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Abstract | This Australian-first study explores the use of sexual violence victims' private records in criminal prosecutions and how independent legal representation (ILR)—a dedicated lawyer for victims—can protect victims' private records. We draw on a national survey of 145 sexual violence victims who have experienced a criminal prosecution process, interviews and a focus group with 24 practitioners and an analysis of 14 pre-trial transcripts in court cases where victims' counselling records were sought. Together, these findings provide insight into how victims' private records are used in court, the effects this has on victims and why participants believe ILR is needed to enforce protections of victims' private records.

How independent legal representation can protect sexual assault victims' private records in court

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Introduction

The experiences of sexual violence victims in the criminal prosecution process were the subject of the Australian Law Reform Commission's (2024) inquiry into Justice Responses to Sexual Violence. A victim's engagement with the criminal prosecution process often results in further harm to them (Iliadis 2019). The adversarial criminal prosecution process in Australia upholds the due process rights and protections of accused people in relation to the power of the state, which prosecutes in the public interest (Iliadis 2020). In this context, victims are assigned the role of complainants or witnesses to proceedings, which can expose them to rigorous questioning, often by defence counsel, to test the veracity of their claims. Such questioning frequently draws on victims' private records, such as those documenting their prior sexual experiences and medical or counselling notes, in an attempt to discredit their testimony and character (Iliadis 2020).



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Legislative and practice shifts now enable courts to restrict questions that can be asked of sexual assault victims relating to their prior sexual experiences (see, for example, *Criminal Procedure Act 2009* (Vic) ss 341–342) or medical, counselling and therapeutic records (see *Evidence (Miscellaneous Provisions) Act 1958* (Vic) s 32C). Courts also hold pre-trial hearings to determine whether and how victims can be questioned in criminal proceedings. In pre-trial hearings, a party (defence or prosecution) can apply to the court for leave (permission) to access victims' private records, such as counselling notes, that are otherwise protected. Despite legislative protections, victims continue to be exposed to intrusive questioning about their private information (Iliadis 2019). Some states, such as Queensland and New South Wales, provide independent legal representation (ILR) for sexual assault victims to enforce protections of their private records in court, such as counselling and therapeutic records. ILR means victims have a lawyer dedicated to representing their interests.

To date, however, no study in Australia has comprehensively explored the access to and use of victims' private records in criminal prosecutions, including the type of information that is sought, why and how it is used, the impacts this has on victims and how victims' protections can be better enforced, including through ILR. Responding to this knowledge gap, this paper draws on a mixed-methods research design involving a nationwide survey of 145 victims of sexual violence, interviews and a focus group with 24 practitioners working in the sexual violence sector and an analysis of 14 pre-trial transcripts of matters where victims' counselling communications were requested in court.

Protecting victims' private records

Proposals for reform have centred on the need to better protect sexual assault victims from the harmful impacts of adversarial court processes and cross-examination in particular. While cross-examination 'has long been considered an "iconic" feature of adversarial criminal proceedings used to test oral evidence' (Jackson et al. 2024: 5), concerns prevail over whether it is a viable and safe way to elicit evidence from victims, especially when defence tactics draw on rape myths and stereotypes (see also Roberts 2022).

All Australian states and territories have introduced legislative protections to shield victims from aggressive and improper questioning relating to their prior sexual experiences or reputation, and to safeguard their medical, counselling and therapeutic records. New South Wales and Queensland have also implemented measures to further enforce protections of victims' counselling and therapeutic records. In New South Wales, the Sexual Assault Communications Privilege is a qualified privilege over a wide range of counselling and therapeutic records that relate to a sexual assault victim. The victim whose records are subject to the privilege is assigned an independent legal representative to enforce the protection.

In operation since 2011, the role of the ILR is to prevent or restrict the disclosure of victims' counselling and therapeutic records. The SACP legislation, as outlined in ss 295–306 of the *Criminal Procedure Act 1986* (NSW), is also applicable to other witnesses and accused people in a criminal proceeding.

In Queensland, ILR was introduced in 2017 via the sexual assault counselling privilege to protect victims' counselling communications. ILR is provided to counselled people, such as victims, in criminal proceedings where a party has applied for leave to subpoena the victim's protected counselling notes or to disclose material obtained under a subpoena (Division 2A of the *Evidence Act 1977* (Qld)).

