KEEP COUNSELLING CONFIDENTIAL

THE PROBLEMS AND SOLUTIONS WITH THE DISCLOSURE OF COUNSELLING NOTES

Prepared by Rape Crisis England & Wales, the Centre for Women's Justice, and the End Violence Against Women coalition

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Endorsed by:

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Contents of this briefing

KEEP COUNSELLING CONFIDENTIAL 1

SUMMARY 1

THE WIDER CONTEXT 4

THE MAIN ISSUES 5

THE SOLUTION: A PRESUMPTION OF NON-DISCLOSURE 9

SUMMARY

1) Victims and survivors who have reported into the CJS are often put in an impossible position, forced to choose between seeking justice and seeking therapeutic support.

2) Current legislation that does not appropriately reflect the uniquely sensitive nature of counselling material, and iterations of guidance has not effectively addressed the widespread and inappropriate requests for counselling material.

3) In order to address this issue, VAWG experts are calling for legislative change for a new higher threshold for disclosure which is unique to counselling and therapy records.

4) Please support our call for an amendment to the Victims Bill to Keep Counselling Confidential, with a presumption of non-disclosure and requests for the disclosure of notes to be decided by a judge.

5) There is precedent for this change, drawing on existing legislation in NSW, Australia.

6) This ask is linked to a separate amendment on independent legal advice for victims and survivors of sexual violence and abuse.

Sexual violence and abuse are deeply traumatic for the victims and survivors subjected to it. For many, the impact of it can be wide-ranging and life-changing. Sexual violence and abuse are often a root cause of mental health problems, eating disorders, self-harm, and suicidality. It is common for the impact of sexual violence and abuse to effect family and personal relationships, their ability to work, and long-term educational attainment. For many victims and survivors, counselling and therapy is a vital means of working through trauma, supporting them to find routes to regaining control of their lives and improve their mental health and overall wellbeing.

Victims and survivors who have reported into the criminal justice system and are also receiving counselling (or have received counselling), face a very serious problem. The private and personal material contained in counselling records are being routinely requested by the police and Crown Prosecution Service, undermining confidentiality and jeopardising a safe therapeutic space. Some survivors therefore feel forced to choose between seeking justice and seeking therapeutic support. Some survivors feel coerced into consenting (an oxymoron) to hand over their notes, to prove they have nothing to hide, and because they have been told that their case will be dropped if the material isn't disclosed. We believe that no one should have to make this choice. Counselling notes should be kept confidential and the privacy and dignity of survivors should be enforced by mechanisms that secure their rights.

"HOW DID IT FEEL TO HAVE YOUR THERAPY NOTES MENTIONED IN A COURT ROOM?

A BLOW. A VIOLATION. AN ASSAULT. VERY PAINFUL AND LASTING. EMBARRASSED. ASHAMED. INTIMIDATED. UNSETTLED. HUMILIATED."

A survivor speaking about the experience of her therapy notes being disclosed in court.

In its latest Pre-Trial Therapy guidance, the CPS recognises that survivors have faced significant barriers in seeking therapy and justice at the same time.[1] Whilst the guidance acknowledges these barriers, an inherent tension remains: the guidance simultaneously recognises that survivors' access to therapy is vital, yet, in practice, counselling notes remain subject to disclosure. This dissuades many survivors from accessing therapy, and can lead to self-censoring in therapy.

[1] Crown Prosecution Service, 'Pre-Trial Therapy: Legal Guidance' [26 May 2022, effective from 25 July 2022]. Available from: https://www.cps.gov.uk/legal-guidance/pre-trial-therapy.

Yet many victims and survivors who have received or are receiving counselling and therapy waive their right to privacy in order to avoid appearing uncooperative, or looking as though they have something to hide. This is often a very difficult choice, made under pressure, where they are told the case simply cannot progress unless they "consent" to the disclosure of the material. The issue of excessive requests for personal records, including counselling notes, was brought to the attention of the Information Commissioner, who in May 2022, produced a report on personal data processing in Rape And Serious Sexual Offences cases. The Commissioner recommended that the 'invalid' use of consent should be stopped, as it is unlikely to be given freely and specifically.

