Confidentiality and “family counselling” under the *Family Law Act 1975*

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Service providers working with separated families are increasingly regulated by law. The *Family Law Act* provides a degree of confidentiality for “family counselling”, but not for other types of counselling. This chapter reviews the relevant provisions to discover just what the law means by “family counselling”, and to what extent it protects confidentiality. It seeks to explain the legal rules, the reasons for them, and to indicate some of the underlying policies. The purpose is to help those in this sector work effectively within the law and, if they wish, make an informed contribution to issues of law reform.

Family counselling is traditionally confidential; but the law has a different tradition, namely that the courts should be able to receive any evidence that will help them determine disputes that come before them. In children’s matters, what the parties have said in counselling may be significant evidence. Parties may admit in counselling that they left a young child unattended, or that they would be willing to allow the other parent to take care of the children for particular periods, or that they leave the children in the care of a grandparent or relative. The making of such statements may be important evidence for the court, especially if they are inconsistent with what the party wants the court to accept. Thus the two traditions clash: if confidentiality prevails and the parties cannot give evidence of what happened in counselling, the court may have to decide the case without having the benefit of some important evidence; if the parties can give such evidence, and for example subpoena the counsellors' notes, the confidentiality of the process will be undermined. There is room for debate about the merits and demerits of the various provisions that constitute the law. We can see the continuing tussle between these two policies as we examine the definitions of the key terms and the rules and the exceptions to them.

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1 Somewhat similar provisions relating to confidentiality apply to family dispute resolution, but this chapter is limited to family counselling.
But first it will be useful to review the general law, to discover what the position is in situations that fall outside the specific provisions of the Act.

**The general law**

Broadly speaking, the law allows parties to tender as evidence any material that is relevant to resolving the dispute. In general, evidence can be given about what has been said and done, and subpoenas can require the production of the relevant records. The fact that a conversation was conducted on a confidential basis does not necessarily mean that evidence of the conversation cannot be given. People may seek assistance or treatment from therapists of various kinds, such as psychologists and medical practitioners, and both parties may treat the process as confidential. It may well be unethical, and perhaps a breach of the contract with the patient, for the therapist to disclose what has been said, except in some situations. Nevertheless, in general there is nothing to stop a party to litigation from calling a party, or the therapist, to give evidence, or issuing a subpoena requiring the therapist's records to be provided to the court. Indeed, it is a routine thing for medical and hospital records, and other such records, to be subpoenaed for the purposes of court cases, including children's cases under the *Family Law Act*, and to be used as evidence.

To this basic rule—that anything relevant can be admitted as evidence—there are numerous exceptions. For example, the court may decline to admit evidence that has been unfairly obtained, even if it is relevant. And confidential communications between a client and a lawyer, for the purpose of the lawyer giving legal advice, are normally confidential. It is not necessary to review all the exceptions, but one needs mention: s 131 of the *Evidence Act 1995*. It provides that evidence cannot be given of a communication that is made between persons in dispute, or between one or more persons in dispute and a third party, in connection with an attempt to negotiate a settlement of the dispute. This rule applies to situations in which the parties are negotiating with each other and equally where they are negotiating with the help of a third party, as in mediation. It applies in children's cases as well as other types of cases. I am not aware of any helpful case law on the application of s 131 in counselling and therapy situations, but the section will apply if the communication can be said to be “in connection with an attempt to negotiate a settlement of the dispute”. The policy basis of this rule is well-established. As stated in a much-quoted passage:

> parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations … may be used to their prejudice in the course of the proceedings. They should … be encouraged fully and frankly to put their cards on the table.