Pilots to trial ILR, funded by the federal government, are also currently underway in the Australian Capital Territory, Western Australia and Victoria. These pilot programs offer legal advice and representation where applications have been made to the court for disclosure of victims' protected confidences, such as counselling and therapeutic records.

The benefits of ILR for sexual assault victims in criminal proceedings are well documented. ILR can help to enforce protections of victims' private records and act as an interpreter of the law and legal process for a victim whose private records have been requested (Iliadis 2019). Victims can also feel that they have more control over their records because the ILR can challenge applications to access them, and the myths and stereotypes underpinning these applications (Iliadis 2019). Through ILR, victims are represented in a system where they otherwise lack an independent voice.

Methodology

This paper presents the findings from a project examining the use of victims' private records in criminal prosecution processes and whether and how ILR can help to protect victims' private records. The results were analysed with reference to the frameworks of procedural fairness and feminist legal theory. Ethical approval was received from Deakin University's Human Research Ethics Committee (#2023-200). Three phases of data were triangulated and a mixed-methods research design was applied. Phase 1 involved a national survey of sexual assault victims ($n=145$). Phase 2 involved semi-structured interviews and a focus group with 24 practitioners supporting victims of sexual violence. Phase 3 included an analysis of 14 pre-trial transcripts of cases where sexual assault victims' counselling, medical and therapeutic records were sought. In this paper, we address the following research questions:

- How do problems with access to and use of sexual assault victims' private records arise in criminal prosecution processes?
- Can ILR help to enforce existing protections of sexual assault victims' private records?

Phase 1

Victim participants were recruited via X and LinkedIn. Qualtrics was used for the online survey, which was open from 19 February to 10 April 2024. It took participants approximately 16 minutes to complete. Only responses that were at least 50 percent complete were retained. Out of 231 people who started the survey, 145 completed at least 50 percent of the questions and their responses were included in the final dataset. The sociodemographic characteristics of the survey sample of victims is outlined in Table 1 below.

Table 1: Sociodemographic characteristics of participants (n=145)				
Characteristic	Range	Mean (SD)	n	%
Age	18–70	35 (11)	145	
Sex				
Female			139	96
Male			6	4
Gender				
Woman or female			138	95
Man or male			5	3
I use a different term			1	1
Non-binary			1	1
Disability				
No			105	73
Yes			31	22
Prefer not to say			8	6
Chronic illness				
No			89	62
Yes			45	31
Prefer not to say			9	6
State or territory				
New South Wales			53	37
Victoria			40	28
Queensland			22	15
Western Australia			9	6
Australian Capital Territory			9	6
South Australia			6	4
Tasmania			4	3
Northern Territory			2	1

Characteristic	Range	Mean (<i>SD</i>)	<i>n</i>	%
Indigenous status				
No			123	85
Yes, Aboriginal			6	4
Yes, Torres Strait Islander			6	4
Prefer not to say			6	4
Yes, both Aboriginal and Torres Strait Islander			2	1
Unsure			2	1
Cultural background^a				
Australian (excluding Indigenous Australian)			116	80
Anglo-European			37	26
Indigenous Australian			10	7
New Zealander and Pacific Islander			7	5
Other European			6	4
Other			6	4
Born in Australia			136	94

a: Respondents could identify with multiple cultural backgrounds

Note: Percentages may not total 100 due to rounding

Participation was limited to victims whose case proceeded to a criminal prosecution. Participation was anonymous and participants could withdraw at any time ahead of submitting the survey. Four team members reviewed and tested the survey questionnaire. The survey included closed- and open-ended questions relating to whether and how victims' private records were sought, disclosed and/or questioned in court; how victims felt about it; and their level of support for ILR to enforce protections of their private records.

The data were analysed using descriptive methods, calculating means and standard deviations (*SD*) to summarise participants' demographic characteristics and survey responses. Microsoft Excel was used to code the open-ended responses before they were analysed thematically using Braun and Clarke's (2022) approach. Themes were derived via a six-step process: familiarisation, coding, generating themes, reviewing themes, defining and naming themes and reporting. Three researchers coded the themes to mitigate the influence of researcher subjectivity in interpreting the findings.