Concerningly, the CPS responded to the Information Commissioner's opinion[2] by revising guidelines and referring to "agreement" rather than "consent." However, doing so makes no substantive difference in practice. Survivors will continue to face pressure to provide their "agreement," and to comply with unreasonable and excessive data requests. It is now widely accepted that RASSO investigations have focused too much on investigating victim credibility, and so in the absence of independent legal advice for victims of rape and sexual violence engaged in the criminal justice system, it is difficult to imagine how truly informed and non-coerced consent to therapy records would be given. In our view the decision should be made by a judge and not on the basis of individual 'consent.'[3]

Given the importance of counselling and therapy for sexual violence and abuse survivors, including the overwhelming majority who never have their cases charged, there is a clear public interest in securing access to this means of recovery. This means that we need a new higher threshold for disclosure which is unique to counselling and therapy records – which also reflects the unique and personal nature of these types of records: counselling is about exploring feelings and not facts, and records are therefore very rarely relevant to a case.

This briefing presents a solution to the issues with the current guidance and practice regarding counselling records. We recommend a way forward that deals with the specificity to the criminal justice system in England and Wales, but draws on the law in New South Wales, Australia, where a presumption of non-disclosure regarding the use of counselling notes within sexual offences cases works effectively. Requests for counselling notes can be made and are decided upon by a judge, at a higher legal threshold than we currently have in the UK. This protects survivors' rights to privacy whilst also safeguarding defendants' rights to a fair trial, and achieves the optimum balance of these rights. In this briefing, we advocate for the adoption of a presumption of non-disclosure for therapeutic records in the Victims and Prisoners Bill, based on the success and efficacy of the New South Wales model, which has been in place since 1997.

[2] "Information Commissioner's Opinion: Who's Under Investigation?", 31 May 2022
[3] We recommend you also consider the VAWG sector joint briefing on independent legal advice.

THE WIDER CONTEXT

Rape and sexual abuse are treated with exceptionalism within the justice system. In no other crime type does the victim have such vast and personal amounts of data scrutinised in a trawl through material, with a view to finding any content that may discredit their character. We know that counselling notes and multiple other materials, such as GP, school, and social care records, continue to be requested overwhelmingly in rape and sexual abuse cases, compared to every other type of criminal case. We believe that this is due, in part, to systemic misogyny within the justice system, deeply rooted in the persistent rape myth that women and girls lie about being raped or sexually abused. 83% of rape survivors never tell the police,[4] because they think it will be humiliating, embarrassing, and that the police will not support them.

It is important to recognise that marginalised groups, especially those with protected characteristics, including sex, race, sexual orientation, disability, gender reassignment, and religion or belief, experience multiple intersecting forms of oppression and disadvantage, linked to structural inequalities and discriminatory practices. In particular, institutional misogyny and racism within police forces are barriers that drive fewer Black and Minoritised women to report sexual violence to the police.[5] This is despite the fact that according to figures from the most recent Crime Survey for England and Wales, 'those in the Black or Black British and Mixed ethnic groups were significantly more likely than those in the White, Asian or Other ethnic groups to experience sexual assault within the last year'.[6] It is also important to note that access to justice for migrant survivors is severely limited, due to factors including communication barriers and the absence of safe pathways to report, given data sharing agreements between police and immigration enforcement.[7]

Women and girls facing multiple disadvantage, may feel additionally concerned about their private therapeutic information being handed over to the police. Cultures of prejudice and discrimination

[4] Rape Crisis England & Wales, 'Statistics about Sexual Violence and Abuse'. Available from: https://rapecrisis.org.uk/get-informed/statistics-sexual-violence/.

[5] Centre for Women's Justice, End Violence Against Women Coalition, Imkaan, & Rape Crisis England & Wales, *The Decriminalisation of Rape: Why the Justice System is Failing Rape Survivors and What Needs to Change* [November 2020]. Available from: https://rcew.fra1.cdn.digitaloceanspaces.com/media/documents/c-decriminalisation-of-rape-report-cwj-evaw-imkaan-rcew-nov-2020.pdf. See further: Thiara, R. & Roy, S. 2020. *Reclaiming Voice: Minoritised Women and Sexual Violence Key Findings* [Imkaan, March 2020]. Available from: https://829ef90d-0745-49b2-b404-cbea85f15fda.filesusr.com/ugd/f98049_a0f11db6395a48fbbac0e40da899dcb8.pdf.