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2 *Evidence Act 1995* (Cth) s 55.
3 *Evidence Act 1995* (Cth) s 138.
4 *Evidence Act 1995* (Cth) ss 118, 119.
6 The “less adversarial” provisions of the Act (Division 12A of Part VI) do not change the position. Section 69ZT says that in children's cases certain provisions of the *Evidence Act* normally do not apply—(although the court can apply them in exceptional circumstances: s 69ZT(3)—but the provisions referred to do not include s 131.
7 *Cutts v Head* [1984] Ch 290, 306 (per Oliver L J).
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There are some exceptions to the privilege, set out in s 131. One, for example, is where the parties consent to it coming into evidence. Another is a statement made “in furtherance of the commission of a fraud or an offence”. Another one is of particular interest, and we will return to it later: a statement that would otherwise be inadmissible under s 131 will be admissible if without it, other evidence would mislead the court.

In each case, evidence can be given of the statement, even though it was made in the course of negotiations to settle a dispute.

**Family counselling confidentiality**

What we are loosely calling “confidentiality” actually comprises two distinct rules.

The first rule is that by s 10D, in general, family counsellors must not disclose what is said to them. There are detailed exceptions. To summarise the most important, the family counsellor must disclose the communication to comply with a law (e.g., when obliged to answer a question in court), and may disclose a communication if the person making it consents, or if the family counsellor believes that disclosing it is reasonably necessary for one or other of a list of purposes:

- to protect a child from risk of harm;
- to prevent a “serious and imminent threat” to a person’s life or health;
- to report or prevent an offence of violence;
- to report or prevent a serious and imminent threat to property;
- to report or to prevent an offence involving intentional damage to property; and, importantly
- to assist an independent lawyer for a child.

The second rule is that by s 10E, evidence cannot be given in any court or tribunal of what people say in the course of family counselling. In contrast with s 10D relating to disclosure, the only exception relates to child abuse: an admission by an adult, or a disclosure by a child, indicating that a child “has been abused or is at risk of abuse”—language that now includes cases where a child has been severely neglected, or in some circumstances, has been exposed to family violence.

Controversial policy issues underlie these provisions. Why can the court be told that a person has admitted severely neglecting a child, but not be told that one party has threatened to murder the other? Why must the statements made in counselling remain inadmissible even if both parties want them to be admitted in evidence? And suppose a person was subjected to covert threats during a counselling session, and on that basis agreed to certain outcomes. The other party could give evidence of the resulting agreement, but it seems that the victim of the threats or violence could not give evidence of the threats made during the counselling: a grossly unfair outcome. That problem is caused by the absence in s 10E of something like s 131(1)(g) of the Evidence Act (mentioned above), under which there is an exception to inadmissibility so the court

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8 Evidence Act 1995 (Cth) s 131(1)(a).
9 Evidence Act 1995 (Cth) s 131(1)(j).
10 Evidence Act 1995 (Cth) s 131(1)(g).
11 Section 10E(1). The effect of the section is extended to professionals to whom the parties have been referred: s 10E(1)(b).
12 See s 4 defining “abuse”, and s 4AB defining “family violence”.
13 The problem was discussed by Reithmüller FM (now Judge) in Roux v Herman [2010] FMCAfam 1369, in connection with s 10J, the equivalent provision relating to dispute resolution rather than family counselling.
will not be misled. These important issues deserve a debate, although this is not the place for it.

It is also beyond the scope of this chapter to deal with the law on subpoenas, but briefly it can be said that documents can be obtained by subpoenas if they are required for a “proper forensic purpose”. If a subpoena is issued in relation to documents or parts of documents that are inadmissible because of s 10E, the court might well find that the subpoena has no proper forensic purpose and set it aside.

As an overview, we can say, very approximately:
- the *Family Law Act* treats “family counselling” as confidential by limiting what counsellors can disclose (with various exceptions) and by preventing evidence being given of what is said (with the exception of child abuse); and
- other sorts of counselling\(^\text{14}\) are generally not confidential, although s 131 of the *Evidence Act* provides for confidentiality (with exceptions) when parties negotiate to settle cases (which could happen in the course of counselling).

It is therefore important to know whether something is “family counselling” or another form of counselling or assistance.