Phase 2

Participants in phase 2 were required to be 18 years or over and a practitioner, stakeholder, counsellor supporting or lawyer representing victims of sexual violence in Queensland, New South Wales or Victoria. Prospective participants were invited to participate via email after the researchers received organisational consent from the participants' workplaces. A plain language statement and consent form was then provided to prospective participants. With participants' consent, interviews were audio recorded and transcribed verbatim. Participants were assigned pseudonyms to ensure their anonymity. Pseudonyms were assigned according to the location of participants; for example, interview participants in Victoria were referred to as V1, V2, V3 etc. Focus group participants were labelled as F1, F2, F3 etc. Twenty-four practitioners participated in phase 2 (see Table 2).

Practitioner pseudonym	Practitioner experience	State/territory	Interview	Focus group
A1	Executive Officer and Lawyer	Australia-wide	✓	
N1	Principal Lawyer	New South Wales	✓	
N2	Policy Specialist and SACP Lawyer	New South Wales	✓	
N3	Victim Support Service Executive Officer	New South Wales	✓	
N4	SACP Lawyer	New South Wales	✓	
N5	SACP Lawyer	New South Wales	✓	
V1	Executive Officer and Lawyer	Victoria	✓	
V2	SACP Lawyer	Victoria	✓	
V3	SACP Lawyer	Victoria	✓	
V4	Victim Support Service Officer	Victoria	✓	
V5	Lawyer	Victoria	✓	
Q1	Solicitor Advocate and (former) SACP Lawyer	Queensland	✓	
Q2	SACP Lawyer	Queensland	✓	
Q3	Executive Officer and Lawyer	Queensland	✓	
Q4	Principal Lawyer	Queensland	✓	
Q5	SACP Lawyer	Queensland	✓	
Q6	Victim Support Service Counsellor	Queensland	✓	
Q7	Barrister	Queensland	✓	
F1	Victim Support Service Executive Officer	Queensland		✓
F2	Victim Support Service Officer	Queensland		✓
F3	Victim Support Service Counsellor	Queensland		✓
F4	Victim Support Service Executive Officer	Queensland		✓
F5	Victim Support Service Executive Officer	Queensland		✓
F6	Victim Support Service Counsellor	Queensland		✓

The interviews and the focus group lasted between 45 and 60 minutes each and took place online between December 2023 and June 2024. The researchers conducted the interviews with sensitivity and care, giving participants the opportunity to learn more about the project and their rights as a participant. Key themes explored related to:

- problems arising from the access to and use of victims' private records in criminal prosecutions;
- the contexts and rationale for applications to access victims' private records;
- the role of ILR in safeguarding victims' private records; and
- the merits and impacts of ILR for sexual assault victims.

We applied King, Horrocks and Brooks's (2019) thematic analysis approach, which is suitable for analysing interview data. King, Horrocks and Brooks's (2019) approach involves three coding steps. This first is descriptive coding, followed by interpretative coding, before overarching themes were developed. Three researchers independently coded the transcripts to strengthen the validity of our analyses.

Phase 3

Fourteen pre-trial (preliminary hearing) transcripts relating to sexual offences were analysed from Queensland ($n=12$) and New South Wales ($n=2$) to explore:

- the reasons for applications to access and/or question victims about their counselling, medical and therapeutic records;
- the basis on which such applications were objected to;
- the outcome of the application (that is, whether the evidence was admitted, excluded or partially admitted); and
- the role that ILR played in responding to applications. All transcripts related to cases involving ILR for the victim.

The transcripts selected were publicly available and spanned the years 2019 to 2024. These were accessed via the online Supreme Court Library Queensland, New South Wales Caselaw and BarNet Jade—a website where legal decisions and transcripts are free for the public to view. We indicated that we only wanted to view District Court pre-trial hearing applications, which is what an application to access protected counselling records is. We randomly selected transcripts from a sample of publicly available cases suggested to us by two solicitors—one from Queensland and one from New South Wales—who have experience providing ILR to victims under the respective SACP schemes. A waiver of consent to analyse the transcripts was obtained from Deakin University's Human Research Ethics Committee. We have also de-identified the transcript names (ie Case 1 etc). However, as the transcripts are publicly accessible, it is possible that some of the direct quotations will lead to identification of a case.

A thematic analysis enabled the researchers to identify the purpose and rationale for applications to access victims' private records, including any cultural influences and understandings informing applications. We applied a hybrid deductive and inductive thematic analysis approach, guided by feminist legal theory in reading and interpreting the transcripts, while simultaneously making space for the data to reveal key themes.