[6] Office for National Statistics, 'Sexual Offences Victim Characteristics, England and Wales: Year Ending March 2020', Section 5 [March 2021]. Available from: https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/sexualoffencesvictimcharacteristicsenglandandwales/march2020#ethnicity.

[7] We support Step Up Migrant Women's call for the establishment of a firewall between police and immigration enforcement.

against marginalised survivors within police forces, as recently outlined in the Baroness Casey report, are likely to influence how personal feelings contained in counselling records are used and presented within an investigation.

The current situation concerning counselling records is just one part of wider failings, where sexual violence and abuse crimes have had such low charge rates (approximately 3% at the time of writing) that it has been argued that these crime types have been effectively decriminalised in England and Wales.[8] We know that the persistence of rape myths within the legal system, as well as the low charging, prosecution, and conviction rates for rape, mean that many survivors never seek criminal justice. We believe the current practices of obtaining counselling records adds to this.

THE MAIN ISSUES

The issues:

1. **A fundamental misunderstanding of counselling and therapy**
2. **Undermining the counselling and therapeutic profession**
3. **Current guidance is not working**
4. **Coerced consent – an oxymoron**
5. **Waste of police resource**

A fundamental misunderstanding of counselling and therapy

The purpose of therapy is to explore feelings, not to investigate facts. The disclosure of records about deeply sensitive and personal feelings related to sexual trauma are very rarely relevant to criminal investigations and proceedings. There is an inherent contradiction between encouraging survivors to access safe and confidential therapy for trauma whilst the records of that therapy are routinely requested by police in practice, which can be harmful and distressing for survivors. The fact that records of feelings surrounding rape and sexual abuse trauma are routinely requested for disclosure puts survivors in the untenable position of having to censor what they share in their personal healing journey. We know that restricting survivors' support in this way can significantly prolong their trauma.

[8] Centre for Women's Justice, End Violence Against Women Coalition, Imkaan, & Rape Crisis England & Wales (n 8).

Undermining the counsellor and therapeutic profession

Whilst the CPS does provide some guidance for therapists delivering Pre-Trial Therapy, in practice therapists are being left to make decisions that jeopardise the confidential, trusting, and private relationship with survivors that is essential to their work.[9] This undermines the fundamental ethical code and professional contract on which therapeutic support is based. The fact that therapeutic notes are disclosable also places a considerable burden on counsellors and therapists: they must keep notes that will not be misconstrued by the CPS and damage a trial. This conflict of interest results in therapists being forced to work in a way that is ethically and professionally compromising, where they must limit survivors' choices and prioritise criminal justice outcomes over the wellbeing, healing, and recovery of survivors.

"IT SEEMS TO GO AGAINST THE FOUNDATION OF THERAPY - THAT IT'S AN OPEN AND NON-JUDGEMENTAL SPACE - WHEN YOUR NOTES FROM THERAPY COULD BE TAKEN LITERALLY TO JUDGE YOU."

Lucy, Counsellor at Nottinghamshire Sexual Violence Support Services.

Current guidance is not working

We know that there is a wide variation and inconsistent implementation of the guidance across police forces and CPS areas; the current guidance leaves police officers with wide discretion and little support in terms of implementation. We are concerned that, in practice, large amounts of survivors' sensitive, personal, and private material will continue to be requested by police.

In terms of application of the law, whilst a defendant's right to a fair trial (Art. 6, ECHR) is recognised and enforced, the right of a survivor to privacy (Art. 8, ECHR)[10] is often marginalised. In practice, private and confidential counselling notes are routinely requested by police and prosecutors who are unfamiliar with their duty to consistently comply with legislative obligations under the Human Rights

[9] Crown Prosecution Service, 'Pre-Trial Therapy – Accompanying Notes for Therapists: Legal Guidance' [26 May 2022]. Available from: https://www.cps.gov.uk/legal-guidance/pre-trial-therapy-accompanying-note-therapists.

[10] Council of Europe, European Convention on Human Rights, Articles 6 and 8. Available from: https://www.echr.coe.int/documents/convention_eng.pdf.

Act 1998[11] and the Data Protection Act 2018.[12] The Data Protection Act requires requests to be strictly necessary and proportionate. We need a law that correctly balances Article 6 and Article 8 rights, which is the maximum privacy possible, whilst still preserving fair trial rights.