**Defining “family counselling”**

The term “family counselling” is defined in the Act. There are two components: it is a certain kind of activity—“family counselling” (defined in s 10B)—conducted by a certain kind of person—a “family counsellor” (defined in s 10C). We will consider each of these components in turn, and then consider how the definition operates in practice, what problems it creates, and how at least some of those problems might be solved.

A preliminary point is that the words used in the definition are ordinary words rather than technical legal terms, and the courts’ general approach is to give the words their ordinary meaning. This means that the words will not necessarily be taken to refer to any special meaning they might have in the field of counselling. If, for example, the term “family counselling” had some special technical meaning for counsellors, the legal definition should not be treated as necessarily adopting that special meaning. This is because there is no evidence that the legislature intended to incorporate any technical or professional meaning of the term.

“Family counselling” is defined by section 10B of the Act as follows:

*Family counselling* is a process in which a family counsellor helps:

(a) one or more persons to deal with personal and interpersonal issues in relation to marriage; or

(b) one or more persons (including children) who are affected, or likely to be affected, by separation or divorce to deal with either or both of the following:
   (i) personal and interpersonal issues;
   (ii) issues relating to the care of children.

What we are calling the confidentiality provisions—s 10D and s 10E—apply only if the activity is shown to be “family counselling”. If the court cannot determine whether it is

\(^{14}\) As mentioned elsewhere, the provisions dealing with family dispute resolution—s 10H and s 10J—are somewhat similar to s 10D and s 10E relating to family counselling.
or is not, the confidentiality provisions do not apply. And it can be “family counselling” only if it is done by a “family counsellor”. Let’s look at the elements of this definition, starting with the activity of family counselling.

**Paragraph (a): Help in relation to marriage**

Paragraph (a) is limited to “marriage”, defined by s 4 of the *Marriage Act 1961* as “the union of a man and a woman to the exclusion of all others, voluntarily entered into for life”. Anything done in relation to family units other than marriages does not fall under this paragraph.

“Personal and interpersonal” issues

The issues must be “personal and interpersonal”. There might be a theoretical issue about whether “and” is used conjunctively—that is, whether the issues must be both personal and interpersonal—or disjunctively—personal or interpersonal. In practice, though, issues troubling one or both parties will almost inevitably be properly described as both “personal and interpersonal”.

Family counselling may cover multiple issues

In practice, marriage and family problems are multiple, not single. Family counselling is likely to touch on a range of other topics: money, sex, employment, substance abuse, and so on. When the counselling does deal with such topics, does it then fall outside the definition of family counselling, because at that point it might be thought of as, say, drug counselling, and is therefore helping people with other problems, as distinct from issues in relation to marriage? There appears to be no case law on the topic, but it seems likely that so long as there remains a connection with the marriage, even though particular topics are mentioned the whole process would be seen as helping people with “personal and interpersonal issues in relation to marriage” and therefore within the definition. Suppose, for example, that there was a dispute in which the spouses were also partners in a business. If the family counselling could be said to be helping “in relation to marriage”, it would probably be considered “family counselling”, even though the discussion also touched on commercial matters, and would therefore be subject to the confidentiality provisions.

“In relation to” marriage

It is family counselling under paragraph (a) if a family counsellor “helps one or more persons to deal with personal and interpersonal issues in relation to marriage”. We do not yet have any case law that really analyses the definition. But the terms seem wide enough to include virtually any issue that has—to use the High Court’s language in another context—a “relevant” or “appropriate” association with the marriage.

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15 See Smirnov & Turova [2009] FMCAFam 1083 (in which the court was not told what was involved in “attachment therapy”).

16 Although Australian law recognises same-sex relationships and de facto and other relationships for various legal purposes, those relationships are not currently included in the *Family Law Act*’s definition of “marriage”.


