

# SCHOOL COUNSELLORS, PRIVACY AND CONFIDENTIALITY

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### **Counselling, Privacy 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 – unconcerned 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 said<sup>1</sup>:

*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.

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

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<sup>1</sup> *Relationships Australia v Pasternak* (1996) at paragraph 52

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 Australian Privacy Principles (APPs). These APPs 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 APPs replaced the National Privacy Principles (NPPs) in March 2014 as part of a broader range of amendments to the *Privacy Act*. Although these amendments were significant, counsellors should find that their obligations under the APPs are, in a practical sense, consistent with their previous obligations under the NPPs.

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. The NSW Department of Education has a

Privacy Code of Practice<sup>2</sup> with which counsellors in government schools should be familiar.

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.

School counsellors in government schools have obligations under both the *Privacy and Personal Information Protection Act* and the *Health Records & Information Privacy Act* and should comply with both concurrently. This is not a problem as they are both NSW Acts and were drafted to operate together.

#### *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). APP 3 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, APP 5 requires the counsellor to take reasonable steps to ensure that the student is aware:

- (a) of the identity of the counsellor and how to contact him or her; and
- (b) that the School's privacy policy contains information about how the student is able to gain access to the information and seek correction of the information; and
- (c) that the School's privacy policy contains information about how the student may complain about a breach of the APPs; and
- (d) of the purposes for which the information is collected; and
- (e) of the organisations (or the types of organisations) to which the counsellor usually discloses information of the kind collected; and
- (f) of any law that requires the particular information to be collected; and

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<sup>2</sup> Available at <https://www.det.nsw.edu.au/privacy/pcp.htm>

- (g) of the main consequences (if any) for the student if all or part of the information is not provided; and
- (h) of whether the counsellor is likely to disclose personal information to an overseas recipient and, if so, the likely countries.

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. APP 5 requires the counsellor to take reasonable steps to ensure that the third party is aware that the information has been collected and of the matters listed in (a) to (h) above.

The counsellor must take such steps as are reasonable in the circumstances to ensure the individual is aware of these matters. However, the counsellor should not notify the individual of these matters if making the individual aware of them would pose a serious threat to the life or health of any individual.

The Information 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 APP 5 is satisfied by doing nothing where steps could be taken but it is unreasonable to take them. The Information 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.

APP 3.3 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 2011 exempting counsellors and other health service providers from the obligation under the APPs 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 APP 5) 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 Information 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 (APP 6.1 (a); 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. Our view is that minors (children under 18) are not a class of people inherently incapable of giving their own consent. An analysis of *Gillick*<sup>3</sup> 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 majority judgment in *Marion's Case* in the High Court of Australia said:

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<sup>3</sup> *Gillick v West Norfolk and Wisbech Area Health Authority* (1986) AC 112

*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].<sup>4</sup>*

In the same case, the majority added:

*This approach, though lacking the certainty of a fixed age rule, accords with experience and with psychology. The psychological model developed by Piaget (Piaget and Inhelder, *The Psychology of the Child*, (1969)), one of the leading theorists in this area, suggests that the capacity to make an intelligent choice, involving the ability to consider different options and their consequences, generally appears in a child somewhere between the ages of 11 and 14. But again, even this is a generalisation. There is no guarantee that any particular child, at 14, is capable of giving informed consent nor that any particular ten year old cannot: see Morgan, "Controlling Minors' Fertility"[1986] *MonashULawRw* 10; (1986) 12 *Monash University Law Review* 161. It should be followed in this country as part of the common law.<sup>5</sup>*

More recently, in *Re Woolleys*<sup>6</sup>, the High Court considered the matter again in the context of three teenage children who had arrived in Australia from Afghanistan unlawfully and who were in detention. Under the *Migration Act 1958 (Cth)*, an unlawful non-citizen may ask the Minister to be removed. The Act does not distinguish between those who are above and those who are below the age of 18 years. Confirming the *Gillick* principle, the Chief Justice noted that "not all persons under the age of 18 would lack the legal capacity to make an effective request for removal"<sup>7</sup>.

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 States of Australia, state laws exist which require mandatory reporting of child abuse by certain professions. The position in NSW is governed by the *Children and Young Persons (Care and Protection) Act 1998*. There are two situations: one is where abuse **may** be reported; the other is where it **must** be.

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<sup>4</sup> *Department of Health & Community Services v JWB & SMB ("Marion's Case")* [1992] HCA 15; (1992) 175 CLR 218 (6 May 1992) at para 19

<sup>5</sup> *Marion's Case* at para 20

<sup>6</sup> [2004] HCA 49; (2004) 225 CLR 1; (2004) 210 ALR 369; (2004) 79 ALJR 43

<sup>7</sup> *Re Woolleys* at para 30

### ***Children and Young Persons (Care and Protection) Act, 1998***

First, a person who has reasonable grounds to suspect that a child or young person is at risk of significant harm **may** notify Community Services<sup>8</sup>.

