

SCHOOL COUNSELLORS AND CONFIDENTIALITY

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Counselling and Confidentiality

To what extent are conversations and other communications between school counsellors and their clients (who are, in the main, their students) “confidential”? Students need to feel absolutely relaxed and confident that they can express themselves freely - in anger, in tears and in guilt without inhibition that their frankness will later be used in an attempt to judge or discipline them. The importance of this was stressed by the Full Court of the Family Court in 1996. After talking about the principle which says that the interests of the child are paramount, the Court said¹:

Whilst it may be in the interests of an individual child ... to ensure that his or her representative has access to every piece of information that may possibly be of use in assisting the tribunal to make the appropriate decision, it is in the broader interests of society that people who consult marriage counsellors know that they may do so in complete confidence and in the knowledge that their confidence will be respected.

Although the Court was speaking of people who consult marriage counsellors, the point applies equally to students and others in school communities who consult school counsellors. These people need to be told in simple and clear propositions what degree of confidentiality exists. School counsellors need to know in simple and clear propositions what degree of confidentiality exists, and exactly when they are walking on thin ice.

¹ *Relationships Australia v Pasternak* (1996) at paragraph 52

This paper will consider the counsellor's duty of confidentiality, the relationship of that duty to privacy law, the situations in which confidential information may be disclosed and, finally, the related issue of admissibility of a counsellor's notes and knowledge into evidence in court proceedings.

The Duty of Confidentiality

At common law, there is a duty of confidentiality which arises because of the confidential nature of the counsellor/student relationship. Examples of other confidential relationships in which the duty arises are those between banker and customer, and lawyer and client.

If there is a breach of this duty, a student could bring an action for breach of confidence against the counsellor. Such action could be brought even though there is no contract between the counsellor and the student. A proposed breach of confidence by a counsellor could be stopped by injunction. Where the breach has already occurred, the student could be compensated for by damages. However, in a counselling situation, damages due to a student for breach of confidence may be difficult to assess. Nevertheless, the risk of being found liable is there and school counsellors ought to consider transferring that risk by insurance. Alternatively, school counsellors should ensure that their school's insurance covers the risk.

For all these reasons, it is important for the counsellor to know when a disclosure of something learned in the course of the counselling can be made without breaching the duty of confidentiality.

Privacy

Statutory privacy law respects and supports the principle of confidentiality. Privacy, however, involves a different approach. Privacy recognises that counsellors and other health providers interact with many others and that health information is handled by a broad spectrum of people. Not all of the people who handle health information are bound by a duty of confidentiality. Privacy legislation attempts to cover the wide range of ways that health information is handled. It does this by entitling the person, who is the subject of the health information, to have the greatest possible control over the flow of their own information. Privacy is an obligation to the subject of the information. The obligation exists regardless of who actually provided the information.

The *Privacy Act 1988* (Cwlth) complements the common law duty of confidentiality, and professional and ethical obligations related to the provision of counselling services. The Act does not replace the common law duty of confidentiality. The Act applies to all private sector organisations and individuals delivering counselling services. Accordingly, counsellors must not do anything, or engage in any practice, that breaches the ten National Privacy Principles (NPPs). These NPPs regulate the way counsellors collect, store, use and disclose different types of personal information, and the way individuals may seek to access and correct that personal information.

The *Privacy Act* applies to independent schools and their counsellors throughout Australia. The *Privacy and Personal Information Protection Act 1998* (NSW), which

contains similar principles to the *Privacy Act*, applies to government schools in NSW, and therefore to counsellors in those schools. A further statutory regime has applied to counsellors in New South Wales since 1 September, 2004 when the *Health Records & Information Privacy Act 2002* commenced. Schools with counsellors and those counsellors have obligations under the *Health Records & Information Privacy Act* because they are health service providers and collect, hold and use health information. Accordingly, they are required to comply with the Health Privacy Principles (HPPs) and must not do anything or engage in any practice that contravenes the HPPs. The fifteen HPPs are set out in Schedule 1 of the *Health Records & Information Privacy Act*.

