Aboriginal & Torres Strait Islander
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The Hon. Cameron Dick MP
Attorney-General and Minister for Industrial Relations
Via email: Greenslopes@parliament.qld.gov.au

Your Ref: 533392/1; 1464526

Re: Statutory Protection of Sexual Assault Counselling Communications - Queensland

Dear Attorney,

I refer to your letter dated 11th November 2010 addressed to our Chief Executive Officer, Mr Shane Duffy in relation to the above topic. Unfortunately, for reasons of which we are unaware, that communication was never received. A further copy was provided on today's date – and we thus acknowledge our appreciation of being granted a 24 hour extension within which to respond. I have been delegated by our CEO to respond on our Organisation's behalf, and I am only too happy to do so:-

Summary

- Our Organisation would support reforms which protect alleged sexual assault victims from the disclosure, publication or cross-examination of matters which are clearly not pertinent to the prosecution or defence of the particular charge(s) themselves.
- However, our Organisation holds significant concerns in relation to certain aspects of the proposed legislative scheme (details below). Particularly in those situations where an accused is in fact "innocent" of the alleged offence(s); and impediments to exculpatory materials being made available are raised.

- It is fundamental to the criminal justice system in Queensland that the "presumption of innocence" not be further eroded away by legislative reform that in effect assumes all complainants are "victims" in the true sense of the word. It can for example be very easy to make a false complaint of a sexual nature (e.g. to assist a party in a child custody dispute), but very hard to refute such a claim.
- Potential restrictions on disclosure which relate to exculpatory material (which could well be the case here), should be an anathema to our justice system.
- A number of the proposals are seemingly contrary to the rationale underpinning the first stage of the so-called "Moynihan" reforms – given that legitimacy for reducing the scope for cross-examination at the committal hearing stage was largely predicated upon the view that the key to the committal process is "disclosure". Whilst we have always maintained that the ability to "test" the veracity of evidence disclosed is equally crucial – these proposals undercut disclosure requirements themselves (let alone the ability to actually test the evidence).
- The Crown's representative (DPP) should not be hamstrung in relation to the appropriate disclosure of material within its possession.
- There should be a lawful requirement placed upon the police in any such legislation, to disclose all such material to the Crown – with a specific penalty provision for non compliance. Such would act as a safeguard to any potential for a police officer to deliberately conceal material from the Crown (particularly exculpatory material).
- The ability to test any decision for non-disclosure should be made available at the committal hearing stage as well as subsequently. Any suggestion that a highly qualified magistrate would not be placed to consider such at that juncture, we would with respect, refute. The earlier <u>relevant</u> evidence is adduced, the better for all concerned – including any alleged victim. *"A right delayed is a right denied"* – Martin Luther King Jnr.
- Restricting disclosure at preliminary stages will also lead to increased trial numbers and pre-trial applications in the superior courts.

Preliminary Consideration: Our Background and ability to meaningfully comment

The Aboriginal and Torres Strait Islander Legal Service (QLD) Ltd ("ATSILS") provides legal services to Aboriginal and Torres Strait Islander peoples throughout mainland Queensland. Our primary role is to provide criminal, civil and family law representation. We are also funded by the Commonwealth to perform a State-wide role in the key areas of: Law and Social Justice Reform; Community Legal Education and Monitoring Indigenous Australian Deaths in Custody. As an organisation which, for almost four decades has practiced at the coalface of the justice arena, we believe we are well placed to provide meaningful comment. Not from a theoretical or purely academic perspective, but rather from a platform based upon actual experiences.

Question 1. Is the list of guiding principles for the interpretation and application of the proposed privilege appropriate?

Our response: The proposed guiding principles are of themselves appropriate enough. However, we believe that additional guidelines – so as to also reinforce the "presumption of innocence" as a key benchmark, should also be included. The guiding principles in their current form appear to have been predicated upon a presumption that the person concerned is indeed a "victim" (i.e. based upon a presumption of guilt).

Question 2. Is the formulation of what will constitute a "protected confidence" appropriate?

Our response: No.

- The statutory proposal is too broad and will lead to injustices occurring.
- We would agree that communications which are purely therapeutic in nature should fall within the definition.
- We would also agree that communications which are not connected (directly or indirectly*) with the particular offence should fall within the definition.

* We would submit that "indirectly" should include for example, medical records of non-related sexual offences – as such might well have a significant bearing upon the reliability

of a complainant. For example, a complainant who suffers from paranoid schizophrenia and has a medical history of inventing sexual assault complaints due to a persecution complex. We appreciate that an individual who has a proven history of false complaints could subsequently be the actual victim of a sexual assault – but this issue should resolve itself in favour of disclosure lest we run the risk of innocent individuals being wrongly convicted. That is, err on the side of caution and adopt an approach which best upholds and reflects the presumption of innocence. We would however view a letter of referral to a psychologist in relation to an eating disorder of the alleged victim (i.e. one of the examples canvassed in the explanatory notes), as not being relevant (directly or indirectly).