We then applied a discourse analysis. In doing so, we were guided by our overarching research questions and aims in analysing the transcripts, before categorising and interpreting the textual data to derive meanings from the discourse cited within the transcripts. This approach revealed how power is created and embedded within the language of courtrooms, resulting in the (re)production of rape myths and stereotypes that are known to characterise experiences of sexual violence (van Hulst et al. 2024).

Results

Disclosure of victims' private records in court

Of the 88 participants who responded to the survey question about the use of their private information in court, 68 (77%) said they were questioned about their private information, but only 38 participants (43%) had been cautioned that this might happen (see Table 3).

Table 3: Victims' experiences of private information being used in court (n=88)		
	n	%
Was questioned in court about private information		
Yes	68	77
No	16	18
Not sure/Do not know	4	5
Was told private information might be requested in court		
Yes	38	43
No	30	34
Not sure/Do not remember	20	23

Note: Not all participants responded to each question. Percentages are calculated based on the number of responses for each question

Types of private information sought from victims

Table 4 shows what private information was requested from victims in court. Forty-seven percent of participants had at least one type of private information requested. On average, 2.58 different types of private information were requested from each participant ($SD=1.14$).

Table 4: Types of private information sought from victims in court		
Information	n	%
Prior sexual history	46	32
Digital communications	43	30
Medical/counselling/therapeutic	41	28
Employment/education	28	19
Other	17	12

Table 5 illustrates the other types of private information requested from victims.

Table 5: Other types of private information requested from victims	
Financial history	Material pertaining to victims':
Calendar entries	• interactions with men
Personal journal/diary entries	• drug and/or alcohol use
Photos	• family issues
Crisis support and emergency services records/transcripts	• anatomy (ie genitalia appearance)
Previous abuse experiences, including:	• relationship with perpetrator
• credibility of prior disclosures	• clothing/undergarment choices
• domestic, family, and sexual violence	• social activities
• historical child sexual abuse	• sexual orientation

In the open-ended responses, participants explained what type of private information was requested from them, whether and how this information was disclosed and used in questioning in court, and how they felt about these practices. We draw on quotations relating to the types of private information most frequently sought from victims. Any emphases in the quotations were cited as such in the raw data.

Prior sexual experiences

Victim participants explained how their prior sexual experiences were questioned to undermine their character and claims. One victim said that the defence sought to imply that they were 'adventurous in the bedroom' (#02). Another victim said that the defence argued that they were 'sexually experienced and had fantasised about a sexual relationship with the accused' who was the victim's uncle (#51).

Other defence tactics included suggesting that prior consensual sex with the accused implied ongoing consent, even when victims were 'motionless, frozen and silent' during the rape (#80). One victim described how the defence referenced their sexual positions and frequently 'enjoyed using the term "doggy-style" before the jury', which was drawn from the accused perpetrator's version of events (#80).

Some victims were surprised that they were questioned about their sexual experiences with others who were not involved in the case, some of whom were 'subpoenaed ... to testify' (#30).

Digital communications

Victims described how their digital communications—mostly phone records—were used in questioning. One victim said that the police gave the defence:

... copies of conversations 'deemed relevant' ... Unrelated matters were not removed from evidence as some were 'too large' and it would take too long to remove. (#28)

Another victim said:

Every message I had ever sent to the perpetrator was printed out ... and we went through each page tediously in front of the court ... This included photographs exchanged with or taken with the perpetrator ... (#95)

In one matter, the defence deliberately ‘misrepresented the text messages and put screenshots in the wrong order’ to cast doubt over the victim’s credibility (#40), while in another case phone records were used to imply that the victim ‘was not in a state of shock: i.e., ability to use phone = not sexually assaulted’ (#68).

Medical, counselling and therapeutic records

Victims’ medical, counselling and therapeutic records were commonly raised in questioning to challenge the allegations. One victim said:

My psychologist recommended I apply for victim assistance payments to pay for my psychology ... It was then used by his [the perpetrator’s] lawyers to say I was doing this for monetary gain. (#15)

Another victim’s medical records detailing a miscarriage eight years prior to the assault were used to imply that the victim was ‘reckless’ (#28).