School counsellors in independent schools have obligations under both the *Privacy Act* and the *Health Records & Information Privacy Act* and should comply with both concurrently. This will be possible in most cases. The underlying principles of both Acts are the same, and the privacy protections are similar. If there is any inconsistency between the *Privacy Act* and the *Health Records & Information Privacy Act* (NSW), the *Privacy Act* prevails because, under the Australian Constitution, Commonwealth legislation overrides State legislation.

Collection of information

Counsellors collect information from their students about their students and about other people (such as family members, other students and so on). NPP1 prohibits the collection of personal information unless the information is necessary for one or more of the functions or activities of the person collecting the information. Personal information may only be collected by lawful and fair means and not in an unreasonably intrusive way.

When a counsellor collects personal information about a student from that student, NPP 1.3 requires the counsellor to take reasonable steps to ensure that the student is aware of:

- (a) the identity of the counsellor and how to contact him or her; and
- (b) the fact that the student is able to gain access to the information; and
- (c) the purposes for which the information is collected; and
- (d) the organisations (or the types of organisations) to which the counsellor usually discloses information of the kind collected; and
- (e) any law that requires the particular information to be collected; and
- (f) the main consequences (if any) for the student if all or part of the information is not provided.

This does not normally cause any difficulty given that the student and the counsellor are in direct contact. However, the same obligation applies when the counsellor collects personal information about a third party from the student. NPP 1.5 requires the counsellor to take reasonable steps to ensure that the third party is aware of:

- (a) the identity of the counsellor and how to contact him or her; and
- (b) the fact that the third party is able to gain access to the information; and
- (c) the purposes for which the information is collected; and

- (d) the organisations (or the types of organisations) to which the counsellor usually discloses information of the kind collected; and
- (e) any law that requires the particular information to be collected; and
- (f) the main consequences (if any) for the third party if all or part of the information is not provided;

unless making the third party aware of these matters would pose a serious threat to the life or health of any individual.

The Privacy Commissioner takes the view that the obligation on a counsellor, when collecting personal information about a third party from a student, to take reasonable steps to ensure that the third party is or has been made aware of the matters listed in NPP 1.3 is satisfied by doing nothing where steps could be taken but it is unreasonable to take them. The Privacy Commissioner acknowledges that there are some steps that might be reasonable to take but for other factors besides the reasonableness of the steps themselves; for example, the fact that the steps if taken would undermine the purpose of collection. Clearly, there are circumstances in relation to the collection of family, social and medical histories where this might apply.

NPP 10.1 prohibits a counsellor from collecting health information about an individual unless the individual has consented or unless one of several other conditions is satisfied. There may be many reasons why it is not possible or reasonable to obtain a third party's consent to the collection of health information about the third party from a student. For this reason, the Privacy Commissioner issued a Public Interest Determination in 2002 exempting counsellors and other health service providers from the obligation under NPP 10 to obtain the consent of a third party when collecting information from a student about the third party when both of the following circumstances are met:

- (a) the collection of a third party's information into a student's social, family or medical history is necessary for the counsellor to provide a health service directly to the student; and
- (b) the third party's information is relevant to the family, social or medical history of that student.

HPP 3 states that a counsellor must collect health information about an individual only from that individual, unless it is unreasonable or impracticable to do so. The counsellor must also notify that individual of certain required information (comparable to that required by NPP 1.3) unless:

- (a) notifying the individual would pose a serious threat to the life or health of any person; or
- (b) the counsellor complies with the NSW Privacy Commissioner's statutory guidelines.

The NSW Privacy Commissioner has issued statutory guidelines about how health information is to be collected for the purposes of HPP 3. They are consistent with the Public Interest Determination of the Federal Privacy Commissioner. The NSW Privacy Commissioner's statutory guidelines provide that a counsellor does not have to notify a

person when the counsellor has collected health information about them from someone in circumstances where:

- (a) the counsellor collected the information from the third party because it was unreasonable or impracticable to collect directly from the person and it would also be unreasonable or impracticable to notify the person;
- (b) the information was collected in the process of recording a family, social or medical history and this was necessary to provide health services to the student;
- (c) the information was collected from an authorised representative, because the counsellor believed the person was incapable of understanding the nature of the information required; or
- (d) the information was initially collected by another organisation and there are reasonable grounds to believe that the person has already been informed of the required information by the first organisation.

