¹⁸⁹. Once this aspect of the test is satisfied the judge must exercise discretion in balancing the competing rights of a fair trial and the confidentiality issues. The judge will generally inspect the records before making a ruling¹⁹⁰.

The above procedure is considered unsatisfactory for the defence, the complainant, the record holder, and for the justice system itself¹⁹¹. The argument from the defence can be summarised as follows: in most sexual assault trials the central issue is that of consent, and the court must decide between two versions, that of the accused and the complainant. Most often than not, there are no eyewitnesses. It is for these reasons that the defence argue that therapeutic or

¹⁸⁴ Ibid.

¹⁸⁵ Ibid at 768.

¹⁸⁶ Ibid.

¹⁸⁷ Ibid at 768-769.

¹⁸⁸ [1992] 3 NZLR 570.

¹⁸⁹ Ibid at 574.

¹⁹⁰ Longdill op cit at 769.

¹⁹¹ Ibid at 775.

counselling records of the complainant take on importance as potential sources of exculpatory information¹⁹². These records may contain admissions of conduct that may have led the accused to believe that the complainant was consenting to the sexual conduct of the accused, or admissions by the complainant that the sexual assault was invented. They go on to argue that they cannot determine whether records may be useful or not without having access to them to inspect them, and it is for this reason that disclosure should be ordered¹⁹³. While the courts are cognisant of the accused's rights, they are also concerned with the rights of the complainant to privacy and are unwilling to condone 'fishing expeditions'. This has resulted in the courts placing an evidentiary burden on the accused to demonstrate why the records are needed and what use they will serve¹⁹⁴. This burden of proof has been legislated in other countries such as Canada¹⁹⁵.

The defence however in New Zealand have argued that a burden of proof that is set too high may breach the fundamental rights of the accused to a fair trial¹⁹⁶ by denying access to all evidence necessary to present his defence. This may in turn lead to a wrongful conviction¹⁹⁷. A Canadian case most quoted by the defence is *R v Ross*¹⁹⁸ to illustrate this point where the complainant allegedly had reacted violently to the accused when they had begun to engage in consensual sex. The accused had held her by the wrists to contain her, resulting in bruising. The complainant thereafter laid charges of attempted rape and indecent assault against the accused. The complainant's psychiatrist read about the trial, and approached the prosecutor with information about the complainant's childhood which may have caused her to misconstrue the lawful conduct of the accused as attempted rape. This case therefore demonstrates that information contained in

¹⁹² Ibid.

¹⁹³ Ibid at 776.

¹⁹⁴ Ibid.

¹⁹⁵ Supra.

¹⁹⁶ *R v Griffin* (2001) 3 NZLR 577.

¹⁹⁷ Longdill op cit at 777.

¹⁹⁸ (1993) NSJ No. 171 (NSCA).

private records may prove to be exculpatory and prevent wrongful convictions¹⁹⁹. In addition to this, the defence argue that the procedural requirements placed on the defence to obtain records are burdensome. The information can only be potentially obtained at the time of trial and not pre-trial, not allowing them sufficient time to review and possibly alter defence strategy, and thus impeding the ability to prepare adequately for cross-examination²⁰⁰.

Apart from the many consequences that complainants suffer as result of a sexual assault that have been discussed at length in this paper, there are specific experiences of the trial process that are particular such as humiliation, embarrassment, and re-victimisation. Several 'rape-shield' law have been passed in New Zealand, as in other jurisdictions, but the personal records procedure has no regard for the important societal concerns that fuelled the passage of the above pieces of legislation²⁰¹. It is the submission of New Zealand authors that the complainant has a privacy interest, an equality interest and a therapeutic recovery interest in protecting these records from disclosure, none of which are being recognised by the current framework²⁰².

The right to privacy in New Zealand is recognised in the section 21 of the Bill of Rights which provides that 'everyone has the right to be secure against unreasonable search and seizure, whether of the person, property, correspondence or otherwise'. In *Attorney –General v Otahuhu District Court*²⁰³ it was recognised that third party rights to privacy must be considered along with fair trial rights of the defendant's²⁰⁴. The court went on to say that the rights to a fair trial were not necessarily the only important rights to consider in the criminal process, and where third party records are being sought by the accused, a conflict of rights in term of the Bill of Rights is recognised. While section 35 of

¹⁹⁹ Ibid at 778.

²⁰⁰ Ibid.

²⁰¹ Ibid at 782.

²⁰² Ibid.

²⁰³ [2001] 3 NZLR 740.

²⁰⁴ Longdill op cit at 783.

the Evidence Amendment Act, discussed above, contemplates a consideration of privacy rights, the procedure in practice fails to protect the privacy rights of the complainant. This is demonstrated by the lack of a requirement to notify the complainant that the defence has served a subpoena on the holder of her personal records, and no legal obligation on the record holder to inform the complainant that the records have been subpoenaed²⁰⁵. Even once the records have been handed to the defence, there is no provision placing a duty on any party, including the court, to inform the complainant. Although section 35 requires that the court must consider the effect of disclosure on the confidant, no provision is made for the complainant to be present or represented at the proceedings. It remains in the discretion of the court as to whether to grant *locus standi* to the complainant, based on its inherent jurisdiction²⁰⁶. A further criticism of section 35, based on its wording, is that it is unclear whether some counselling relationships would fall within its protection²⁰⁷. Even if the counselling relationship were deemed a 'special relationship' it is unclear whether all information arising out of the confidential sessions would be covered or only actual communications between the victim and counsellor. The counsellor's observations may not be covered and she may therefore be pressed to testify about this.

Possibly the most problematic aspect of section 35 is the fact that the privilege is vested in the record holder and not the complainant. This makes the complainant wholly dependent on the counsellor to raise the privilege. If the privilege is waived by the record holder, there is no recourse for the complainant to prevent the disclosure. This is of course contrary to the Canadian situation, as recognised in *Mills*, that the privacy rights of the complainant cannot be ignored simply because the records have been disclosed to the prosecution. This is legislated for in Bill C-46 in sections 278.5 and 278.7. As a final criticism of section 35, the procedure allows for the inspection of the records by the judge in

²⁰⁵ Ibid op cit at 784.

