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Health Insights

A reminder for Victorian medical practitioners and counsellors of the prohibition on producing medical records containing "confidential communications" unless the patient has consented, or there is specific approval of the Court

Legislation in Victoria now protects the medical and counselling records of victims of sexual assault from disclosure in Court hearings.[1]

The legislation is directed at:-

> 'remedying the mischief of sexual assault victims being deterred from reporting or giving full information to doctors or counsellors in the course of their treatment, because of uncertainty and fear about unwarranted access to their records being granted by the courts.' *KR v BR & Anor* (2018) VSCA 159 (***KR v BR***). [2]

The legislative changes govern the access and use in Court of confidential communications of a patient to a registered medical practitioner or counsellor. Counsellor is defined to mean a person who is treating a person for an emotional or psychological condition.

A 'confidential communication' is defined as:-

> 'a communication whether oral or written, made in confidence by a person against whom a sexual offence has been, or is alleged to have been committed to a registered medical practitioner or counsellor, in the course of the relationship of a medical practitioner and patient or counsellor and client, as the case requires, whether before or after the acts constituting the offence occurred or are alleged to have occurred. [3]

The definition includes communications during treatment, prior to and following when the sexual offence has been or is alleged to have been committed; it is not limited to communications about a sexual offence.

In summary, the changes brought about by this legislation provide additional protections for the medical records of people who have been or are, victims of sexual assault or abuse**.** For any patient of medical

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[1] Division 2A of the *Evidence (Miscellaneous Provisions) Act* 1958 (Vic) (*EMP Act*).
[2] *KR v BR & Anor* [2018] VSCA 159, Osborn and Beach JJA at [32].
[3] Section 32B(1), *EMP Act*.

practitioners or counsellors who have been or are victims of sexual assault or abuse, their medical record is protected from being accessed.

The legislation recognises the high prevalence and nature of sexual offences in society. The aim is to reassure victims of sexual assault that access to their records is limited, to prevent any further harm.

If the patient has not consented, medical practitioners and counsellors must not produce any information divulging confidential communications. It is important that medical practitioners and counsellors are aware of the changes. A medical record that contains 'confidential communication' cannot be released to the Court without the approval and the written notifications outlined above.

It is recommended that medical practitioners and counsellors carefully review the records that are the subject of a Subpoena to check if there is any record of confidential communications.

Records of confidential communications can be produced with the consent of the patient, or if the patient is less than 14 years of age, with the consent of any person whom the Court regards as being an appropriate person to give that consent. If, however, a medical practitioner or counsellor receives a Subpoena for the medical records of a person that may contain confidential communications and there is no clear consent to the release of the communications, then it is strongly recommended that practitioners consult their medical defence organisation, insurer or legal practitioner for advice before providing any part of the record, or report to the Court.

An insurer or their representative lawyer can advise whether the correct procedure has been followed and whether it is permissible to release the records or any part of the records to the Court. Very often, the advice to a medical practitioner or counsellor will be to write to the Court, stating objection to the release of the information that is requested, on the grounds that it may contain confidential communication. If the parties seeking production of the document seek leave, written notice must be given to the medical practitioner or counsellor from whom the records are sought. That provides the practitioner with the opportunity to make a submission or to appear in person, regarding the request.

It may be possible to argue that the restrictions are only intended to apply to cases concerning sexual offences, [4] but that is a narrow construction and it remains to be seen whether the Courts will adopt that view. It is preferable at this early stage, to adopt a broad interpretation of the application of these provisions.

Only if the requirements set out in the legislation have been met, is it possible to comply with an order to produce the medical record to the Court.

These amendments are specific to Victoria, and relate to all proceedings. Other States have provisions that limit revealing privileged communications, however they do not have the same effect and are more limited in operation. For example, New South Wales has a more narrow provision relating to 'sexual assault

[4] See *R v Lyons* [2018] VSC 256 Riordan J.

communications privilege' which applies in limited circumstances.[5] Protection of 'counselling communications' in Tasmania is limited to criminal proceedings. [6] Northern Territory, Western Australia and Queensland have a similar regime to NSW.[7] By comparison, the South Australian provisions have wider application but rely on protection by public interest immunity.[8]

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[5] NSW Part 3.10 Div 1B of the *Evidence Act* 1995 (NSW).
[6] *Evidence Act* 2001 (Tas) s127B(3)-(5).

[7] *Evidence Act* 1939 (NT) ss56-56G; *Evidence Act* 1906 (WA) ss19A-19M; *Evidence (Miscellaneous Provisions) Act* 1991 (ACT) ss 54-67: *Evidence Act* 1977(Qld) ss14A-14P and *Criminal Code Act* (Qld) 1899 s 590APA.
[8] *Evidence Act* 1929 (SA) Pt VII Div 9.