A child or young person is at risk of significant harm if current concerns exist for their safety, welfare or well-being because of the presence, to a significant extent, of any one or more of the following circumstances:

- (a) their basic physical or psychological needs are not being met or are at risk of not being met;
- (b) the parents or other caregivers have not arranged and are unable or unwilling to arrange for the child or young person to receive necessary medical care;
- (c) in the case of a child or young person who is required to attend school in accordance with the *Education Act 1990*—the parents or other caregivers have not arranged and are unable or unwilling to arrange for the child or young person to receive an education in accordance with that Act;
- (d) the child or young person has been, or is at risk of being, physically or sexually abused or ill-treated;
- (e) the child or young person is living in a household where there have been incidents of domestic violence and, as a consequence, the child or young person is at risk of serious physical or psychological harm;
- (f) a parent or other caregiver has behaved in such a way towards the child or young person that the child or young person has suffered or is at risk of suffering serious psychological harm;
- (g) the child was the subject of a pre-natal report under section 25 of the Act and the birth mother of the child did not engage successfully with support services to eliminate, or minimise to the lowest level reasonably practical, the risk factors that gave rise to the report.

Second, there is a **mandatory** reporting obligation for persons who, in the course of their work, deliver health care, welfare, education, children's services, residential services or law enforcement wholly or partly to children<sup>9</sup>.

The category of people who have a mandatory obligation is quite wide. There is no exemption for ministers of religion. Doctors are caught as those who deliver health care services to children. Likewise, teachers are caught as they deliver education services to children. Those doing social work at a school are presumably caught as they deliver welfare services to children. However, some argue that there is some doubt as to whether counsellors are caught. Nevertheless, it seems to me clear that school counsellors are mandatory reporters.

The persons who do deliver the relevant services must report if:

- (a) they have reasonable grounds to suspect that a **child** is at risk of significant harm, and

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<sup>8</sup> Section 24

<sup>9</sup> Section 27

(b) those grounds arise during the course of or from the person's work.

Under the Act, a child is a person under 16 years of age. Therefore, in relation to young persons who are 16 or 17, there is no mandatory obligation to report.

Basically, where a person in either situation reports to Community Services:

- the counsellor is not in breach of the duty of confidentiality;
- the notification does not constitute a breach of professional etiquette or ethics or a departure from accepted standards of professional conduct;
- the counsellor incurs no liability for defamation;
- the notification does not constitute a ground for civil proceedings for malicious prosecution or for conspiracy;
- 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.<sup>10</sup>

### *Privacy*

Reporting child abuse where this is required or authorised by law does not infringe privacy laws (APP 6.2 (b); 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 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.<sup>11</sup> Similarly, there would be no breach of privacy laws (APP 6.2 (e); 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.*

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<sup>10</sup> Section 29

<sup>11</sup> *A v Hayden* (1984) 156 CLR 532

*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).*

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*<sup>12</sup>, 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.

Although one cannot be definite about it, we 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 relatively 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 case<sup>13</sup>, 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

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<sup>12</sup> unreported, NSW Court of Criminal Appeal, 10 March 1995

<sup>13</sup> *Tarasoff v The Regent of the University of California* (1976) 131 Cal Rptr 14

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.*

We doubt whether Australian courts are ready to go this far. We believe that judges in Australia are likely to follow the English<sup>14</sup> and Canadian<sup>15</sup> 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.

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?*<sup>16</sup>

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.*<sup>17</sup>

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*<sup>18</sup>, 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

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<sup>14</sup> *W v Egde* [1990] 1 All ER 835 (CA)

<sup>15</sup> *Smith v Jones* [1999] 1 SCR 455

<sup>16</sup> [1958] NZLR 396 at 405 (SC)

<sup>17</sup> [1986] 1 NZLR 513 at 521 (HC)

<sup>18</sup> (1977) 141 Cal Rptr 92 (CA Cal)

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."<sup>19</sup>

Privacy law allows disclosure of information where there is a serious threat to health or welfare. APP 6.2 permits an organisation to disclose personal information about an individual when a permitted general situation exists, including when:

- (a) it is impractical to obtain the consent of the individual; and
- (b) the counsellor reasonably believes that the use or disclosure is necessary to lessen or prevent a serious and imminent threat to the life, health or safety of any individual or to public health or public safety.

HPP 11 (c) is in similar terms.