Case Example: A number of years ago our Organisation was involved with a rape matter wherein the alleged victim advised the counsellor (who had been called in by the police) that she had been raped by two men. Conversely, the version of events relayed by this alleged victim to the police, was that only one man, namely our client, had been involved. This conversation only came to light because the counsellor ran into one of our after-hours on-call lawyers at the police station and struck up an impromptu conversation. Clearly, such a communication was highly relevant to the defence case – indeed, the matter was subsequently discontinued. The unfortunately lady concerned had a history of mental heath illness. We need to guard against the potential for situations to rise where clearly relevant and/or exculpatory material might fall within the ambit of protected material.

Question 3. Is the scope of the definition of "counsellor" appropriate? Does it adequately address the needs of indigenous (Australians) and culturally linguistically diverse communities?

Our responses: Yes and Yes.

Question 4. Are the circumstances where the privilege will apply appropriately framed?

Our response: No.

There should for example be no prohibition placed upon the Prosecution from disclosing information (which in its view) should rightfully be disclosed to the defence (or to the court).

The explanatory notes make reference to the fact that *"the police **could** disclose their knowledge that a counsellor was seen to the court".* [Emphasis added]. We would firmly be of the view that such disclosures, (which would include disclosure by the Police to the DPP), should be **mandatory** – with a penalty provision for any non compliance. Court orders aside (i.e. pursuant to any related defence application for disclosure), it is vital that the DPP and not the Police Service ultimately serve as the filtration system for what is or is not appropriate material to disclose (irrespective of the wishes of any alleged victim). Such is not a criticism of the police service, but merely a recognition that the DPP is in the main made up of qualified legal practitioners – who are thus far better placed to make such judgement calls. Further, such is not intended to mean that the police (in relevant situations) should be absolved from making appropriate disclosures.

Question 5. Should the statutory protection apply to only criminal proceedings or should it be extended to other legal proceedings? And if so what proceedings?

Our response: Initially only to criminal law proceedings. However we can see logic in potentially applying (justifiable) protections across the entire legal spectrum.

Question 6. Is an absolute privilege in preliminary criminal proceedings and a qualified privilege in other criminal proceedings appropriate?

Our response: No.

We see no justification for curtailing appropriate disclosure/discovery at the committal hearing stage. As outlined above, we feel that to do so is contrary to a key rationale which was heralded as a justification for one aspect of the first round of the so-called "Moynihan" reforms (wherein restrictions on cross examination were justified based upon full disclosure).

Non disclosure at the preliminary stage also significantly increases the prospects of matters which might otherwise have been listed for sentencing – going to **trial** (or at least to pre-trial rulings). Such will of necessity involve significant cost to the community and is contrary to the public interest.

Question 7. Are the waiver requirements appropriate?

Our response: Whilst we would agree that an alleged victim should have a right to waive privilege (of what in our view could only be irrelevant material – as there should be no exclusion of relevant material to begin with), such will for all practical purposes be of very limited utility.

Question 8. Are the procedures for obtaining leave of the court, and the notice and standing requirements, appropriate?

Our responses: No and No.

Proposal: that as a first stage the party seeking disclosure must satisfy the court that there is a legitimate forensic purpose for seeking same (the threshold test).

Concern: Extreme problems will be encountered by the party seeking disclosure (presumably the defence) to surmount the evidentiary onus in a context of not being privy to the contents of that which is sought to be disclosed in the first place. In other words, the defence is asked to show that there is a legitimate forensic purpose in a disclosure about which the contents etc are unknown. Given that the defence could well be left to "guess" – how are they to surmount their onus or resist any claim that they are merely on a fishing expedition?

Further, the explanatory notes makes reference to: *"If the applicant does establish a legitimate forensic purpose, the court **may** issue an interim disclosure… .."*. [Emphasis added]. With respect, if a legitimate forensic purpose is indeed established, one would have thought that such should automatically trigger the issuance of an interim disclosure notice (i.e. be mandatory not discretionary).

As to the "notice" requirement – it is submitted that from a defence applicant perspective, service upon either the investigating officer (or "informant"); or a police prosecutor with carriage; or an officer of the DPP with carriage – should suffice.

Question 9. Does the "legitimate forensic purpose" test set an appropriate threshold test?

Our response: No.