Despite the legal tests that are set out in the guidance, frontline Rape Crisis workers routinely witness deeply personal records being requested and obtained by police, passed on to investigating officers, and scrutinised by the police and the CPS. Where the material requested is thought to undermine the prosecution or assist the defence, these notes will be disclosed to defence counsel and to the person who has carried out the sexual violence and abuse. As a result, survivors are often told they cannot or should not access therapeutic support whilst they have an open case; we are aware of police officers and organisations discouraging survivors from accessing pre-trial therapy, as well as some NHS mental health services. This leads to some survivors feeling forced to choose between seeking justice and seeking therapeutic support. A recent letter sent to the CPS from a coalition of leading health organisations, including the British Psychological Society, the British Association for Counselling and Psychotherapy, and the UK Council for Psychotherapy, stresses how the test of relevancy allows for the unnecessary and potentially "devastating" use of survivors' private health information.[13] we believe that the current guidance will continue to prevent survivors accessing both justice and therapy.

"I HAD A COMPLETELY SUPPORTIVE VICTIM, AN ABSOLUTELY VIABLE INVESTIGATION, WAS SENDING IT TO THE CPS AND THEN ALL OF A SUDDEN THEY DECIDED THAT THEY WANTED COUNSELLING RECORDS BECAUSE IN THE VICTIM'S ABE [INTERVIEW] SHE SAID THAT SHE'S RECEIVED COUNSELLING FOR A COMPLETELY UNRELATED MATTER TO WHAT WAS BEING REPORTED AND CPS WOULD NOT DROP THE FACT THAT THEY NEEDED TO SEE SIGHT OF THOSE COUNSELLING RECORDS

[11] Available from: https://www.legislation.gov.uk/ukpga/1998/42/contents.
[12] Available from: https://www.legislation.gov.uk/ukpga/2018/12/contents/enacted. For further details regarding the obligations of state and criminal justice agencies under both the Human Rights Act and the Data Protection Act, see Information Commissioner's Office, 'Who's Under Investigation? The Processing of Victims' Personal Data in Rape and Serious Sexual Offence Investigations' [Information Commissioner's Opinion, 31 May 2022] at 20-33. Available from: https://ico.org.uk/media/about-the-ico/documents/4020539/commissioners-opinion-whos-under-investigation-20220531.pdf.
[13] British Psychological Society, 'Major Health Organisations Warn CPS Guidance that Allows Rape Victims' Private Therapy Notes to be Accessed in Court is 'Damaging and Dangerous' [5 August 2022]. Available from: https://www.bps.org.uk/news/major-health-organisations-warn-cps-guidance-allows-rape-victims-private-therapy-notes-be; British Association for Counselling and Psychotherapy, 'Call for CPS to Reconsider Pre-Trial Therapy Guidance' [8 August 2022]. Available from: https://www.bacp.co.uk/news/news-from-bacp/2022/5-august-call-for-cps-to-reconsider-pre-trial-therapy-guidance/.

OTHERWISE THEY WOULD NOT CHARGE, WENT TO THE VICTIM TO SAY THIS IS WHAT THE CPS HAVE SAID EVEN THOUGH IT'S GOT NO BEARING ON YOUR ACTUAL INVESTIGATION SHE SAID I'M NOT SHARING, I'M NOT EXPOSING MY CHILDHOOD LIFE AND MY ISSUES WITH ANYBODY ELSE, THAT'S PRIVATE AND THE CPS THEN DROPPED THE CASE."

Police investigator participant, Review Into the Criminal Justice System Response to Adult Rape and Serious Sexual Offences Across England and Wales Research Report (Home Office, Ministry Of Justice, 2021). [14] This quote is an example of how prosecutors do not follow CPS guidance; this was not a lawful request.