²⁰⁶ Ibid op cit at 785.

²⁰⁷ Ibid op cit at 786.

making a decision. This fails to recognise that the judge's inspection itself is a breach of privacy²⁰⁸.

Although the effects of disclosure on the complainant's recovery process and on the criminal justice system/administration of justice are discussed in detail elsewhere in this paper, it is however important to note that these effects are echoed in all jurisdictions that this writer researched. New Zealand is no exception, and had documented that as a result of disclosure, counsellors have commented that it is difficult to establish relationships of trust with sexual assault victims as their revelations about their feelings and thoughts following a sexual assault may be disclosed to the very person that has perpetrated the offence²⁰⁹. Record holders are also placed in the invidious position of having to choose between conflicting ethical obligations of confidentiality to their client and the legal obligations to submit to a subpoena. Consequences of not complying with a subpoena vary from jurisdiction to jurisdiction, but most involve the possibility of some form of incarceration. Consequences of this nature make it very difficult to expect counsellors to resist subpoenas to protect their clients. Other methods are being used the world over to protect information, but again this is far from ideal, and may result in counsellors being charged with defeating the ends justice. With regard to the consequences for the justice system, disclosure has resulted in fewer women reporting sexual assault in New Zealand, specifically identifying disclosure as the reason for refusing to contact law enforcement authorities²¹⁰. This leads to impairing the administration of justice by preventing the apprehension of offenders, resulting in more victimisation in the community²¹¹. Complainants that have reported to police may either withdraw charges once their records are subpoenaed, or may withdraw from the

²⁰⁸ Ibid op cit at 789.

²⁰⁹ Ibid op cit at 790.

²¹⁰ Ibid op cit at 792.

²¹¹ Ibid.

counselling process, or censor themselves, once warned by counsellors that records may be subpoenaed²¹².

Writers in New Zealand²¹³ have also questioned the relevance of personal records in the sexual assault trial, once again echoing the concerns of their colleagues in other jurisdictions. They question the use of records in assisting the court in its truth-finding process as records cannot be said to be reliable for the purposes for which they are ostensibly sought, as they may contain subjective observations of the counsellor, and have not been subsequently verified by the victim. If the main purpose of using records is to discredit complainants, showing them to be unreliable and morally unworthy, then the legislative intent behind other 'rape-shield' provisions is undermined. By allowing sexual assault trial proceedings to be diverted away from the determination of fact to discussions of credibility by relying on stereotypes and myths associated with sexual assault victims²¹⁴ the entire criminal justice system is thrown into disrepute.

AUSTRALIA – NEW SOUTH WALES

In December 1995 the co-ordinator of the Canberra Rape Crisis Centre Di Lucas refused to comply with a subpoena that required her to produce a counselling file in relation to a sexual assault complainant²¹⁵. She was sentenced by the judge to imprisonment in the Court's watch house, and was released four hours later on condition that she provide to the court the subpoenaed file in a locked briefcase to which she alone knew the combination. The question of access to the file by the defence was decided at a later hearing²¹⁶. This case received a great deal of publicity and public debate about the lack of legal provisions available at that

²¹² Ibid.

²¹³ Longdill op cit.

²¹⁴ Ibid at 800.

²¹⁵ Cossins op cit at 222.

²¹⁶ Ibid at 223.

time for confidential communications between a counsellor and a sexual assault victim. This debate culminated in the introduction of a sexual assault communications privilege (SACP) in the state of New South Wales. This privilege prevents disclosure of communications made for the purpose of counselling a complainant of a sexual assault in circumstances prescribed by the provisions of the legislation. As a result of the tension between attempts by Parliament to implement a strict, broad and effective privilege, and the restrictive interpretations of the legislation by the New South Wales Court of Criminal Appeal, the legislation has been amended a number of times. This section of the paper will discuss the various provisions of the SACP, judicial interpretation and amendments to the provisions.

As illustrated by the example above, prior to the passing of the SACP provisions, there were no specific privileges that existed between sexual assault victims and counsellors. The regular provisions of criminal procedure allowed for the defence to subpoena witnesses and records for trial purposes, leaving the record holder with little choice other than to produce the record and testify (or be imprisoned). In the 1970's and 1980's a number of 'rape-shield' laws and procedures were passed to reduce some of the trauma suffered by sexual assault victims at the hands of the criminal justice system²¹⁷. Concerns were raised when it became evident that defence lawyers were attempting the circumvent 'rape-shield' laws by accessing subpoenaed counsellor's notes in order to discredit victims by exposing details of their personal histories, for example, previous psychiatric treatment, drug and alcohol problems, terminations of pregnancies, having ex-nuptial children and rebellious childhood histories²¹⁸.

As with other jurisdictions where legislation has been passed specifically creating a sexual assault communications privilege, there is continued opposition in Australia to the legislation, especially from defence lawyers. The basis of their

²¹⁷ G Bartley 'Sexual Assault Communications Privilege Under Siege' (2000-2001) *NSW Bar Association Journal* 6 at 6.

²¹⁸ *Ibid* at 7.

objection is not dissimilar from their international colleagues, pleading for the rights of the accused to a fair trial, and the possibility of a miscarriage of justice by wrongful conviction. A common criticism of the privilege is that it prevents disclosure of a counselling note that would reveal that the complaint of the sexual assault was a 'recovered memory' which arose after counselling or hypnotherapy²¹⁹.

In justifying the passing of the legislation, the Hon. Jeff Shaw QC MLC, the then Attorney General of New South Wales, used the rationale that victims often seek counselling, and the relationship with a counsellor must be built on trust and confidentiality in order for it to be effective. Any possibility of that trust and confidentiality being broken will result in victims not accessing these vital services. That the perpetrator may have sight of these records only serves to further traumatise the victim. He was particularly persuaded by the arguments that were made in favour of a privilege that included that the primary purpose of counselling is therapeutic and not investigative and are not verified by the victim, thus making counselling notes unreliable. The consequences of not having a privilege were disastrous for victims and counsellors, leading to situations, amongst others, where victims would not report sexual assaults, and counsellors would either not take notes or refuse to hand over notes²²⁰.