Where victims engaged medical support or advice, they were viewed as mentally unwell, which undermined their claims. In one case, a victim stated:

The judge concluded that I had ‘multiple psychiatric illnesses’ (I have none), and, significantly, that anyone mentally unwell cannot understand consent—the implication being that I had not been raped. (#95)

Victims were also questioned about their medical examinations and genitalia. One victim said she was questioned about ‘the physical appearance of my vagina ... it was humiliating ... and also the reason I didn’t want any of my family present at the trial’ (#63). Another victim expressed fury that they had to ‘reveal *everything* from vaginal scratching to details of mental trauma’, which they felt was ‘violating, disgusting, enraging’ (#68).

Some victims even stated that seeking help was counterproductive because their disclosures were used against them:

I felt violated and will never feel safe again knowing that my experiences could be used against me ... I was housebound for months after the trial, and find it hard to trust people, especially medical and psychological supports ... (#07)

How victims felt about the use of their private information in court

Most participants felt negatively about the use of their private information in court. Thirty-eight participants reported feeling that their privacy was compromised, 37 felt traumatised and 27 felt let down by the system. Twenty-four participants felt humiliated, degraded, embarrassed and belittled and 23 participants felt unprepared for questions about their private information. Other impacts are outlined in Table 6 below.

Table 6: How victims felt about the use of their private information in court	
	<i>n</i>
Negative	
Intruded upon/subjected to invasive practices (privacy compromised)	38
Traumatised	37
Let down by the system	27
Humiliated/degraded/embarrassed/belittled	24
Unprepared/caught off guard	23
Violated/betrayed	17
Regretful/reluctant/hated it	10
Disgusted/angry/outraged	10
Dismissed/silenced	8
Worried/anxious/distressed	8
Haunted/devastated/horrified	5
Hurt and confused/vulnerable/unprotected	5
Dehumanised	5
Fearful/unsafe	4
Manipulated	4
Frustrated	4
Upset, to an extent/uncomfortable/annoyed	4
Suicidal	3
Gross	1
Neutral	
Acceptance (ie 'it's evidence')	2
Positive	
Relieved	1
Motivated	1
Satisfied	1

Victims' views on independent legal representation

Victims' views on ILR were measured on a Likert scale from 1 (strongly disagree/extremely unlikely) to 5 (strongly agree/extremely likely). As seen in Table 7, victims felt that ILR is needed for better support in court ($M=4.81$, $SD=0.51$) and to protect their private information ($M=4.65$, $SD=0.67$). Participants also strongly agreed that they would have benefited from their own ILR during the criminal prosecution process ($M=4.53$, $SD=1.01$).

Victims felt that ILR can enhance their experiences of procedural fairness ($M=4.12$, $SD=0.93$), lead to better protection of their private information ($M=4.20$, $SD=0.93$), improve information provision and access ($M=4.32$, $SD=0.84$), and lead to safer and more empowering experiences ($M=4.20$, $SD=0.94$).

Table 7: Victim views on independent legal representation ($n=145$)	
Statement	Mean (SD)
Support for independent legal representation	
Victims need to be better supported in court	4.81 (0.51)
Victims need better protections for their private information	4.65 (0.67)
I would have benefited from having my own independent legal representation throughout the criminal prosecution process	4.53 (1.01)
Independent legal representation will likely result in:	
Fairer processes for victims in the criminal legal system	4.12 (0.93)
Better protections of victims' private information	4.20 (0.93)
Improved information provision and access for victims	4.32 (0.84)
Safer and more empowering experiences for victims	4.20 (0.94)

Support for independent legal representation

Victims and practitioners expressed strong support for ILR because they felt that it can provide dedicated support and representation for victims while also protecting their private records. Some practitioner participants explained how ILR can provide continuity of support and information to victims. They felt that 'trials would be simplified and complainants would have a better trial experience if they had a lawyer assist them' (N4). This view was shared by some victims, with one stating: 'if victims had lawyers, then there would be someone who puts their priority with the victim' (#90).