Situations in Which Disclosure Is Proper

Bearing in mind both the common law duty of confidentiality and the privacy laws, I turn to those situations in which a school counsellor may safely disclose confidential and health information to people other than the student.

1. Where the Consent of the Student Has Been Given

The duty of confidentiality is there for the benefit of the student. Accordingly, the student may waive that right at any time. Privacy law also recognises that personal information about an individual may be disclosed to others with the consent of the individual (NPP 2.1 (b); HPP 11 (1) (a)).

Counsellors ought to get such consent in writing if at all possible. Otherwise, proving consent has been given could be very difficult.

School counsellors can find themselves in difficult situations when other school staff or parents ask for information about the counselling of a child. My view is that minors (children under 18) are not a class of people inherently incapable of giving their own consent. An analysis of *Gillick*² suggests that, where a school counsellor counsels a mature adolescent student at the student's request or with his or her consent, the counsellor owes duties, including that of confidentiality, to the student. *Gillick*, of course, was a case about a minor's right to consent to medical treatment. The majority in the House of Lords held that parental power to consent to medical treatment on behalf of a child diminishes gradually as the child's capacities and maturity grow and that this rate of development depends on the individual child. The High Court of Australia has said:

A minor is, according to this principle, capable of giving informed consent when he or she "achieves a sufficient understanding and intelligence to enable him or her to understand fully what is proposed" [quoting Gillick].

² *Gillick v West Norfolk and Wisbech Area Health Authority* (1986) AC 112

Accordingly, mature adolescents can both consent to having counselling and consent to the duty of confidentiality owed to them being waived. Therefore, a school counsellor would be at risk in disclosing confidences without the student's consent unless one of the following exceptions applies.

This conclusion is not affected by the fact that, at independent schools, the parents are paying fees and have a contract with the school which employs the counsellor. The counsellor's duty is still to the student.

2. *Child Abuse*

State Laws

In most Australian States, state laws exist which require mandatory reporting of child abuse by certain professions.³ If a school counsellor is counselling in a State where the law requires the counsellor to report information about child abuse to the police or welfare authorities, the counsellor must comply or be guilty of an offence. In places such as NSW where there may be some doubt as to whether or not counsellors are affected by the mandatory reporting regime, counsellors may still be obliged to report by the internal rules of the school for which they work.

Normally, legislation which makes reporting mandatory also provides that:

- (a) the counsellor is not in breach of the duty of confidentiality;
- (b) the notification does not constitute a breach of professional etiquette or ethics or a departure from accepted standards of professional conduct;
- (c) the counsellor incurs no liability for defamation;
- (d) the notification does not constitute a ground for civil proceedings for malicious prosecution or for conspiracy;
- (e) the notification is not admissible in evidence in any court proceedings and no-one can be compelled to produce the notification or disclose its contents to a court.

Privacy

Reporting child abuse where this is required or authorised by law does not infringe privacy laws (NPP 2.1 (g); HPP (2) (a) and (b)).

3. *Police Warrant or Court Subpoena*

A counsellor confronted by police with a valid search warrant or served with a court subpoena must submit to authority which overrides, at least to some extent, the duty of confidentiality. However, while documents may be seized under a valid warrant, their use in evidence in court may be prohibited as will be mentioned later. Accordingly, it is suggested that counsellors adopt an attitude of "aggressive submissiveness". That is, treat everything as confidential until a judicial officer specifically rules that it is not. For example, if obliged to produce documents to a court or to the police, lock the

³ The position in NSW is governed by the *Children and Young Persons (Care and Protection) Act 1998*.

requested records in a container, express willingness to deliver the container and the keys to a Judge or Judge's associate and to no-one else immediately or on the appropriate day, and express willingness to be bound by the Judge's ruling on disclosure but only after the Judge has heard your arguments (or your lawyer's arguments) on confidentiality in full.

Complying with a warrant or subpoena is allowed by privacy legislation.