According to the explanatory notes, "*unsupported assertions will not be sufficient"* to establish a legitimate forensic purpose. The corollary of which is that only "supported' assertions will suffice. This begs the question as to what constitutes a "supported" assertion? There will for example be many instances where highly relevant material will be in the hands of the police or the Crown – but about which the defence will have not the slightest idea. How then, to make a supported assertion in such instances? "*We'll disclose what we have to the court if you can prove that you already know that we have it!"*

Of great concern is the fact that the explanatory notes also makes reference to the proposed stance that a legitimate forensic purpose is not established merely because the applicant asserts, (without more):

- *The evidence relates to a matter that is a fact in issue in the proceedings;* (which could for example, be "consent");
- *The evidence may disclose a prior inconsistent statement of a witness in the proceedings* (see *R v Funderburk [1990] 1 WLR* where a prior inconsistent statement was considered relevant – albeit not involving a counselling scenario);
- *The evidence may relate to the credibility of the witness;* (see case example supra);
- *The evidence relates to the sexual activity of the alleged victim of a sexual offence with any person, **including** the person accused of the offence;* [Emphasis added].
- *The evidence may disclose that an alleged victim of a sexual offence has or had a mental disorder.*

Surely cogent evidence which for example demonstrates that a particular witness is likely to be highly unreliable – is evidence pertaining to a legitimate forensic purpose? Such also begs the question of: what does *"without more"* constitute?

The proposed parameters appear to be analogous to that of applying to a bank for a loan: *"we will lend you the money if you can prove you do not need the loan".*

Question 10. Is the formulation of the "public interest" test and the non-exhaustive list of factors the court must consider, appropriate?

Our response: No and No.

We feel that the quoted public interest test from the ACT is a far better balanced approach to such a test. For example, it might well be the case that there is a strong argument in support of the view that in a particular instance the disclosure of information would seriously undermine the counselling process and thus cause harm to the alleged victim – but notwithstanding such, the seriousness of the case to the accused, demands that it is none-the-less in the public interest that disclosure be made. The ACT test makes it clear that the right to a fair trial by an accused is the paramount consideration. Surely if any one of us had a loved one who stood so accused – we would be appalled if there was non disclosure of exculpatory material.

Further, as to the non-exhaustive list:

Whilst many of the examples cited in the explanatory notes are uncontroversial, we would take issue with the requirement (in the fifth dot point) that any probative value must be "substantial". We would suggest that the word "substantial" be deleted altogether.

Question 11. Are the proposed exemptions appropriately framed and adequate in their scope? Should there be specific exemptions or provision for other communications which may fall within the definition of a "protected confidence" (for example, for the purposes of section 4A of the *Criminal Law (Sexual Offences) Act 1978* or section 21A of the *Evidence Act*?

Our response: It is difficult to answer this question given our threshold position that that which is currently proposed to fall within the definition of "protected communications" is too widely couched to being with. On that basis, our response would have to be "No" and "Yes".

Question 12. Are the proposed amendments to the prosecution disclosure obligations in the *Criminal* Code appropriate? What special provision should be made to ensure the continuing safeguards of Guideline 25 of the Director's Guidelines?

Our response: No.

We are of the view that the proposed measures interfere with the discretion which should be afforded to the DPP in relation to appropriate disclosure. Whilst it is conceivable that some officers of the DPP itself might potentially be content to be relieved of such decisions – it is our respectful submission that it is inappropriate to so hamstring the DPP.

As to Guideline 25 – which in essence relates to the Crown only seeking to place reliance upon "original recollection" evidence; coupled with a duty to advise the defence of the fact that the witness has undergone hypnosis. It might simply be a case of making a specific exclusion (in terms of application) of the proposed changes in relation to such evidence.

Question 13. What ancillary orders can a court make to minimise harm?

Our response: We would agree with the proposals outlined in the explanatory notes. However, just to clarify: If the suggestion is that "documents" are to be limited to "inspection" only – (that is, no copies being provided to the defence), we would suggest that such would cause great difficulties from a logistical perspective (for example, cross-examining upon the document or the tendering of such).

Part 3 of the *Criminal Law (Sexual Offences) Act 1978,* already provides most of the safeguards in question.

Question 14. Ancillary measures to support the privilege

Our response: We would support the proposal for pro-forma materials etc.

We hope and trust that our submission (which of necessity has been somewhat rushed in the circumstances), is of assistance in relation to what is clearly a highly significant area of proposed law reform. We would be appreciative of an opportunity for further consultation post the related draft Bill in due course. Please do not hesitate to contact the author or our CEO should we be able to assist further.

Yours sincerely,

Gregory M. Shadbolt
Principal Legal Officer

CC: Ms Jane Flower – Acting Senior Legal Officer – Strategic Policy, JAG
via email: jane.flower@justice.qld.gov.au