There was also consensus that ILR can help victims to maintain control over their private records. One victim stated that their ILR 'was incredible' and 'managed to argue to protect my medical records not just my counselling records' (#95). All practitioner participants viewed the role of ILR in enforcing protections as necessary because they often felt that the prosecution did not sufficiently do this or explain how their records would be handled. A practitioner described how it is common for victims to provide evidence to the police when reporting, but 'they're very rarely aware that that is going to almost inevitably be given to the defence lawyer as part of the disclosure process' or 'that the DPP [Department of Public Prosecutions] also have disclosure obligations that will require essentially any communication that the [victim] makes to them to be disclosed to the defence' (N4).

All practitioner and victim participants who spoke about ILR in the survey felt that ILR could explain the law and legal process to victims while providing representation to uphold their privacy, including from as early as police reporting. One practitioner explained how early and ongoing access to ILR helps victims:

... understand what they're entitled to, what their rights are, when they should be engaged in decision-making processes by the prosecution, and if they have those protections in the legislation they understand what the process is, what the next steps are, how to do a victim impact statement, what kind of evidence is going to be adduced, how to protect it, how to think about all of the different options available and which one's going to be best for them'. (A1)

In summary, victim and practitioner participants overwhelmingly supported the need for victim ILR in jurisdictions that do not already offer it. They identified its ability to provide information and continuity of support to victims, and to protect their private records. Participants highlighted the significant gap in support from prosecuting agencies and emphasised the critical role of ILR in ensuring that victims' privacy and interests are prioritised throughout the criminal prosecution process.

Pre-trial document analysis

Fourteen pre-trial documents from Queensland and New South Wales were analysed. In all 14 of these cases, defence counsel had applied for leave to access the victims' counselling, medical or therapeutic records and victims had ILR. Table 8 provides an overview of these pre-trial applications for victims' private records.

Eleven hearings involved matters where the victim was under 18 years of age at the time of the alleged incident, in one matter the victim was 18 years or over at the time of the alleged incident, and two cases did not disclose the age of the victim at the time of the alleged incident. In some matters, a statement of harm describing the impact of the alleged offending on the victim and others was provided as part of the pre-trial disclosure and evidence gathering process.

Table 8: Pre-trial applications for victims' counselling, medical or therapeutic records

Case	Evidence sought	Arguments submitted by defence applicant	Basis for objection	Reference to statement of harm	Outcome of application
Case 1	Counsellor clinical notes, reports, attendance records, referrals and other clinical records	Definition of protected counselling communication (PCC): some of the material does not fall within the definition of PCCs, such as attendance records. Credibility and reliability: there were alleged inconsistencies between the police interview and the notes from the sexual assault investigation kit.	Lack of substantial probative value	Yes	Application dismissed
Case 2	Psychiatrist and psychologist records	Reliability: the victim may have made similar allegations against others, they may have psychiatric disorders, there were alleged inconsistent statements, and there may have been records of counsellors' opinions of the truthfulness of the allegations.	Lack of substantial probative value	No statement of harm mentioned	Application dismissed
Case 3	Counselling records concerning two child victims	Reliability and credibility: the evidence may pertain to conversations between the child victims and thus hold substantial probative value.	Lack of substantial probative value	No statement of harm mentioned	Privilege was waived for some documents to be disclosed in the hearing, and an order was made in relation to these documents. The application in relation to the other documents was dismissed.

Table 8: Pre-trial applications for victims' counselling, medical or therapeutic records (cont.)

Case	Evidence sought	Arguments submitted by defence applicant	Basis for objection	Reference to statement of harm	Outcome of application
Case 4	Medical and health records School behaviour records School chaplain records	Reliability: hospital records may detail a psychological condition and medication taken, which may reveal issues related to memory recall. Credibility: records may show previous inconsistent statements and times when the victim had not disclosed the alleged offending. Definition of PCC: the school chaplain records are not protected as the chaplain providing support was a religious representative, not a counsellor.	The potential for retraumatisation of the victim, and counselling is important for aiding recovery. Documents about self-harm, medical conditions and medication do not have substantial probative value. The school chaplain was considered a counsellor for the purposes of the privilege.	Yes	The court considered the school chaplain to be acting as a counsellor at the relevant time and not as a religious representative. Application partially granted, providing access to selected general practitioner medical records from 2013 to 2020, including a mental health plan.
Case 5	Records from a family violence support service; a medical centre; the Department of Child Safety, Youth and Women; and the Department of Education	Credibility: records of mental health treatments would have considered victim's credibility in depth	Lack of substantial probative value	Yes	Application dismissed
Case 6	Counselling records	Credibility and reliability: the PCCs could reveal inconsistencies across complaints to others.	Lack of substantial probative value	No statement of harm mentioned	Application dismissed

Table 8: Pre-trial applications for victims' counselling, medical or therapeutic records (cont.)