4. *Crime and Fraud*

If a counsellor learns that a student is about to commit, or has committed a serious crime or fraud, and reports this to the police or other appropriate authority, then the counsellor would have a good defence to any action for breach of confidentiality brought by the student.⁴ Similarly, there would be no breach of privacy laws (NPP 2.1 (h); HPP 11 (1) (i)).

However, it is not always mandatory to report in such circumstances. Generally, you are not obliged to inform the police of a crime unless you know (not just suspect) that a serious offence has been committed.

Section 316 of the *Crimes Act 1900* (NSW) reads:

(1) If a person has committed a serious offence and another person who knows or believes that the offence has been committed and that he or she has information which might be of material assistance in securing the apprehension of the offender or the prosecution or conviction of the offender for it fails without reasonable excuse to bring that information to the attention of a member of the Police Force or other appropriate authority, that other person is liable to imprisonment for 2 years.

(2) A person who solicits, accepts or agrees to accept any benefit for himself or herself or any other person in consideration for doing anything that would be an offence under subsection (1) is liable to imprisonment for 5 years.

(3) It is not an offence against subsection (2) merely to solicit, accept or agree to accept the making good of loss or injury caused by an offence or the making of reasonable compensation for that loss or injury.

(4) A prosecution for an offence against subsection (1) is not to be commenced against a person without the approval of the Attorney General if the knowledge or belief that an offence has been committed was formed or the information referred to in the subsection was obtained by the person in the course of practising or following a profession, calling or vocation prescribed by the regulations for the purposes of this subsection.

(5) The regulations may prescribe a profession, calling or vocation as referred to in subsection (4).

⁴ *A v Hayden* (1984) 156 CLR 532

The professions, callings or vocations prescribed by the regulations include:

- (a) a psychologist;
- (b) a social worker, including:
 - i. a support worker for victims of crime, and
 - ii. a counsellor who treats persons for emotional or psychological conditions suffered by them.

This section was introduced into the *Crimes Act* in 1990 and has yet to receive any detailed judicial analysis. For a person to be convicted of an offence under Section 316, the prosecution would have to prove beyond reasonable doubt that:

- (a) a person had committed a serious offence (that is, an offence punishable by imprisonment for 5 years or more); and
- (b) the person being prosecuted:
 - i. knew or believed that the offence had been committed; and
 - ii. had information which might be of material assistance in securing:
 - (a) the offender's apprehension; or
 - (b) his prosecution; or
 - (c) his conviction for the offence; and
 - iii. failed **without reasonable excuse** to bring the information to the attention of the Police or other appropriate authority.

In *R v Crofts*⁵, the Court of Criminal Appeal in New South Wales was considering an appeal by Mr Crofts against the severity of his sentence. Mr Crofts had pleaded guilty to a charge under Section 316. Mr Crofts knew that either or both of his stepbrother and another man had murdered someone because his stepbrother had told him. The maximum sentence under the *Crimes Act* is two years. The trial judge sentenced Mr Crofts to six months, taking into account his dislocated family background and his unstable mental state.

Meagher JA said:

This section is a comparatively new section and this is the first case, so far as one knows, which has been brought under it. It is a section which has many potential difficulties, the chief of which is the meaning of the words "without reasonable excuse", difficulties which are magnified when one endeavours to contemplate how those words would apply to the victim of the crime.

Gleeson CJ added:

... it may be extremely difficult to form a judgment as to whether a failure to provide information to the police was "without reasonable excuse".

Because Mr Crofts had pleaded guilty, the Court did not have to decide what might amount to a reasonable excuse. However, it is obvious that the judges of the Court of Criminal Appeal in NSW are concerned at the difficulties thrown up by Section 316.

⁵ unreported, NSW Court of Criminal Appeal, 10 March 1995

Although one cannot be definite about it, I suggest that reasonable excuses could include:

- (a) doubt as to whether a person has committed an offence;
- (b) the contrition of the person who has committed the offence together with restitution of property where theft is involved;
- (c) the health and family circumstances of the person who has committed the offence, particularly if the person with the knowledge or belief is the person wronged.