The first challenge to the SACP came in *R v Young*²²¹. The court held that the privilege could only be invoked at the adduction of evidence stage and not at an earlier stage, when the documents are produced upon subpoena. The effect of this decision was that it negated the purposes of privilege²²², as the documents would have already been disclosed to the defence and the privacy of the complainant invaded. The privilege was in turn strengthened by an amendment

²¹⁹ Ibid.

²²⁰ Ibid op cit at 8.

²²¹ (1999) 46 NSWLR 681.

²²² Bartley op cit at 8.

to the legislation that expressly applied the privilege to the production of documents upon subpoena²²³.

The SACP provisions may be claimed to prevent production of a document recording a protected confidence or the adducing of evidence disclosing a protected confidence²²⁴. A 'protected confidence' is a 'counselling communication that is made by, or to or about a victim or alleged victim in a sexual assault offence'²²⁵. The definition of 'counselling communication' incorporates all communications by, to or about the alleged victim made in confidence in the course of counselling²²⁶. The court must enter into a balancing exercise. A document recording a protected confidence cannot be produced and evidence disclosing a protected confidence or the contents of a document recording a protected confidence cannot be adduced unless the court is satisfied that: the document or evidence has substantial probative value; other evidence of the protected confidence is not available; and the public interest in preserving the confidentiality of the protected confidences and protecting the principle protected confider from harm is substantially outweighed by the public interest in allowing inspection of the document (or admission of the tendered evidence)²²⁷. As part of the balancing exercise the court must take into account the likelihood, and the nature or extent of the harm that would be caused by the victim if the document is produced or the evidence adduced²²⁸. 'Harm' is defined by the legislation in the interpretation of section 295, as including actual physical bodily harm, financial loss, stress or shock, damage to reputation or emotional or psychological harm (such as shame, humiliation and fear). Section 299 of the legislation provides for notice to be given by the defence (or any party requiring production) to each other party and the protected confider (the victim). Evidence is not to be adduced unless such notice is given. Consent to disclose documents

²²³ Ibid.

²²⁴ Section 296 of Criminal Procedure Act 1986 No. 209 Division 2 Sexual Assault Communications Privilege.

²²⁵ Section 296(1).

²²⁶ Section 296(4).

²²⁷ Section 298.

²²⁸ Section 298(2).

may be given, but is not effective unless it is given by the principle protected confider²²⁹.

The provisions of the legislation were challenged for a second time in *R v Norman Lee*²³⁰. The provisions that the court in *Lee* considered related to counselling. A 'counselling communication' meant a communication '...made in confidence...in the course of a relationship in which the counsellor is counselling, giving therapy to or treating the counselled person *for any emotional or psychological condition*²³¹...'²³². The court in *Lee* interpreted 'any emotional condition' as a 'condition which reveals or reflects *some defect or illness or disease or abnormality*' and a psychological condition as 'a state of health *which is poor or abnormal or diseased or otherwise defective from the emotional or psychological point of view...some defect or illness or disease or abnormality in the victim's mental states and processes*²³³'. The section therefore required, according to the court, that a recognisable psychiatric illness be established for which a diagnosis was necessary. The criticism of this interpretation was that most victims of sexual assault do not develop recognisable psychiatric illnesses but simply experience normal reactions such as humiliation, shame and fear. In order for the privilege to operate, the victim would have to be declared mentally ill, adding to her victimisation.

Further, the court held in relation to the term 'counselling' that it referred to '*...provision of expert advice and procedures by persons skilled, by training or experience, in the treatment of mental or emotional disease or trouble*²³⁴'. This narrow interpretation of counselling would exclude most lay counsellors at rape crisis centres. These interpretations had the effect of many victims discontinuing counselling, or not seeking counselling following a sexual assault.

²²⁹ Section 300.

²³⁰ (2000) NSW CCA 444.

²³¹ Own emphasis added.

²³² Section 148(4) of Part 7 of the Criminal Procedure Act (NSW).

²³³ *Bartley* op cit at 11.

²³⁴ *Ibid*.

The legislature responded to the judgment by once again changing the provisions. The provisions now reflect a wider definition of counsellor, as well as the 'type' of assistance that can be given to a victim, avoiding the necessity of the victim being diagnosed as mentally ill. Section 296(5) defines a person who is counselling as someone who has undertaken training or study or has experience that is relevant to the process of counselling persons who have suffered harm; and counselling occurs when the counsellor listens to and gives verbal or other support or encouragement to another person, or advises, gives therapy to or treats the other person, whether for a fee or reward.

The New South Wales legislation, although not creating an absolute privilege for sexual assault victims or declaring all evidence from third parties irrelevant and therefore inadmissible, does offer some real protection for victims. This writer was unable to obtain information as to the effectiveness of the changes to the legislation in preventing access to this information, or whether it has had any effect on deterring the defence in making disclosure applications.

INTERNATIONAL LAW

In Article 8 of the European Convention on Human Rights, the right to respect for private life is enshrined. The Article states that there should be no interference from a public authority in relation to the exercise of this right except where it is necessary²³⁵. Exceptions or limitations to rights must be narrowly interpreted, and any interference must be necessary in a democratic society. In assessing whether there is a pressing social need for interference, or that the means to impair the right or freedom is no more than is necessary to accomplish the legitimate objective, a proportionality test must be used²³⁶. First, the measures

²³⁵ Temkin op cit at 133.