18 If it were necessary to explore the meaning of the words, the courts might well seek guidance from the case law on the constitutional scope of the word “marriage” (Constitution s51(xxi)).
practice, they would probably include virtually any problem that either party sees as being connected to the marital relationship. They would not include, however, problems unrelated to the marriage. If a married couple sought debt counselling, for example, or investment advice, and there were no problems between the two of them, the court might consider that the counselling was not in relation to marriage (but was rather in relation to debt, or investing). Similarly, if the married couple went to a counsellor to deal with their disagreements relating to the care of a drug-addicted child, that would no doubt be “in relation to marriage”, but if they were united and sought advice on the care of their 21-year-old son or daughter who had lost a job or had got involved with drugs, it might be arguable whether that was counselling “in relation to marriage”. However although there may be such borderline cases, in practice it will usually be clear whether married people who come for family counselling will be seeking help with “personal and interpersonal issues in relation to marriage”.

Helping other persons in relation to marriage
The section does not say “helps a party to a marriage”, but refers to helping “one or more persons”. Thus disputes or problems involving grandparents, parents-in-law, or other persons will be included if it can be said that the family counsellor is helping some person deal with personal and interpersonal issues in relation to marriage (but not, as mentioned earlier, other forms of family unions, such as de facto heterosexual or same-sex relationships).

Paragraph (b): Dealing with separation and divorce
Paragraph (b) deals with “separation” as well as divorce, and thus applies to separating parents who have not been married as well as those that have. But whereas paragraph (a) deals with marriage as such, paragraph (b) focuses on family breakdown. To illustrate the difference: counselling aimed at improving the relationship between a couple would be “family counselling” if the couple were married. But the same counselling provided to an unmarried couple would not be “family counselling” if they were unlikely to be affected by separation or divorce. Thus, in relation to non-marital families, the definition of family counselling focuses on the consequences of family breakdown, rather than the relationship as such.

The components of paragraph (b) might be broken down as follows:

- a process in which a family counsellor helps persons, including children—These words obviously include help to children, and to other family members, as well as to one or both parents.
- who are affected, or likely to be affected, by separation or divorce—The word “separation”, occurring in the phrase “separation and divorce”, obviously refers to

19 It seems clear that paragraph (b) is not limited to marriage. First, it does not mention marriage, and the word “separation” can apply to non-married parents who separate. Second, there is nothing in the Explanatory Memorandum to the Act of 2006 (which inserted the section) to support limiting it to marriage. Third—and surely decisively—by s13C a court may order “one or more of the parties to the proceedings” to attend family counselling, and it may do so when “exercising jurisdiction in proceedings under this Act”. Many proceedings under the Act involve parties to relationships other than marriage, and s13C contemplates that there can be “family counselling” in relation to those families. The constitutional validity of paragraph (b) is outside the scope of this chapter.

20 The reason for this difference might be linked to the fact that under the Constitution the Commonwealth has legislative power over “marriage”—s51(xxi)—but does not have the same power over other family relationships. The constitutional issues are, however, beyond the scope of this discussion.
separation between the parents. However it is not explicitly limited to that situation, and probably it could also refer to a separation between a child and a parent, or, indeed a separation involving other family members (such as grandparents).

- **deal with personal and interpersonal issues**—Like paragraph (a), the paragraph refers to “personal and interpersonal issues”, and as in that paragraph, the issues will almost always be both personal and interpersonal.

- **deal with issues relating to the care of children**—The “care” of children probably includes virtually all aspects of parenting. The definition is not limited to children of the parties, and so, for example, family counselling might include issues relating to a foster child, or a child of one of the parties, and even where the child is not living in the household.

A convenient example of paragraph (b) of the definition is *Medeiros & Fink*, which involved a dispute between two sets of grandparents after the death of the child’s father. The father and mother had been unmarried. The mother had killed the father, and at the time of the hearing she was serving a term of imprisonment for manslaughter. The child had been seeing an “art therapist” in a confidential setting. The art therapist was taken to be qualified as a “family counsellor” within the definition in s 10C. All the court was told about the nature of the counselling was that the counsellor was “working with [the child] to assist her recovery from trauma”. The court upheld an objection to a subpoena addressed to the counsellor, holding that the process was “family counselling”:

> Ms R was a person engaged in a process designed to help [the child], as a person affected by separation, to deal with personal and interpersonal issues and issues relating to her care. In these circumstances, the prohibition on disclosure contained in s 10D of the Act seems to me to apply.