In my view, a counsellor who fails to disclose information obtained during the course of a confidential interview is unlikely to be charged with this offence. The recent addition of section 316 (4) and (5) of the *Crimes Act* make it necessary for the Attorney General to first give his or her approval before a counsellor who obtained the information in the course of counselling can be prosecuted for this offence. This makes the likelihood of a charge even more remote. However, in the unlikely event of being charged, the counsellor may be able to successfully defend the charge on the basis that the non-disclosure was justified for professional reasons.

The legal position of the counsellor with regard to disclosure of confidential information about intended crimes is less clear. In a Californian case⁶, a psychologist was successfully sued for damages for failure to warn of an intended crime of a serious nature. A university psychologist was informed by a student of his plan to kill his girl friend. The psychologist told the police but not the girl or her parents. The girl was subsequently murdered and the parents successfully sued the psychologist for failing to warn their daughter of the threat made by his student. The Court held:

When a therapist determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger. The discharge of this duty may require the therapist to take one or more of various steps, depending upon the nature of the case. Thus it may call for him to warn the intended victim or others likely to apprise the victim of the danger, to notify the police, or to take whatever other steps are reasonably necessary under the circumstances.

I doubt whether Australian courts are ready to go this far. I believe that judges here are likely to follow the English⁷ and Canadian⁸ approach which permits rather than compels the therapist to disclose information in breach of the duty of confidentiality where:

- (a) there is a clear risk to an identifiable person or group of persons;
- (b) the risk is of serious bodily harm or death;
- (c) the danger is imminent.

⁶ *Tarasoff v The Regent of the University of California* (1976) 131 Cal Rptr 14

⁷ *R v Egdell* [1990] 1 All ER 835 (CA)

⁸ *Smith v Jones* [1999] 1 SCR 455

However, two New Zealand cases are tending toward the Californian position. In *Furniss v Fitchett*, Barrowclough CJ said that disclosure is "require[d]" when a doctor:

*...discovers that his patient entertains delusions in respect of another, and in his disordered state of mind is liable at any moment to cause death or grievous bodily harm to that other. Can it be doubted for one moment that the public interest requires him to report that finding to someone?*⁹

In *Duncan v Medical Practitioners Disciplinary Council*, Jeffries J said:

*There must be occasions, they are fortunately rare, when a doctor receives information involving a patient that another's life is immediately endangered and urgent action is required. The doctor must then exercise his professional judgement based upon the circumstances, and if he fairly and reasonably believes such a danger exists he must act unhesitatingly to prevent injury or loss of life even if there is to be a breach of confidentiality.*¹⁰

Suicide is not a crime in Australia but encouraging or assisting another to commit or attempt suicide is. However, if a school counsellor reported a threatened suicide to someone else, the counsellor would probably not be in breach of his or her duty of confidentiality on public policy grounds. This is not to say that there is a duty to warn.

A year after the *Tarasoff* decision, another Californian court found that *Tarasoff* did not require a counsellor to warn parents that their child was suicidal. In *Bellah v Greenson*¹¹, the court said that *Tarasoff* did not require therapists to warn others of the likelihood of all harm. The court was concerned that the counsellor/client relationship would be damaged if counsellors revealed that their clients were suicidal. Unlike *Tarasoff* where the risk was to a third party, the duty of confidentiality was not overborne by the risk of suicide because to breach the duty could well "inhibit psychiatric treatment."¹²

Privacy law allows disclosure of information where there is a serious threat to health or welfare. NPP 2.1 states that an organisation must not disclose personal information about an individual for a purpose other than the primary purpose of collection unless:

- (e) *the organisation reasonably believes that the use or disclosure is necessary to lessen or prevent:*
 - (i) *a serious and imminent threat to an individual's life, health or safety; or*
 - (ii) *a serious threat to public health or public safety.*

HPP 11 (c) is in similar terms.

⁹ [1958] NZLR 396 at 405 (SC)

¹⁰ [1986] 1 NZLR 513 at 521 (HC)

¹¹ (1977) 141 Cal Rptr 92 (CA Cal)

¹² Joan Neisser "Disclosing Adolescent Suicidal Impulses to Parents: Protecting the Child or the Confidence?" (1993) 26 Ind L R 433, n 11, 445

5. *Child Snatching*

A few years ago, some, but not all, of the judges of the High Court of Australia¹³ suggested that there was a paramount public interest in the welfare of a child which allowed the disclosure of information obtained confidentially; for example, the whereabouts of a child which has been illegally abducted. Subsequently, the *Family Law Act* was amended to allow the Court to order a person to provide the Registrar of the Court with information that the person has or obtains about a child's whereabouts. This is not to say that there is a positive duty on school counsellors to report child-snatching.