²³⁶ Ibid.

employed must be fair and not arbitrary, designed to achieve the objective in question and rationally connected to that objective. Secondly, the limitation or interference should impair the right as little as possible. And thirdly, there must be proportionality between the effects of the limiting measure and the objective²³⁷. These guidelines, endorsed by the European Court of Human Rights²³⁸ suggest that, when applied to the disclosure of records or sexual assault victims, courts may not act irrationally or unfairly by relying on myths and stereotypes about sexual assault complainants²³⁹.

SOUTH AFRICA

At present there is no legal provision, either at common law or in statute, that provides any protection specifically for victims of sexual assault or those who offer victims any form of support, be it counselling, medical treatment or psychiatric care, from the accused accessing their personal records in trial proceedings. There is also no literature or case law on this particular point, although there is currently an interlocutory application before the High Court in the KwaZulu Provincial Division²⁴⁰, originating from a criminal case in the Pietermaritzburg Regional Court²⁴¹, which contains elements of disclosure of sexual assault victims' records to the accused. This case will be discussed in some detail below. Relevance, admissibility and inadmissibility of evidence have been discussed in detail above. With those discussions in mind, the following section will explore the various methods that may be used by the accused in accessing the personal records of a sexual assault victim for trial purposes. The options that may be available to the complainant, the record holder and the

²³⁷ Ibid.

²³⁸ *Z v Finland* (1998) 25 E.H.R.R. 371.

²³⁹ Temkin op cit at 134.

²⁴⁰ *Pillay and another v The Regional Court Magistrate, Pietermaritzburg and Others* Case No 8708/2004 (Unreported).

²⁴¹ *S v Alex Henry* Case No. RC860/03 (Unreported).

prosecution, to resist access will then be explored, interrogating the concepts of privilege, and the Constitutional²⁴² rights of privacy²⁴³ and equality²⁴⁴.

The Constitutional Court held in *Shabalala v The Attorney General of the Transvaal and Another*²⁴⁵ that the common law pertaining to the contents of a police docket, which amounted to a 'blanket docket privilege', was unconstitutional. The court held that in order to ensure that the rights of the accused to a fair trial as enshrined in the Constitution²⁴⁶ are upheld, the accused was entitled to access of the statements of witnesses. In certain circumstances access could be justifiably denied²⁴⁷, but the basic principle held that the accused has access to the police docket. The importance of this judgment in this context is that access was not authorized by the court to any information that is not in the docket, thereby excluding any duty on the prosecution to inform or disclose any information that may be held by third parties in relation to the complainant. It is however trite law that the prosecution is by law obliged to disclose any information to the accused and the court which would further the administration of justice, including the right to a fair trial, including exculpatory evidence for the accused.

The most common method of securing a witness to attend trial and/or produce a document at trial is to issue a subpoena in terms of section 179 of the Criminal Procedure Act 51 of 1977 (CPA). The person issued with a subpoena *duces tecum* must either have some degree of custody of the document or control before she or he can be compelled to produce it²⁴⁸.

²⁴² The Constitution of the Republic of South Africa, Act 108/1996.

²⁴³ *Ibid* section 14.

²⁴⁴ *Ibid* section 9.

²⁴⁵ 1996 (1) SA 725 (CC).

²⁴⁶ *Ibid* section 35(3).

²⁴⁷ *Shabalala* *supra* at par 55, read with par 40 at 751 E-H and 745 A-D.

²⁴⁸ *R v Mkwazi* 1956 (3) SA 406 (E) in E Du Toit et al *Commentary on the Criminal Procedure Act* (1987, as revised bi-annually) at 23-2.

Section 205 of the CPA also provides a mechanism for a court (a judge, regional court magistrate or magistrate) to secure the attendance of a witness at trial. However, the provisions only allow for the prosecution to make a request to the court for the witness' attendance, and not the defence. It is therefore submitted that unless the prosecution was desirous of obtaining the personal records of the complainant that were in the control of a third party, this would not be a provision that would be used in this context.

There are a number of ways that are available to a witness to avoid having to comply with a subpoena. A number of these are contained in the CPA, and will be discussed separately and analysed for effectiveness in the context of disclosure of personal records of sexual assault victims.

The first ground for not complying with a subpoena is privilege. Privilege exists when a person is not obliged to testify in court or produce documentation, even though the information she or he may have is relevant²⁴⁹. The witness must enter the witness box and then raise the privilege as the reason for not answering the questions or disclosing documents²⁵⁰. Because the effect of privilege is to deprive the court of relevant evidence, the courts are slow to extend the currently legally recognised privileges. This legal recognition of privilege of communications between two parties invariably involves two competing interests: one, society's interest in presenting and promoting certain relationships; and two, the interest in the administration of justice in placing all relevant information before the court²⁵¹.

Unlike some other countries that have recognised privileges that have extended beyond the traditional privileges, such as sexual assault victim/counsellor privilege in Australia and the US, South Africa has a very limited range of legally recognised privileges. Many professions, such as doctors and psychologists

²⁴⁹ Schwikkard et al op cit at 115.

²⁵⁰ Ibid.

²⁵¹ Ibid at 141.

have ethical duties to keep confidential any communications between them and their patients/clients, but this ethical duty is not recognised in law, and they may be subpoenaed and obligated to testify on the content of the communication. The only professional privilege recognised in South African law is the legal professional privilege. It is a common law rule that has been legislated and is contained in section 201 of the CPA. Communications between a client and her or his lawyer may not be disclosed without the client's consent²⁵². The rationale for this privilege is that it is a 'doctrine based upon the view that confidentiality is necessary for the proper functioning of the legal system...'²⁵³ and it encourages people to consult with lawyers and to tell them all the facts of the case, not only those that favour them, in order to ensure that the lawyer is able to assist them in the best possible way. Lawyer-client relations must be assured of that confidence for the legal system to be operative²⁵⁴. The Appellate division in *Safatsa* recognised, for the first time, that legal privilege is a fundamental right derived from the requirements of procedural justice and not merely an evidentiary rule²⁵⁵. It is not within the scope of this paper to criticise the rationale behind legal professional privilege, suffice to say that it may be upon this very rationale that it can be argued that a privilege of a similar nature should extend to communications between victims of sexual assault and counsellors. It is important to note that the legal professional privilege is recognised as a fundamental legal right, and not conditional upon the balancing of rights between the holder thereof and any other party. The privilege vests with the client and not the legal professional, meaning that only the client may waive the privilege²⁵⁶.

