Final grant report: Counsellors and Subpoenas in Family Law Issues Paper

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<th>Project title</th>
<th>Counsellors and Subpoenas in Family Law Issues Paper</th>
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<td>Grant recipient</td>
<td>Women’s Legal Service NSW</td>
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<td>Law and Justice Foundation awarded amount</td>
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**Description of the project**

Describe the project in just enough detail so that anyone can understand it. What was the aim of the project, who was the intended audience and what strategies did you implement to achieve the aim?

To write and disseminate an issues paper on the current state of law and practice around the issue of subpoenas in family law jurisdiction matters, how counsellors and other relevant professionals respond to subpoenas, what difficulties they experience, and what needs to be done to assist them.

**The project – what happened?**

How did the project come about?

The disclosure of personal records without notification or consent can be harmful to a person. In family violence proceedings, where the records relate to victims of sexual assault or other forms of abuse, disclosure may result in records being released to the alleged perpetrator. Impacts on victims include: heightened fears the records will be used against them in court; retribution concerns; and damage to the therapeutic relationship affecting the person’s ability to trust and seek help in the future.

In the course of the preparation of the 4th edition of the guide for counsellors on subpoenas and
the community education program to accompany it, we have become aware of two major emerging issues impacting on this area.

Firstly there have been significant recent reforms to the Family Law Act to take greater account of the need for protection from domestic and family violence, and secondly that these reforms have not been accompanied by the extension into the family law jurisdiction of a sexual assault communications privilege such as now applies in NSW criminal law.

The absence of adequate protections may act as a disincentive for people seeking help for emotional or physical harm before separation or before family dispute resolution or court proceedings are started. It could also be an obstacle to a person participating in family law proceedings or raising relevant issues before the court.

Counsellors and caseworkers whose records might be called upon, parties, their legal advisers and representatives of children in family law proceedings could all benefit from access to advice about their rights and options and ultimately to the benefit that might flow from improving the consistency and accessibility of the protection of confidential communications in family law matters.

Briefly set out the project stages and what happened in each stage.

Despite being unsuccessful for a larger grant for work in this area in a previous application to the Foundation, discussion with the Foundation’s Director identified the need to develop an issues paper on these matters. The issues paper would:

- assist in identifying the need for law or procedural reform;
- gather evidence of the effects of subpoenas on family law matters involving allegations of violence;
- assess the impact on victims of the outcomes of their matter; and/or their willingness to engage with therapeutic services.

We worked with our partners in Legal Aid NSW Sexual Assault Communications Privilege Service, our pro bono partners in this service, our colleagues from Domestic Violence NSW who provide court support for women in refuges who have family court matters, Rape and Domestic Violence Services Australia, our colleagues in Family Relationships Centres and other relevant family support agencies and therapeutic service providers.

We engaged a research assistant, conducted stakeholder interviews and produced a literature review.

We distributed an issues paper for feedback and comment.

We engaged with the Family Law Council and provided input to its inquiry into families with complex needs.
We published a report of our project findings which will be launched by Rosie Batty on 19 August 2016 and distributed widely to family law practitioners, report writers, and counsellors.

Now that the project has concluded, how did the implementation and/or the outcome differ from what was originally intended? Did anything surprise you? Were there any unintended outcomes?

The project took longer than we originally anticipated. Partly this was because as this was a previously unexplored area, we did not accurately predict the complexity of the field.

The Inquiry by the Family Law Council into families with complex needs both caused a further delay and provided a great opportunity to maximise the effectiveness of our work. This project enabled us to put a fully reasoned and researched submission to the most influential body in the family law jurisdiction. We have high hopes that this will make a positive influence on the Council’s decision about the approach to confidentiality of counselling records and the conditions of disclosure of sensitive information in family law proceedings.

Evaluation
What questions did you ask to evaluate whether you had achieved your aim?

- Examine the practices and consequences of information sharing;
- Highlight the difficulties that arise from a lack of consensus about which potential evidentiary material is confidential and inadmissible;
- Explore the unintended consequences of disclosure of sensitive material;
- Examine the competing public interests in obtaining relevant evidence, particularly the paramountcy of the best interests of the child, and preserving the confidentiality of the therapeutic relationship;
- Encourage the development of a consistent approach to the exercise of broad judicial discretion to provide equivalent protections regardless of the source of the sensitive material;
- Encourage input from a range of professions and stakeholders; and
- Energise the development of guidelines and training to assist the judiciary and legal practitioners to emphasise safety and to balance competing priorities when considering access to sensitive records.

What data did you gather to answer your questions?

The data we gathered was published in the report: Sense And Sensitivity: Family Law, Family Violence, And Confidentiality, published by Women’s Legal Service NSW, May 2016.
Did you achieve your aim? What did you find out?

We succeeded in drawing attention to inconsistencies and potential harms arising from the courts’ varying interpretations of the best interests of the child, the role of family dispute resolution and the impact of family and sexual violence on the presentation of parenting capacity.

We hope to continue to work with family practitioners to develop and promote a best practice model of the use of confidential records in family law proceedings.

Conclusion and recommendations

What is your conclusion?