Case	Evidence sought	Arguments submitted by defence applicant	Basis for objection	Reference to statement of harm	Outcome of application
Case 7	Health and counselling records	Credibility: records may reveal inconsistencies in descriptions of the offending. Reliability: records may reveal a mental illness or disorder, illogical thoughts, memory problems, prescribed medication, frequency of counselling/treatment and other matters that could undermine memory recall.	Negative impacts on the victim. Granting access could deter others from reporting and seeking counselling.	Yes	Application granted
Case 8	Counselling records	Credibility and reliability: a medical or psychiatric condition could lead to inconsistencies with testimony provided to police. Motive to lie: details of the victim's personal life could indicate motive for a false allegation.	Lack of substantial probative value: the applicant had not highlighted that this evidence was not available elsewhere and speculative applications to see what evidence might exist are not permitted.	Yes	Application dismissed
Case 9	Records from support services and a psychiatrist	Credibility: the records may detail potential diagnoses that pertain to the credibility and reliability of the victim.	Lack of substantial probative value, and the possibility of retraumatisation.	No statement of harm was submitted by the victim.	Application partially granted
Case 10	Counselling records	Reliability and motive to lie: the potential of a positively described relationship with the accused and the possibility of no records of a complaint about the offending to the counsellor	Arguments not disclosed, judge considered probative value	Yes	Application dismissed

Table 8: Pre-trial applications for victims' counselling, medical or therapeutic records (cont.)

Case	Evidence sought	Arguments submitted by defence applicant	Basis for objection	Reference to statement of harm	Outcome of application
Case 11	Counselling and medical records	Credibility and reliability: records may show inconsistent statements made to practitioners and the presence of potential mental health issues	Lack of substantial probative value	No statement of harm mentioned	Application granted
Case 12	Counselling records held by health services Police records relating to the victim's previous encounters with police	Reliability: records may show the victim's diagnosed mental health conditions, and their use of drugs and its impacts on their mental health.	The application was based on presumptions of mental health conditions and drug use, which did not have substantial probative value.	No statement of harm was submitted by the victim.	Application dismissed
Case 13	Records from health and psychiatry services Police records	Reliability and credibility: the victim was diagnosed with schizophrenia, and the records could show changed perceptions of events over time.	Evidence is only substantially probative if there is a demonstrable link between the victim's mental health condition and the evidence they would give at trial.	No statement of harm mentioned	Partial access granted to some of the victim's hospital and health records.
Case 14	Counselling records and notes of a rehearsed confrontation with the accused A monograph written by the victim based on the events in question	The sexual activity and experience evidence is believed to form part of a connected set of circumstances, and the probative value would outweigh any possible distress, humiliation and embarrassment experienced by the victim. The accused submitted that the victim is a fantasist.	Probative value did not substantially outweigh public interest in preserving confidentiality of protected confidences; the question of whether the victim was a virgin was not relevant.	No statement of harm mentioned	Application for PCCs was refused, but the monograph was admitted.

Common reasons for applications

All 14 pre-trial hearings involved applications for leave of the court to access and use the records of the 'counselled person' (the victim). These applications to access counselling communications were most commonly made to challenge the victim's capacity to provide a reliable, truthful account of what happened.

Rules of evidence and case law allow applications for disclosure of victims' counselling records. The defence can test the evidence of the Crown's case by discovering, revealing and submitting information that challenges and questions a victim's credibility, reliability and character. The admissibility of preliminary complaint evidence—such as anything the victim disclosed to police upon reporting—is an example of this. While this evidence cannot be used as proof of what happened, it can be drawn on to challenge victim credibility (s 94A *Evidence Act 1977* (Qld)).

In the transcripts analysed, defence counsel made arguments relating to a victim's mental health and medical diagnoses, details of the victim's life or character suggesting a motive to lie, and any inconsistent statements made to police and health or counselling services. For example, in Case 10, the defence submitted that the victim's counselling records may disclose a motive to lie because if the victim spoke favourably about the accused person in counselling and did not disclose the child sexual abuse, they would be less credible.