The South African courts have rejected the extension of the legal professional privilege to other professions on the basis that no considerations of public policy

²⁵² Ibid at 134.

²⁵³ In *S v Safatsa* 1988 1 SA 868 (A) 886 quoting Dawson J in *Baker v Campbell* 1983 49 ALR at 442-445 in Schwikkard et al op cit at 135.

²⁵⁴ Heydon & Ockledon *Evidence: Cases & Materials* 4ed (1996) 417 in Schwikkard et al op cit at 134.

²⁵⁵ Schwikkard et al op cit at 135.

²⁵⁶ Ibid at 140.

would entitle that extension²⁵⁷. Some writers have argued for the extension of the privilege to other groups such as the clergy²⁵⁸ and journalists²⁵⁹. In arguing for this extension, consideration must be given to another section in the CPA, section 189. This section entitles the court to sentence a witness to imprisonment who does not comply with a subpoena to produce documentation or testify, unless the witness has a just excuse for so refusing. A just excuse arises from the law of privilege, compellability of witnesses or the admissibility of evidence, and has been held to apply to situations beyond a lawful excuse²⁶⁰. In *Attorney-General, Transvaal v Kader*²⁶¹ it was held that a just excuse in terms of the CPA was not limited to a lawful excuse, but could also be invoked if it were humanly intolerable for the witness to testify²⁶². As Skeen points out, this recognition is not recognising a privilege properly so called, but the finding of a just excuse does afford the witness the same rights as those holding a legal professional privilege, and may therefore withhold evidence which may have otherwise been admissible²⁶³. It could be argued that it is 'humanly intolerable' for a counsellor to testify about her communications with a sexual assault victims and on those grounds satisfy the requirements of section 189. It is submitted however, that the courts will probably be reluctant to agree with this argument, as it was envisaged that this interpretation of 'just excuse' would involve situations where there was life at risk, or the questioning of a witness would result in serious, irreversible psychiatric damage. While *Cornelissen*²⁶⁴ held that journalists possess no legal privileges to refuse to give evidence as to the

²⁵⁷ *Smit v Van Niekerk* 1976 (4) SA 293 (A); *S v Cornelissen*; *Cornelissen v Zeelie* NO 1994 SACR 41 (W).

²⁵⁸ W Freedman 'A Privilege for Members of the Clergy: *Smit v Van Niekerk* Reconsidered' (1997) 10 SACJ 74.

²⁵⁹ JCW Van Rooyen 'The Disclosure of Journalists' Sources in South African Law' (1995) 11 SAJHR 132.

²⁶⁰ Freedman op cit at 76.

²⁶¹ 1991 (4) SA 727 (A) .

²⁶² Freedman op cit at 76 and PJ Schwikkard '*Attorney-General, Transvaal v Kader* Section 198 – What is Just Excuse?' (1992) 2 SACJ 203 at 205.

²⁶³ A Skeen 'What Amounts to a Just Excuse in Terms of Section 189(1) of the Criminal Procedure Act 1977' (1992) 109 SACJ 587 at 590.

²⁶⁴ 1994 SACR 41 (W).

sources of their information, it was recognised that the refusal may, depending on the circumstances, amount to a just excuse.

In a more recent case, the Constitutional Court considered the constitutionality of section 205 of the Criminal Procedure Act. While the constitutionality arguments of *Nel v Le Roux NO and others*²⁶⁵ do not concern the issues under discussion in this paper, a number of observations by the court are of assistance to this writer's argument in favour of protection for third party records on the grounds of just excuse. The court held that the provisions of section 205 incorporated section 189 of the Criminal Procedure Act, and the considerations of section 205 thus applied to section 189²⁶⁶. Referring to one of its previous decisions, *Bernstein and Others v Bester NO and Others*²⁶⁷, the court considered the meaning of and implications of section 418 of the Companies Act 61 of 1973 (as amended). This section requires a person to answer questions, failing which they shall be guilty of an offence. This consequence may be avoided should they have 'sufficient cause'²⁶⁸ not to answer. The court held that 'an examinee is not compelled to answer a question which would result in the unjustified infringement of any examinee's Chapter 3 rights'^{269,270}. The court went further to say that '...if the answer to any question put at such an examination would infringe or threaten to infringe any of the examinee's Chapter 3 rights, this would constitute "sufficient cause"...unless such a right of the examinee has been limited in a way which passes section 33(1) scrutiny'²⁷¹. Drawing on this finding, the court in *Nel* found that there was 'no material difference between the expression "a just excuse" in section 189(1) of the Criminal Procedure Act and "sufficient cause" in section 418(5)(iii)(aa) of the Companies Act'²⁷². The impact of this finding is that if an answer to any question put to a witness would infringe or threaten to infringe any

²⁶⁵ 1996 (1) SACR 572 (CC).

²⁶⁶ Supra at para [3].

²⁶⁷ 1996 (2) SA 751 (CC).

²⁶⁸ Section 418(5)(iii)(aa).

²⁶⁹ Supra at para [60].

²⁷⁰ This judgment was in terms of the Constitution of the Republic of South Africa Act 200 of 1993.

²⁷¹ Supra at par [61].

²⁷² Supra at par [7].

of the witness's Chapter 3 rights (now Chapter 2 rights²⁷³), this would constitute a 'just excuse' for refusing to answer the question. The witness may however be compelled to answer the question (or produce documentation) if the infringement could be justified in terms of section 33(1) of the Constitution. The court unfortunately did not expand on the meaning of 'just excuse', but did direct that other courts that would be in a position to determine the meaning must bear in mind the duty imposed upon them by section 35(3) of the Constitution to have 'due regard to the spirit, purport and objects" of Chapter 3²⁷⁴. It is submitted that this argument may be applied to the disclosure of personal records scenario, with the complainant and/or counsellor refusing to answer or produce documents relating to information in their possession. There is however concern that the courts may hold that the rights of the complainant in terms of Chapter 2 of the Constitution, those of equality and privacy (discussed below), will be justifiably limited in terms of section 36 to accommodate the rights of the accused to a fair trial.