Coerced consent – an oxymoron

Our current disclosure system relies on 'consent' by the survivor to having her therapy records disclosed to the police, and potentially to the CPS, and the defence. However, as the Information Commissioner has explained[15] in a detailed opinion, it is simply not possible for survivors to give true 'consent' under the Data Protection Act in this situation. This is because for true 'consent' a person must be free to decline consent without suffering a detriment. A rape survivor who declines consent always suffers a detriment, even when the request that was made was not a lawful request because it was not a reasonable line of enquiry. When a survivor declines to grant access to her therapy records this immediately creates the impression that she has 'something to hide', which creates a detriment. Furthermore, survivors are often told that if they refuse to consent this will result in their cases being closed and no charge being brought. Even in those rare cases that do go to trial, a survivor can be cross-examined by the defence barrister accusing her of refusing consent because she has 'something to hide' which can influence the jury against her. Many, if not most, survivors are so aware of the negative consequences if they decline consent, that they prefer to give consent, and to be seen to be co-operating with the police at all costs, even when they have received legal advice that the request made was not a reasonable line of enquiry. The current system puts survivors (and also therapists) between a rock and a hard place and cannot deliver on fundamental privacy rights.

[14] George, R. & Ferguson, S. 'Review into the Criminal Justice System Response to Adult Rape and Serious Sexual Offences Across England and Wales: Research Report' [HM Government, June 2021]. Available from: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/994817/rape-review-research-report.pdf.

[15] "Information Commissioner's Opinion: Who's Under Investigation?", 31 May 2022

Waste of police resource

We are concerned that the practice of routine requests for counselling or therapeutic notes further strains and wastes police forces' already limited time and scarce resources. We believe that the current CPS guidance will continue to make timely and efficient police work difficult, leaving survivors in limbo, sometimes for years. Disproportionate requests cause delays to investigations, regardless of whether or not they are prosecuted. We know that for many survivors, the long delays within the criminal justice system prolong stress and trauma, and is major factor in their decision to withdraw from the process.

THE SOLUTION: A PRESUMPTION OF NON-DISCLOSURE

The solutions:

1. **a system that does not unfairly put survivors in a situation where they either have to consent to share counselling and therapy records or suffer a detriment**
2. **a system with a higher threshold to protect privacy whilst only allowing through those rare cases where there really would be a threat to fair trial rights**
3. **a system where every request has to be approved by a judge to ensure the law is actually implemented and create clear caselaw and consistency**

A solution to 'coerced consent'

We believe that no one should have to choose between seeking criminal justice and seeking specialist, trauma informed therapy. In other jurisdictions with adversarial legal systems similar to that of England and Wales, survivors' ability to seek both justice and therapy is afforded greater protection, at the same time as duly safeguarding the right to a fair trial. One such jurisdiction is Australia.

New South Wales, was the first Australian state to introduce a law protecting the confidentiality of survivors' counselling records, under the Evidence Amendment (Confidential Communications) Act 1997.[16] It has been operating successfully for over 20 years, within a criminal justice system that is very similar to that of the UK. In NSW, the legal threshold for obtaining counselling and therapy

[16] New South Wales, Evidence Amendment (Confidential Communications) Act 1997, No. 122. Available from: https://legislation.nsw.gov.au/view/pdf/asmade/act-1997-122.

records is "substantial probative value taking into account the public interest in preserving confidentiality".

This higher threshold has not resulted in miscarriages of justice – over the last twenty years there have been approximately 20 appeals to the Court of Criminal Appeal – none of which resulted in the overturning of a conviction. It is clear from this example that it is indeed possible to preserve defendants' right to a fair trial alongside a more appropriately restrictive arrangement for disclosure of therapy records.

Today, there are varying models of legal protection concerning survivors' counselling records across Australia[17] and in some US states. In Tasmania, the protection of counselling notes as confidential is absolute; this is also the case in Kentucky. In other Australian states, legal protection takes the form of a privilege, whereby a survivor can be granted standing with the court's leave to assert or waive the privilege at court.[18] We think the NSW model takes the most nuanced and balanced approach to the issue and will work effectively within the context here.

Balancing Rights

In New South Wales, a presumption of non-disclosure operates by law under the sexual assault communications privilege.[19] This strikes a "middle ground" between balancing survivors' and defendants' rights, where confidential counselling notes may only be disclosed in a criminal proceeding if the information is deemed to be of substantial probative value, and the public interest in disclosure "substantially outweighs" that of non-disclosure.[20] Importantly, the legal test used in the New South Wales model safeguards both the right to privacy and the right to a fair trial; to access therapeutic records an application is made to a court for leave to issue a subpoena, where a party believes the records have **substantial probative value**.

