FACT SHEET — *This fact sheet is for people of all ages.*

Can my client records be subpoenaed?

If you've been sexually assaulted, and you have decided to pursue the matter through the court system, then your client records may be subpoenaed. If someone or something is subpoenaed it means they have to attend court, or the evidence (for example, your client records) will be used as evidence in court.

Under Section S32C(2) of the Evidence Act 1958, files do not have to be produced in court in response to a subpoena. In Victoria, this falls under the Evidence (Confidential Communications) Act 1998.

"The purpose of this Act is to protect from disclosure in legal proceedings confidential communications between the victim or alleged victim of a sexual offence and a medical practitioner or counsellor. The Act enables a court to order disclosure, but specifies matters about which the court must be satisfied before doing so."

Exclusion of evidence of confidential communications

Your client records cannot be used as evidence if it would disclose confidential communication between you and your counsellor. However, the court may grant permission to decide if it could provide essential evidence and therefore be used in court. This is the subpoena process.

The person (lawyer) requesting your records must give 14 days' notice in writing to both you and your counsellor. Do note that the court may waive this requirement. When the subpoena is received, you and your counsellor may make a submission to the court to argue that the information is confidential.

How does the court decide?

The court may order that your records be produced to be inspected, but the court may not make your records available, or disclose its contents, to the person requesting the records. The court needs to look at your records first to enable them to make a decision about whether or not it will be useful evidence.

How does the court determine whether your records should be allowed as evidence?

A court will allow confidential communications (your records) to be used as evidence if:

- the evidence will be useful to prove something important; and
- other evidence concerning the matter is not available; and

- the public interest in preserving confidentiality and protecting you from harm is outweighed by the public interest in admitting your records as evidence.

The court will also consider any possible harm that could be caused to you if your records are allowed as evidence. The court must state its reasons for giving or refusing to allow your records in as evidence. If the application is refused the court must not allow this to be known to a jury.

How the court may try to reduce harm

If approval has been granted for your client records to be used as evidence, the court may:

- order that all or part of the evidence be heard via video link;
- order the suppression of publication of all or part of the evidence;
- make orders relating to disclosure of protected identity to protect the safety or welfare of you or your counsellor.

Limitations

This legislation does not prevent the evidence being brought into court if you give consent, or, if you are under 14, your guardian gives consent. It also does not protect information acquired by a registered medical practitioner through physical examination of you in relation to the sexual assault.