



KEEP COUNSELLING CONFIDENTIAL

THE PROBLEMS AND SOLUTIONS AROUND THE DISCLOSURE OF COUNSELLING NOTES

Summary Briefing

Second Reading of the Victims and Prisoners Bill in the House of Lords

Prepared by Rape Crisis England & Wales, the Centre for Women's Justice, the End Violence Against Women coalition and Rights of Women

December 2023

Endorsed by:



Introduction

Victims and survivors who have reported sexual violence to into the criminal justice system are often forced to choose between seeking justice and accessing therapy. This is because police routinely request these records following the report of rape. Legislation and guidance introduced to prevent intrusive and inappropriate requests for survivors' personal records has not gone far enough in this area. We are therefore inviting support from Peers for an amendment to the Victims and Prisoners Bill, which will receive its Second Reading in the House of Lords on 18 December 2023, to keep counselling confidential.

The Main Issues

A fundamental misunderstanding of the purpose of counselling and therapy: The disclosure of records about deeply sensitive, personal feelings related to sexual trauma are very rarely relevant to criminal investigations. There is an inherent contradiction between the need for survivors to access safe and confidential therapy for trauma and the routine practice of police requesting these records.

Lack of safeguards for counselling records: Current guidance leaves police officers with wide discretion and little support in terms of implementation. In practice, large amounts of survivors' sensitive and private material are requested by police. A recent letter sent to the CPS from a coalition of leading health organisations stresses how the current test of 'relevance' allows for the unnecessary and potentially "devastating" use of survivors' private health information, contributing to high victim attrition rates.

Undermining counsellors and therapists: Therapists are being left to make decisions that jeopardise the confidential, trusting, and private relationship with survivors that is essential to their work - some avoiding discussing the rape with their patient, and trying to keep notes in a way that will not be misconstrued in any future criminal trial.

Solution: The New South Wales model

"An excellent safeguard which would protect the wellbeing of victims of crime who are having to relive the circumstances every time those issues are brought up".¹ - Sir Robert Buckland KC

- 1. A system with a higher legal threshold for disclosure, which protects survivors' privacy and only permits disclosure where there is genuine evidential value in doing so, in alignment with fair trial rights**
- 2. A system where every request has to be approved by a judge to ensure the law is properly implemented and to create clear case law and consistency**

In other jurisdictions with similarly adversarial legal systems, the ability of survivors to seek both justice and therapy is afforded greater protection, at the same time as duly safeguarding the right to a fair trial.

New South Wales was the first Australian state to introduce a law protecting the confidentiality of survivors' counselling records.² It has operated successfully for over 20 years, within a criminal justice system very similar to that of the UK. In New South Wales, the legal threshold for obtaining counselling and therapy records is "*substantial probative value taking into account the public interest in preserving confidentiality*". Under this model, applications for access to therapy records are made directly to the court and a judge considers whether the basis for the request meets the legal threshold. This higher threshold has not resulted in any miscarriages of justice. Over twenty years there have been approximately 20 appeals to the Court of Criminal Appeal, none of which resulted in the overturning of a conviction.

¹ House of Commons, Victims and Prisoners Bill Debate [4 December 2023]. Available from: <https://hansard.parliament.uk/commons/2023-12-04/debates/5DA8E455-339D-497A-9F0D-8B566B3E8EA9/VictimsAndPrisonersBill>

² New South Wales, Evidence Amendment (Confidential Communications) Act 1997, No. 122. Available from: <https://legislation.nsw.gov.au/view/pdf/asmade/act-1997-12> .