In *Bernstein and Others v Bester NO and Others*²⁷⁵ the Constitutional Court held that the common law of privilege had not been limited by statute and that it was the function of all courts to have 'due regard to the spirit, purposes and objects of the Chapter 3 [as it then was in the Interim Constitution] in the development of the common law of privilege'²⁷⁶. This makes way for the possibility of an extension to the privilege for sexual assault victims and communications made in confidence to third parties.

The last remaining possible CPA option for a witness to resist a subpoena would be in terms of section 202. This section provides no witness may be compelled or permitted to give evidence (or disclose documentation) if such evidence were contrary to public policy or would not be in the public interest. This section has

²⁷³ In terms of Act 108 of 1996.

²⁷⁴ Supra at par [8].

²⁷⁵ Supra.

²⁷⁶ Ibid at par [63].

been deemed to be concerned with two categories of evidence that is protected against disclosure: one, matters of public or state interest; and two, information given for the detection of crime²⁷⁷. A *prima facie* reading of this section indicated to this writer that this may indeed be a section that could possibly be used by a witness to resist a subpoena to testify or disclose documents concerning the personal communications of a sexual assault victim. Historically, public interest was called 'state privilege' referring to '...highest affairs of state, such as national security, state secrets in times of war and matters of great diplomatic importance'²⁷⁸, and it was thus in these occasions that 'most claims to immunity were made on behalf of central government by ministers of the Crown'²⁷⁹. The privilege no longer seems to be restricted to the state²⁸⁰, and may therefore possibly be used in the personal records context.

The courts have reiterated that the public interest in receiving relevant testimony has to be weighed against the disadvantages that the witness was likely to suffer if she were to testify²⁸¹. In the striking of this balance the public interest should be afforded much more weight than the individual. While the principle is agreed with, this writer questions the very concept of 'public interest'. What or whose public interest is being protected by these rules? It may be argued that it is in the public interest that the communications of sexual assault victims be protected, whether under the protection of privilege or just excuse. This would be on the grounds of the public interest in encouraging the reporting of sexual offences for the good administration of justice. As has been discussed, disclosure of personal records leads to a reduction in victims reporting offences, bringing the administration of justice into disrepute.

A second challenge to this principle is that the balancing should not necessarily be seen to be between the public interest and the *individual* witness in the

²⁷⁷ Ibid at 23-42Q.

²⁷⁸ I Murphy *Murphy on Evidence* 6ed (1997) 362 in Schwikkard et al (2002) op cit at 146.

²⁷⁹ P Dennis *Law of Evidence* (1999) 280 in Schwikkard et al (2002) op cit at 146.

²⁸⁰ Schwikkard et al (2002) op cit at 146.

²⁸¹ Du Toit et al op cit at 23-16.

personal records context. The individual witness in this context represents a large part of the very population that informs 'public interest', that is sexual assault victims. Therefore that balancing act is between the 'public interest' that is historically informed by a male, patriarchal, and conventional view of the legal system and what is considered, in the best interests of justice, to be evidence that is worthy of protection, and the 'public interest' that is informed by the experiences of millions of sexual assault victims, those who support them, those who are directly and indirectly affected by the sexual assault, and feminists who believe that the very construct of law is a reflection of the dominance of men in society. This male construct protects the interests that men hold to be important, and not the interests that may undermine their power and hold them responsible for the unacceptable levels of violence against women and children the world over.

As matters of this nature have not come before the South African courts as yet, it is submitted that another basis on which to resist having to disclose personal communications of a sexual assault victim would be to protect the constitutional rights of the victim. Two constitutional rights of the victim that will be discussed are her rights to equality and privacy.

Constitutional Arguments

It is acknowledged at the outset of this section that both the rights of equality (with regard to gender) and privacy in the South African Bill of Rights are derogable rights, and can thus be limited in terms of section 36, if the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Once again, this paper does not allow for an extensive discussion on these rights and how they have been interpreted by the Constitutional Court, but reference will be made to case law and lessons from other jurisdictions.

Equality

The issue of sexual violence is an equality issue as it overwhelmingly perpetrated against women and girl children. In South Africa, more than 50 000 reports of rape were made to the police in 2003, with half of those being perpetrated against children²⁸². An added equality dimension is that in other jurisdictions, such as Canada where disclosure applications have been the order of the day for some twenty years, personal records are sought almost exclusively in sexual assault cases²⁸³. In entering into an equality rights analysis, two issues must be addressed. First, what is the inequality and how is it created and maintained? What are the social constructs relied upon by law and its implementers to 'justify' the inequality? Secondly, what is the impact of this law and its implementation, especially the disproportional impacts²⁸⁴? The reliance on evidence based on discriminatory beliefs, and the subsequent prejudicial effects on fact finding violates the equality rights of the victim²⁸⁵. The reliance on beliefs such as women are likely to lie about sexual assault due to vindictiveness, and to protect their sexual reputations justifies the use of personal records, is fundamentally unfair to women as there is no proof the world over that women have a greater propensity to lie about sexual assault than any other victim of any crime. The high levels of withdrawal of sexual assault cases cannot be attributed to false charges, but rather to victims being intimidated by perpetrators, victims losing faith in the system largely due to time delays in finalising cases, alternative resolution of cases through community structures or families, or lack of evidence.

The disproportionate impact of the practice of disclosing records of sexual assault victims is that this practice has (and probably will in South Africa) undermined supportive counselling relationships in other jurisdictions²⁸⁶. Victims cease to use these services, and counsellors have been forced to use other

²⁸² SAPS Website www.saps.gov.za, last accessed June 2005.

²⁸³ Busby (1997) op cit at 168.