#### 5. *Child Snatching*

A few years ago, some, but not all, of the judges of the High Court of Australia<sup>20</sup> 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 who 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 (APP 6.2 (c), 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 (APP 6.2 (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*

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<sup>19</sup> Joan Neisser "Disclosing Adolescent Suicidal Impulses to Parents: Protecting the Child or the Confidence?" (1993) 26 Ind L R 433, n 11, 445

<sup>20</sup> *Northern Territory of Australia v GPAO* [1999] HCA 8 (11 March 1999); *ZP v PS* [1994] HCA 29; (1994) 181 CLR 639

## *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, APP 6 does not override any existing legal obligations not to disclose personal information. Nothing in APP 6 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.

## **Access to Counselling Records**

### *Parents*

We have discussed above the issue of whether a student is capable of making decisions in relation to his or her personal information. There is no set age when a student is deemed to be capable of making such decisions. Rather, the test is whether the student has the requisite maturity and intelligence. This will impact on the student's parents' rights to access information about their child, including counselling records.

If a counsellor believes a student has the requisite maturity and intelligence to make informed decisions about his or her personal information, the counsellor should seek the consent of the student before disclosing any information to his or her parents.

The relationship between the counsellor, student and parents may be more complicated if the parents are paying school fees or have engaged the counsellor privately. The parents may expect access to the records because they are paying for the counselling either directly or indirectly. Regardless of who is paying, the counsellor still owes a duty of confidentiality to the student. Practically, these issues are best dealt with before counselling begins. The counsellor should notify the parents and the student what information will be disclosed. This is best done in writing.

If the counsellor believes the student does not have the requisite maturity and intelligence, the parents will generally make decisions on behalf of the student. Therefore, they will require access to the information, which the law permits.

There may be situations when the counsellor may choose not to disclose information to the parents. In particular, if disclosing information to the parents may threaten the safety of the student, the counsellor should not disclose the information.

### *Principal (and other school staff)*

Schools provide counselling services to maintain and promote the wellbeing of their students. To maximise the effectiveness of counselling, students need to trust that the counsellor will maintain confidentiality. This is the basis for a counsellor's duty of confidentiality.

A school (and each of its teachers) has a duty of care for the students. To determine what precautions the school should take against a risk of harm, the school needs to be aware of as much information as possible.

The counsellor's duty of confidentiality and the school's duty of care can come into conflict. This usually occurs when the principal requests a student's counselling records and the counsellor refuses to provide them to avoid breaching the student's

confidentiality. Such situations are often further complicated when the counsellor is also an employee of the school.

When an employee creates a document in the course of his or her employment, the employer owns the document, not the employee. Therefore, when an employed counsellor makes notes while counselling a student, the school, as the employer, owns those notes. However, the notes are still subject to the duty of confidentiality owed to the student. The fact that the school owns the counsellor's notes does not give any individual in the school, including the principal, the right to access the record.

There is no legal rule or principle which definitively answers which duty takes precedence in any given situation. The facts will determine whether it is appropriate for the counsellor to breach confidentiality when the counsellor's duty of confidentiality conflicts with the counsellor's duties as an employee and the school's duty of care.

Practically, it is better to establish systems and protocols for the sharing of information before a conflict arises. When the counsellor is employed, the principal and the counsellor should agree what information is to be disclosed to the principal. The counsellor and principal should put what is agreed into writing. This may be included in the employment contract.

Whatever the counsellor and principal agree, the counsellor should notify the student (or, in the case of a younger student, his or her parents) of the circumstances in which the counsellor may disclose information to the principal. This is also best done in writing.

#### *Other schools*

Chapter 16A of the *Children and Young Person (Care and Protection) Act 1998* (NSW) and Chapter 5A of the *Education Act 1990* (NSW) permit, and in some circumstances require, a school to share information:

- (a) that relates to the safety, welfare or well-being of a child or group of children; or
- (b) to assess whether the enrolment of a particular student at a school is likely to constitute a risk (because of the behaviour of the student) to the health or safety of any person (including the student) and to develop and maintain strategies to eliminate or minimise any such risk.

An example of when a school is required to share information under Chapter 16A of the *Children and Young Person (Care and Protection) Act 1998* is when another school requests the information and the school reasonably believes, after being provided with sufficient information by the requesting school to enable the school to form that belief, that the information may assist the requesting school to:

- (a) make any decision, assessment or plan or to initiate or conduct any investigation, or to provide any service, relating to the safety, welfare or well-being of the child or group of children; or
- (b) manage any risk to the child or group of children that might arise in the school's capacity as an employer.

The information that the school is required to share may include counselling records and so the counselling records must be shared.

If the information is shared under either Act in good faith, the counsellor cannot be found liable for a breach of his or her duty. However, it may be best practice to seal the counselling records and mark them as confidential. The counsellor may also wish to make contact with the counsellor at the other school to indicate that counselling records are being shared and that they should be kept as confidential as possible.

### *Courts*

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.