**Summary**

We can say, very roughly, that family counselling comprises marriage counselling (paragraph (a)) and family breakdown counselling (paragraph (b)).

**The second component of the definition: A “family counsellor”**

The term “family counsellor” is defined in s 10C. Under s 10C(b) a family counsellor is “a person who is authorised to act on behalf of an organisation designated by the Minister for the purposes of this paragraph”. A list of designated family counselling organisations is available on the Family Relationships Online website. It is a matter for

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21 See *Medeiros & Fink and Anor* [2011] FMCAfam 1184 (Burchardt FM), mentioned further below.
22 For an unusual situation where there might be a personal issue that is not also an interpersonal one, see the discussion below of *Kidd & London* [2011] FMCAfam 1084.
23 *Medeiros & Fink and Anor* [2011] FMCAfam 1184 (Burchardt FM), [79].
24 The report of the case speaks only of a “relationship” between them.
25 This was agreed in the case, so the point was not discussed. However, we will see in the discussion to follow that whether the art therapist was a “family counsellor” might depend on the interpretation of the definition of that term.
26 Under s 10C(1) it is theoretically possible for people to become “family counsellors” in other ways, but none of them seem to have been used in practice.

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Families, policy and the law 191
the designated organisations to authorise individuals to act on behalf of the organisation. No particular formalities are required by the Act, and whether an individual has been so authorised appears to be a question of fact.

We start with a “designated organisation”. No problem here—the organisation is either on the list of designated organisations or it is not. But the organisation is not a family counsellor. The family counsellor is an individual who, in the words of the section, is “authorised to act on behalf of” the organisation.

The wording says nothing about the qualities or qualifications of the individual who is a family counsellor. This is left entirely to the designated organisation. In effect, by way of the definition, the legislature trusts the designated organisations to provide suitable people to work as family counsellors.

What is more surprising is that the wording does not even say that the individual is authorised to carry out family counselling. It just says the individual is “authorised to act on behalf of” the organisation. Does this mean what it says?

Suppose a designated organisation employed Alex, a person with counselling qualifications, to work exclusively in a drug and alcohol unit. Suppose Alex was never treated by the organisation as a family counsellor, and never described as such, but in the course of employment in the drug unit worked with clients’ family problems (as well as with drug issues). Alex might well be doing things that fell within the definition of family counselling (see the discussion earlier). Would Alex therefore be doing, without anyone realising it, “family counselling” within the meaning of the Act? On the face of it, yes, because each element of the definition is satisfied. But the words could also be interpreted more narrowly, so the definition refers only to people who are authorised by the designated organisation to conduct family counselling. The scope of “family counselling” in the Act will be affected by whether the definition is taken to include anyone authorised to act on behalf of the organisation—what the words actually say—or whether it will be read in context as referring only to someone the organisation authorises to conduct family counselling. The courts are often willing to interpret a provision in a way that is sensible, treating the sensible meaning as the one that the legislature “intended”. But it is possible that they would stick to the literal wording of the section, and say that the definition includes anyone who is authorised to act (in any capacity) on behalf of the organisation.

My own view is that the second, narrower interpretation will be easier for the sector to work with. If a “family counsellor” means only a person authorised to conduct family counselling, it is less likely that drug or other specialist counsellors will find themselves in the position of “accidental” family counsellors.

When does family counselling begin and end?
The process of family counselling starts when the counsellor helps a person deal with personal and interpersonal issues in relation to marriage, or helps a person affected by separation or divorce deal with personal and interpersonal issues or with issues relating to the care of children. And it ends when the counsellor has ceased to do so.