In Case 7 and Case 11, all subpoenaed documents were admitted into evidence due to perceived inconsistencies in the victim's recollection and description of the alleged offending. In Case 7, a District Court Judge summarised the defence applicant's submissions, noting that the victim's medical records and other counselling records were:

... substantially probative concerning a diagnosis of mental illness or disorder, indicia of illogical thoughts, memory problems, medication prescribed, frequency of counselling and/or treatment sought and any other matter which undermines the reliability of the complainant's memory.

Similarly, in Case 2, the defence argued the victim's mental health and medical conditions suggested that they were not a reliable witness. In this matter, two co-accused were represented by different defence counsel, and two separate applications were made for the victim's counselling records, which predated the alleged offence. The first defence applicant submitted that 'it is the psychiatric and psychological makeup of the complainant that is in issue', while the second defence applicant suggested that the victim had a 'history of false accusation or gross exaggeration' and had 'engaged in attention seeking behaviour beyond what might reasonably be expected of an adolescent girl'.

In Case 3, the defence counsel considered the timing of the victim's report to the police because it could reveal inconsistencies or a motive to lie in a preliminary complaint made during counselling that had begun prior to the victim reporting. In another matter, the defence sought the victim's clinical notes to argue that:

... the complainant is a fantasist and that the alleged sexual activity with both brothers was a figment of her imagination, first raised more than three decades after the alleged incidents. (District Court Judge summarising the applicant's submissions in Case 14)

In Case 13, the defence submitted that the victim suffered from schizophrenia in the year prior to their police report and that the medication they were taking could have skewed their perception of the events, thereby raising doubt over the allegations.

These cases illustrate how details of the victim's life and character, particularly as featured in their counselling, medical and therapeutic records, are weaponised in court, often by defence counsel, to suggest that the victim has a motive to lie or has made inconsistent statements. These arguments, in turn, position victims as unreliable and unfavourable witnesses, retraumatising them and making the 'beyond reasonable doubt' threshold for a conviction more difficult to reach.

What is noteworthy, however, is the role and impact of ILR in these matters. For example, seven applications were completely dismissed, five were partially granted and only two applications were granted in full. This emphasises the important role that ILR played in limiting or preventing the disclosure of victims' private records in 12 out of the 14 pre-trial transcripts analysed.

Conclusion

Our study revealed that victims' private records are often sought in criminal prosecutions. Records commonly sought related to victims' prior sexual experiences; digital communications; and medical, counselling and therapeutic records. On average, each victim had 2.58 different types of private information requested from them. Our pre-trial transcript analysis also highlighted that victims' medical, counselling and therapeutic records were commonly sought to reveal inconsistencies in victim statements or to imply that a victim had a motive to lie about the allegations. Details of the victim's behaviour and character featured in these records would often be used to discredit and undermine their claims (see Iliadis et al. 2026 for a discussion of the implications of these findings).

Victims overwhelmingly felt negative about the disclosure and use of their private records, saying they felt violated, traumatised, let down, humiliated and degraded.

To counteract these problems, both victims and practitioner participants expressed strong support for ILR. They felt that ILR would lead to more support and representation for victims and better protection of their private records. This, in turn, could ensure that the criminal prosecution process is more procedurally empowering for victims. While our study provides preliminary evidence of the benefits of ILR for victims of sexual offences, further research is needed to understand the implications for victims, including in relation to the pilot sites in the Australian Capital Territory, Victoria and Western Australia, funded by the federal government.

Our findings inform the development of ILR across Australia, particularly for states seeking to extend or review current ILR schemes, and for states and territories looking to implement ILR to better enforce protections of victims' private records. The findings can also assist stakeholders supporting victims of sexual violence to understand the impacts of the criminal prosecution process based on the perspectives and experiences of victims themselves, and to review the support they provide to victims. Future research should continue to centre the voices of victims, including those who have experience of ILR.

Our project findings should be considered in light of some limitations of each phase of data collection. Notably, our survey results cannot be generalised to victims' experiences in criminal prosecution processes more broadly. Our sample of interview and focus group participants is also limited and so findings cannot be assumed to apply to the views of stakeholders who did not participate in this research. Likewise, our analysis of pre-trial transcripts focused on a small sample of 14 cases and therefore findings should be interpreted in light of this.

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