Privacy law also recognises the public interest in finding missing persons. The legislation therefore permits disclosure of information to a law enforcement agency for the purposes of ascertaining the whereabouts of an individual who has been reported to the police as a missing person (HPP 11 (h)).

6. *Training and Supervision of Counsellors (HPP 11 (e))*

While a school counsellor is probably safe to disclose a student's information in this and the next four situations, prudence dictates that it is best to have the student's consent for each of them. This can be achieved by having the student (or his or her parents) read and sign something before counselling begins.

7. *Analysis and recording of case histories and the maintenance of a case records system (NPP 2.1 (d); HPP 11 (f))*

8. *Referral to Professionals in Related or Other Specialties*

9. *The Seeking of Advice or Information by a Counsellor from Other Professionals*

10. *Reporting Back to a Referring Agency*

Privacy

The *Privacy Act* is not intended to deter counsellors from lawfully co-operating with agencies performing law enforcement functions in the performance of their functions. At the same time, NPP 2.1 does not override any existing legal obligations not to disclose personal information. Nothing in NPP 2.1 requires a counsellor to disclose personal information. A counsellor is always entitled not to disclose personal information in the absence of a legal obligation to disclose it. Therefore, a counsellor must always be mindful of the common law duty of confidentiality. Counsellors must be careful not to do something which breaches this duty just because the privacy principles suggest that there is no infringement of privacy in doing so.

¹³ *Northern Territory of Australia v GPAO* [1999] HCA 8 (11 March 1999); *ZP v PS* [1994] HCA 29; (1994) 181 CLR 639

Admissibility

Admissibility is the word used when discussing what can be allowed in evidence in a court. While this is related to confidentiality, it is important to distinguish the two matters.

The precise type of counselling given and the circumstances in which it is given are relevant when deciding whether evidence is admissible or not. There are two bases for a court not admitting any evidence from counselling sessions involving school counsellors.

Evidence Act Protection

The *Evidence Act*, which applies throughout Australia, contains provisions dealing with "professional privilege." Information which is privileged is protected from disclosure in court proceedings. The Act provides for a measure of professional privilege by creating a scheme which prevents the admission of "protected confidences."

Protected confidences are:

- (a) communications from a person (the confider)
- (b) to another person (the confidant)
- (c) where the confidant is acting in a professional capacity, and
- (d) there is either an express or implied requirement of confidentiality.

Therefore, if a student communicates something to a counsellor while the counsellor is acting in that capacity, then that communication is a protected confidence.

The *Evidence Act* provides that a court may refuse to admit the protected confidence into evidence. This is, however, left completely to the discretion of the court. But the Act also provides that if the harm caused to the confider by admitting the evidence outweighs the desirability of admitting the evidence, then the court must prevent the protected confidence, or any document containing the protected confidence, from being introduced as evidence.

Common Law Protection

Where the *Evidence Act* provisions do not cover the counselling situation, there still remains the possible use of the common law. The most obvious example of this is that statements made in an attempt to settle a dispute by the parties cannot be put in evidence without the consent of both parties. For example, in a case in 1981, a husband made various admissions to a pastor and to a psychiatric nurse during discussions concerning possible reconciliation with his wife. The Judge held that the admissions made to the pastor and the nurse were privileged and only admissible with the consent of the husband.

Exceptions to Common Law Protection

(a) Protection waived by student

This privilege is conferred to benefit the negotiating family members, not any conciliator, mediator or counsellor who may be present. Therefore, only the parties can elect to waive the privilege.

It also follows that this common law privilege would not apply to statements made by a counsellor who is later sued for professional negligence for incorrect advice given during the course of negotiations.

(b) Public Policy Exceptions

Further, like the statutory inadmissibility rule, this common law privilege is probably subject to the "public policy" exceptions discussed above.