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28 In one case the parties agreed—wrongly, as a matter of law, although nothing turned on this—that the organisation was a “family counsellor”: Smirnov & Turova [2009] FMCAFam 1083.

29 The facts of Kidd & London [2011] FMCAfam 1084 (school counsellor) illustrate the problem, although the debate there was about whether the activity was family counselling, not whether the counsellor was a family counsellor.

30 I owe this nice term to Francesca Gerner.
Determining when the process of helping starts and stops might however be difficult in some cases. Does it include preliminary intake or assessment processes, when a staff member takes a client’s details, or, say, screens for family violence issues? If this is done by someone who is not a “family counsellor”, it will surely not be family counselling. If a family counsellor does it, intake might be considered to fall outside the definition because the counsellor is not yet “helping” people, but determining whether family counselling will be undertaken.31 Similarly, it might be arguable whether measures taken at the end of the process are part of the counselling.32 If such measures fall outside the definition, the confidentiality provisions will not apply, and the admissibility of things said during those preliminary or subsequent steps would be governed by the general law, as indicated above.33

Summary, and implications for agencies
In contrast with the general law, which does not protect the confidentiality of counselling and therapy, the Family Law Act has provisions that restrict the extent to which the family counsellor can disclose communications in family counselling, and prevent the communications being given in evidence.

The Act’s definition of family counselling has two components. The first, the activity of family counselling, could include some activities that are not generally seen as family counselling. The second, the definition of “family counsellor” refers to a person authorised to act on behalf of a designated organisation.

Although in most situations it is clear whether a process is or is not family counselling, there are some situations in which the interpretation of “family counsellor” will affect whether the process falls within the definition. Much will depend on whether the courts interpret “family counsellor” to mean someone authorised to act on behalf of a designated organisation.

How agencies can help clarify what is and is not “family counselling”
It seems obviously desirable that everyone involved should know whether what is being done is family counselling, and thus whether the confidentiality provisions of the Act apply. What might agencies do to achieve this?

The previous discussion suggests that if the narrow interpretation of “family counsellor” is correct, the solution to many of the problems will lie in the hands of the agencies. They could explicitly authorise some individuals, and not others, to conduct family counselling on behalf of the organisation (without qualification) or a narrower meaning: someone authorised to conduct family counselling on behalf of the organisation. This narrower interpretation seems more sensible, but we can’t be sure at this stage that the courts will adopt it.

31 In a case dealing with family dispute resolution (not family counselling), Reithmuller FM considered—rightly in my view—that family dispute resolution did not include the preliminary assessment phase: Rastall & Ball & Ors [2010] FMCAfam 1290.
32 In a case dealing with family dispute resolution, not counselling, Reithmuller FM held that an agreement reached in family dispute resolution is not itself part of the process: Roux v Herman [2010] FMCAfam 1369.
33 Thus in Smirnov & Turova it was held that a statement made by a counsellor to a solicitor after the process was not protected by the confidentiality provisions.
the literal meaning—any person authorised to act on behalf of the organisation—it will be more difficult for agencies to determine what is and what is not family counselling; but it might help if they do their best to ensure that all job descriptions, names of tasks, appointment documents and the like make explicit whether what is happening is or is not considered to be family counselling.

In short, in my view agencies might help to clarify the situation by:

- making it explicit which activities are considered to be family counselling;
- taking any suitable opportunity to obtain a court ruling on whether the literal or the narrower interpretation is correct (and, if they agree with me, trying to persuade the court to adopt the narrower version); and
- seeking an amendment to the section; for example, so it reads “a person authorised by an organisation designated by the Minister for the purposes of this paragraph to conduct family counselling”.\(^{34}\)

\(^{34}\) The existing wording of s 10C(1)(b) is “a person who is authorised to act on behalf of an organisation designated by the Minister for the purposes of this paragraph”.\(^{34}\)