²⁸⁴ Ibid.

²⁸⁵ Ibid at 169.

²⁸⁶ Ibid at 179.

means to protect these communications such as destroying records, which have in turn negatively impacted on these services²⁸⁷. As discussed above, access to records also disproportionately impacts on women and children who are heavily documented. Lastly, the rate of reporting of sexual assault cases will be disproportionately impacted in comparison to other crimes as a result of this practice.

Privacy

The right to privacy enshrined in the South African Constitution provides for the bearers of the right not to have their person or home or property searched, their possessions seized or the *privacy of their communications infringed*²⁸⁸. In the Canadian case of *O'Connor* the accused's defence attorney is on records saying that if sexual assault victims did not have anything to hide they would not object to releasing their personal records²⁸⁹. This is a commonly held belief, revealing a misunderstanding of the right to privacy, and a disregard of the secondary victimisation experienced by sexual assault victims at the hands of the criminal justice system. The statement also reveals the belief that women lie about sexual assault and fabricate charges against innocent men. If the right to privacy were upheld in the case of personal records of sexual assault victims, this would presume against ordering disclosure. Privacy must be protected because of the intimate nature of communications between counsellor and victim, not because the 'truth' of 'what really happened' is being kept secret by both victim and counsellor. The presumed²⁹⁰ explanation behind this theory is that there is a conspiracy against men by women who cry rape (for the reasons discussed above) and either hoodwink the likes of counsellors into believing them or tell the counsellor the 'truth' – that the sexual assault did not occur, and together they decide for the victim to pursue the charges anyway for some unarticulated benefit

²⁸⁷ Without records, it is difficult for Rape Crisis Centres to justify the need for and access funding, and to keep accurate statistics of clients accessing their services.

²⁸⁸ Own emphasis.

²⁸⁹ Busby (1997) op cit at 175.

²⁹⁰ By this writer.

or gain. Alternatively, it is the counsellors themselves who influence women that they have been sexual assaulted, and encourage them to lay charges against innocent men.

The Constitutional Court has considered the right to privacy in a number of cases. In *Bernstein and Others v Bester NO and Others*²⁹¹ the court considered the right in the context of a section 417 enquiry of the South African Companies Act 61 of 1973 (as amended). Briefly, the applicants were resisting the subpoena and the compulsion to answer particular questions in terms of this section. As no courts in South Africa have ruled on the issue of disclosure of personal records, it is intention of this section of the paper to draw on some comments from this Constitutional case on the rights to privacy and how they relate to resisting a subpoena to testify. The court discussed the concept of privacy in detail, saying that it an amorphous and elusive one. It acknowledged the scope of privacy being closely linked to the concept of dignity and that it is not based on a notion of the unencumbered self, but on the notion of what is necessary to have one's own autonomous identity²⁹². The court accepted that no right is absolute, and in the context of privacy, only the inner sanctum of the person, such as his/her inner family life, sexual preference and home environment is shielded from erosion by conflicting rights of the community²⁹³. A breach of privacy occurs either when there is an unlawful intrusion upon the personal privacy of another or by way of unlawful disclosure of private facts of a person. The unlawfulness is judged in the light of the contemporary *boni mores* and the general sense of justice of the community as perceived by the court²⁹⁴.

It is submitted that the courts have the opportunity to hold in the case of disclosure of personal records that the breach of privacy that occurs when communications between a sexual assault victim and counsellor are revealed to

²⁹¹ Ibid.

²⁹² Ibid at par [65].

²⁹³ Ibid at par [67].

²⁹⁴ Ibid at par [68].

the defence constitutes an unlawful infringement as it is against the *boni mores* of the South African community. It is so because if the real voices of the community were heard on this matter, and opinions of the courts were informed by these voices, the rights of sexual assault victims would be more adequately protected, and not disrespected by relying on antiquated notions and beliefs about women, children and sexual assault.

If it were held by the South African courts that the right to privacy of victims of sexual assault in relation to their private communications with their counsellors was justifiably limited in terms of section 36, it is submitted that the courts themselves would have fallen prey to the very prejudices and stereotypes that the Constitution attempts to protect against. To justify access to these records on the basis of providing the accused a fair trial, or that they may contain exculpatory evidence, or that they may contain relevant evidence to the fact finding process, is to place our courts and the administration of justice firmly in the paradigm that discriminates against women and sexual assault victims simply because they are women and sexual assault victims, and they lie.

*S v Alex Henry and Pillay and another v The Regional Court Magistrate, Pietermaritzburg and Others*²⁹⁵

There have been no reported South African cases on the issue of disclosure of personal records of sexual assault victims. Anecdotally, the practice in South African courts is uncontested compliance by third parties of subpoenas issued to produce either documentary evidence or oral evidence about the complainant. In addition, the complainant is also compliant should she be asked by the defence to produce personal documents, such as diaries. This compliance is based on instructions from the prosecution, who have not, to date, questioned the practice of the defence requesting documentation or questioned the court in allowing this information into evidence. It must however be said that the practice of requesting

²⁹⁵ Supra.

this information is relatively rare and to a large extent is restricted to personal documents in the possession of the complainant, such as diaries²⁹⁶. Generally there seems to be a combination of lack of awareness on the part of the prosecution of the possible infringements on the rights of the complainant by allowing this information into evidence and an accepted belief that information of this nature is *per se* relevant.

The case of *Henry* has highlighted this issue publicly for the first time and has been covered in the media, which has resulted in a raised awareness. Briefly, the facts of the case are as follows: the complainant, a woman in her late twenties, began a counselling relationship with a psychologist as she was depressed, and was having trouble in her marriage. At some stage in the counselling, the complainant revealed to the psychologist that she had been raped by the accused when she was ten years old. The complainant then laid charges of rape and indecent assault against the accused. As part of the investigation the psychologist was asked to prepare an expert report on the effects of the sexual assault on the complainant, which she duly did, which was discovered to the defence. On the basis of the report the defence asked for further and better particulars in relation to the report, requesting all the files and documents pertaining to the sessions of psychotherapy, copies of all the tests the pertaining to psychological assessment and copies of all consultation notes from the sessions. The argument of the accused was based on the assertion of his right to a fair trial in that these notes were needed in order for him to prepare his cross-examination of the complainant and the expert witness (the psychologist). At this stage of the proceedings, counsel represented the complainant and psychologist. The argument of the complainant and psychologist in resisting production of the information was that the information was strictly confidential and was not relevant to the charges against the accused. They also alleged that the communication was privileged. The prosecution was silent on the issue.