A genuine commitment to improving responsiveness to victims of family violence must include preserving the integrity of therapeutic relationships. The detrimental impact of disclosure of confidences must not be ignored or put in the too hard basket. There must be a common understanding of what constitutes safe and appropriate information sharing amongst family violence service providers and in the family law context, with opportunity to access equivalent protections whenever sensitive material is sought as evidence.

Ideally accessing counselling or therapeutic records should be the last resort and only used when required in the best interests of the child, including urgency, or there is a relevant and significant fact in issue that cannot otherwise be proven.

At the very least, there is a need for clarity around how subpoenas can and will be used in the context of therapeutic relationships. At present there is great confusion amongst both clients and practitioners. If the family courts are to continue facilitating access to such sensitive material, then the means of access should at least be ‘both predictable and justifiable’, though the role of judicial discretion in family law matters is recognized. It is also acknowledged that best practice guides in and of themselves do not ensure best practice.

In summary the key concerns held by WLS NSW include:

- Recognising that there are limits to information sharing, it is not a panacea and will not solve systemic problems such as delays or inexperience in responding to family violence;
- The lack of consensus about and commitment to what constitutes good and safe information sharing, which must be based on family violence and trauma informed principles and aim to be consistent, minimally intrusive, proportionate, culturally appropriate and respectful of agency;
- The apparent lack of understanding about the significant variations in the FDR experience depending on the choice of FDR provider and the resulting inconsistency and inequity in the scope of the protection offered by sections 10H and 10J FLA, particularly with respect to intake;
• The inconsistency in the family law litigation treatment of sensitive records, such as the protections available for section 10B FLA family counselling records compared with the access to and use of other types of counselling records; McDonald (2013) 12. Breckenridge and Hamer (2014) 9, who also note Laing et al ‘...over-reliance on strict guidelines can sometimes lead to simplification of the complex and fluid nature of DFV service provision’

• The need for genuine commitment to preserving the confidentiality of sensitive records for reasons of safety, therapeutic integrity and the protection of victims from the misuse of court processes by perpetrators aiming to harm, intimidate and undermine their recovery and parenting capacity; and

Ensuring that victims of family violence have safe and equal access to all family law pathways, including greater emphasis on protections for victims when they are forced to come into contact with the court process.

What are your recommendations for improvements both for the intended audience of your project, and for the strategy you used to achieve your aim? What would you do differently next time?

**Information Sharing**
Proposal 1
Utilise victim centric practices that acknowledge that informed consent is the cornerstone of safe and appropriate exchange of information.

Proposal 2
Shift the focus from information sharing to efforts to improve responsiveness to disclosures of family violence and prevention.

**Therapeutic records**
Proposal 3
The addition of a new principle in 60B FLA that confidential therapeutic services are recognised as an important aspect of individual support and recovery and also as a means of building parenting capacity.

Proposal 4
Develop guidelines for self-represented litigants (and lawyers) on drafting affidavits about family violence, safety concerns and impact on parenting capacity to improve the quality of primary evidence of family violence, which could reduce the need to rely on third party material.

Proposal 5
Undertake further research into the impact of disclosure of sensitive information for specific groups, including Aboriginal and Torres Strait Islander people, culturally and linguistically diverse people, people identifying as LGBTIQ and people with disabilities.

Proposal 6
Develop guidelines and training to assist the judiciary and family law professionals to approach
the issue of access to therapeutic records with sensitivity and to encourage a shared responsibility for the safety of victims and their children.

**Subpoenas**  
Proposal 7  
Therapeutic records be subpoenaed and produced by following a guided, preferably prescribed, decision-making process to establish the necessity and importance of accessing these documents. The potential for further delay in proceedings is acknowledged, but in the absence of urgency the consequences of disclosure outweigh any delay.

Proposal 8  
The decision making process about access to therapeutic records, whether ideally contained in the court rules or in the form of guidelines like the Family Violence Best Practice Principles, might include the following:

- A presumption that there is always potential for a detrimental impact on the therapeutic relationship when sensitive records are accessed, particularly in a litigation context.
- Clarification of the type of sensitive records to be protected.
- Acknowledgement that parties can seek production of their own therapeutic records with restrictions on access by a perpetrator as required.
- A requirement to seek leave to issue a subpoena for therapeutic records, reversing the onus from parties and professionals who would typically object to the subpoena production to the party seeking access, including ICLs. Parties retain the right to object to production even if leave is granted to issue the subpoena.
- A standard that leave to issue a subpoena only be granted if the records appear to be relevant to a fact in issue and there is no less intrusive source of the evidence available or there are circumstances of urgency, which may need to be defined.
- If records about therapeutic interventions with children are sought, the court must consider whether the consent of the child must be obtained or if an additional protection is required, such as the records only being viewed by the judge.
- Acknowledgement that evidentiary rules will be relevant to the consideration of legitimate forensic purpose.
- A requirement for parties inspecting therapeutic records to sign an undertaking pursuant to 15A.12(2) as discussed in Sampson & Hartnett [2014] FCCA 99 at 19-20.

Proposal 9  

Proposal 10  
Establish a service, similar to the SACP Service, to provide advice and representation for individuals and services wishing to object to subpoenas of therapeutic records in family law matters.