Under the New South Wales model, a judge is tasked with determining whether counselling records should be disclosed by applying a strict public interest test, comprising of a set of six factors, which include the need to ensure the continued efficacy of the confidential therapeutic relationship.[21] This ensures that the release of confidential therapeutic information is of 'crucial evidential value', which

[17] Jillard, Loughman, & MacDonald (n 21).
[18] Ibid, see in particular 254.
[19] New South Wales, Criminal Procedure Act 1986, No. 209, Division 2, S. 295. Available from: https://legislation.nsw.gov.au/view/html/inforce/2022-06-01/act-1986-209/ch.6-pt.5-div.2.
[20] Legal Aid New South Wales, 'Subpoena Survival Guide'. Available from: https://www.legalaid.nsw.gov.au/publications/factsheets-and-resources/subpoena-survival-guide/sexual-assault-communications-privilege-sacp.
[21] Ibid; Jillard, Loughman, & MacDonald (n 21) at 257.

is determined by a court of law.[22] Additionally, a court can consider a 'confidential harm statement', detailing the harm a survivor is likely to experience if their records are disclosed or used.[23] These statements mean that judges are made aware of "highly sensitive information in the documents", such as a history of childhood sexual abuse, relationship difficulties, pregnancy terminations, recent episodes of self-harm, or suicidal ideation.[24] Crucially, in New South Wales, a survivor has the right to attend court and put forward the arguments in her favour when a judge decides whether to give an order for disclosure, and be legally represented to do so. This means survivors have an automatic right to argue that their counselling records do not meet the threshold for disclosure.[25]

In this system, there are specialist lawyers (independent legal advocates) with the relevant expertise able to advise and represent a survivor, as well as guide the court on how the law operates and ensure the survivor's right to privacy is adequately safeguarded.[26] Lawyers are available to represent all survivors directly as part of a publicly-funded scheme.[27] This commitment to providing legal advice and representation for survivors ensures an understanding and awareness of their legal rights and a means to protects those rights in practice.[28] These mechanisms stand in stark contrast to the current absence of independent legal advice or representation for survivors in England & Wales, where survivors lack access to legal advocates to advise on the suitability of requests for records and the potential impact of agreeing to such requests. Without this survivors' rights are hard to enforce.

Given the success of the New South Wales model in protecting both the right to privacy and the right to a fair trial, we are calling for a clause in the Victims and Prisoners Bill that would adopt a presumption of non-disclosure regarding therapy notes in England and Wales with the same threshold as in New South Wales. This would mean that therapy notes would not be the subject of disclosure, except in very exceptional circumstances (including when a survivor wishes for their notes to be used).

Proper process: oversight of judge

Under the New South Wales model applications for access to therapy records are made directly to the court, and a judge considers whether the basis for the request meets the legal threshold of "substantive probative value". In our own system, requiring requests to be determined at court will

[22] Legal Aid New South Wales, 'Subpoena Survival Guide' (n 26).
[23] Ibid.
[24] Ibid.
[25] Jillard, Loughman, & MacDonald (n 26) at 257.
[26] Legal Aid New South Wales, 'Sexual Assault Communications Privilege Service'. Available from: https://www.legalaid.nsw.gov.au/what-we-do/civil-law/sexual-assault-communications-privilege-service.
[27] Legal Aid New South Wales, 'Subpoena Survival Guide' (n 26).
[28] Jillard, Loughman, & MacDonald (n 21).

ensure that the law is in fact applied correctly, create consistency and provide guidance for police and prosecutors. It will remove the highly problematic practice that exists, whereby the police can obtain therapy records on the basis of survivors' 'consent'.

It is also essential to have a judge make the decision, to avoid a situation where therapists are faced with having to decide whether to disclose records against their client's wishes. That would put therapists in an impossible position, destroy the relationship of trust with their client and harm the recovery process. Therapists have their own data protection duties to their clients so they can't be expected to hand over their records voluntarily without a court order.

In addition, we are calling for the provision of independent legal advice for all survivors of sexual violence and abuse. Independent legal advice must be provided by qualified and experienced lawyers, to ensure survivors' Article 8 ECHR rights are upheld, which are being breached by current practice around routine access to therapy records.

There is a separate amendment on independent legal advice for rape survivors in the Victims and Prisoners Bill, accompanied by a separate briefing, however they are necessarily bound together. The experience in New South Wales shows us that it was only after 2010 when the law was amended to include independent legal advice, that the system began to work effectively.