²⁹⁶ Personal experience as a prosecutor and discussions with Specialist Prosecutors in Sexual Offences Courts.

The judgement of the magistrate, with respect, is flawed in a number of ways. The court ruled that as a result of the complainant's decision to 'go public with the matter'²⁹⁷ by reporting the matter to the police she 'herself had decided to let go of the confidential and privileged relationship between herself and the [psychologist]'²⁹⁸. The court reasoned the complainant knew that the matter would be heard in open court and this amounted to a waiver of her rights to confidentiality with the psychologist. It is submitted that this reasoning is nothing short of absurd, has no foundation in law, and should be rejected by the High Court on appeal. However, it is submitted that court was correct on one point that it raised: the report prepared by the psychologist was recognised as that of an expert, and for that reason, the information that formed the basis of the report and led to the conclusions reached in the report must be made available to the defence in order for him to adequately prepare his defence. This information was what the defence had requested and must therefore be handed to the defence.

The complainant and the psychologist have appealed the decision of the magistrate, and the matter is to be heard in the KwaZulu High Court in October 2005. It is submitted that, based on the papers before the court, submitted by the applicants, the issues have been conflated and misconstrued. The applicants have based their refusal to produce the documentation on arguments of privacy and dignity of the complainant in terms of the Bill of Rights and the privilege of the confidential relationship between the complainant and her psychologist. Issues of public policy of the rights of sexual assault victims have been raised and arguments put forward of the deleterious effects on sexual assault victims if this type of information is revealed to the defence, not only in this case, but in cases to follow.

²⁹⁷ Supra at 4.

²⁹⁸ Ibid.

While this writer is in full support of these arguments of the complainant and psychologist in relation to the issues of disclosure of personal information to the defence, and is of the opinion that personal information should never be disclosed on the basis that it is irrelevant to the fact finding process, this case differs fundamentally in one respect - the state is relying on an expert witness report (and potential testimony) as part of its case against the accused. That expert is the psychologist of the complainant in this case. On this basis alone, the accused is entitled to information that has informed that expert report and opinion. The information from the psychologist sessions is not admissible on the basis of relevance in that it may reveal exculpatory evidence of the accused, but rather because it forms the basis of the expert report.

Both the applicants and the media have misconstrued the issues in this case. It is submitted that the High Court should find in favour of the accused in this case, and rightly so. The unfortunate consequences are that the manner in which this will be reported and interpreted by the media and the public is that this amounts to the defence being able to access all personal information about sexual assault victims from their counsellors as a matter of course. It is submitted that to prevent this from happening, the prosecution must withdraw the expert report. If the defence persists in claiming access the information from the counselling sessions, it will have to motivate with reasons why access is necessary. If the reasons mirror those in other jurisdictions, such as revealing of information showing that complainant has motive to lie, or that the psychologist influenced the memories of the complainant, then the complainant, psychologist and the prosecution have excellent grounds to oppose the application, making use of the mechanisms discussed above.

RECOMMENDATIONS

It is evident that there are four options available for legislative intervention to regulate the disclosure of victim communications to counsellors in sexual assault trials. Option one is an absolute prohibition, making all counselling records inadmissible on the premise that counselling records are never relevant to the facts in issue or the credibility of the complainant. Option two provides for a legal privilege and is based on the premise that it is in the public interest to protect confidentiality, and that it outweighs the public interest in an accused being able to access all relevant evidence. This privilege would either be absolute or, option three, would be subject to an exception if the accused could show that the communications contained evidence necessary to establishing the innocence of the accused. This option would be subject to procedural requirements and requirements of motivation and substantiation by the accused to avoid 'fishing expeditions'. Option four would provide that the evidence is inadmissible unless the accused can show relevance, again with the concomitant procedural and evidential requirements on the accused.

It is submitted that although no other jurisdiction has absolutely prohibited the use of victim-counsellor records in sexual assault trials, this is the option that is recommended for South Africa. Where courts have had the jurisdiction to rule on relevancy of evidence as it relates to sexual assault victims, the research shows that relevance is justified too often under the guise of affording the accused the right to a fair trial.

If however the South African legislature chooses to adopt a similar approach to that of the Canadians, the Americans or the Australians, it is submitted that important issues of *locus standi* and legal representation for complainants and record holders are vital to be included, so as to provide for the independent voice of victims.

It is submitted that option one is the option containing the most legal integrity. To base the exclusion of evidence on a legal privilege is to concede that the evidence may be relevant, but is protected by public interest. The very premise of the objection by feminists supporting the non-disclosure of records is that they are irrelevant to the truth finding process. To entertain the possibility that this evidence may be relevant to any issue at trial, in particular the innocence of the accused, is to buy wholesale into the myths about women and sexual assault. To do so not only fails women, but also the administration of justice. However, of practical concern is the argument that option one may still require the court to have sight of the evidence to establish that it constitutes communications between the complainant and a third party. This would undermine the purpose of the protection. While option one is indeed preferable in principle, practicality may dictate that the most effective manner in which to protect complainants of sexual violence is to create and recognise a privilege similar to that of the lawyer client privilege, that of a fundamental legal right.

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LEGISLATION

New South Wales Criminal Procedure Act 1986 No. 209 Division 2 Sexual Assault Communications Privilege

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The Constitution of the Republic of South Africa, Act 108/1996

E Du Toit et al *Commentary on the Criminal Procedure Act* (1987, as revised bi-annually)