

SUPREME COURT OF QUEENSLAND

CITATION: *SWN v CJA* [2026] QCA 174

PARTIES: **SWN**
(appellant)
v
CJA
(first respondent)
DIRECTOR OF PUBLIC PROSECUTIONS
(second respondent)
DISTRICT COURT OF QUEENSLAND
(third respondent)

FILE NO/S: Appeal No 4374 of 2025
SC No 16528 of 2024

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal

ORIGINATING COURT: Supreme Court at Brisbane – [2025] QSC 218 (Crowley J)

DELIVERED ON: 15 September 2026

DELIVERED AT: Brisbane

HEARING DATE: 12 March 2026

JUDGES: Brown JA, Bradley JA, Freeburn J

ORDER: **The appeal is dismissed.**

CATCHWORDS: EVIDENCE – ADDUCING EVIDENCE – DOCUMENTS – REQUESTS TO PRODUCE – where the appellant is a complainant regarding child sexual offences allegedly committed by the first respondent – where the District Court granted leave for the issue of a subpoena to a counsellor to obtain records about the appellant under s 14F *Evidence Act 1977* (Qld) (*Evidence Act*) – where the appellant sought to have the District Court judge vacate the order granting leave and order the documents be produced under s 14H(2A) *Evidence Act* – where the District Court judge refused to vacate original order – where the appellant sought judicial review on the basis that the District Court judge was in jurisdictional error – where the appellant contended that the grant of leave was in excess of jurisdiction as the District Court judge was not satisfied to the appropriate standard regarding whether protected counselling communications will have substantial probative value to satisfy the public interest test under s 14H *Evidence Act* – where the primary judge found there was no jurisdictional error – where the primary

judge held that the Court did not need to consider each document containing a protected counselling communication in order to be satisfied that it will have substantial probative value and satisfy the public interest test – whether the primary judge’s construction of s 14H *Evidence Act* was in error – whether s 14H(1) *Evidence Act* requires the Court to be satisfied of each of the matters in s 14H(1) *Evidence Act* for each individual document containing a protected counselling communication in order to grant leave under s 14F *Evidence Act*

Criminal Procedure Act 1986 (NSW), s 299D(1)(a)
Evidence Act 1977 (Qld), s 14A, s 14F, s 14G, s 14H, s 14L

JK v R [2025] NSWCCA 44, distinguished
KS v Veitch (No 2) (2012) 84 NSWLR 172; [2012]
 NSWCCA 266, considered
PPC v Williams [2013] NSWCCA 286, distinguished
TRKJ v Director of Public Prosecutions (Qld) (2021)
 9 QR 472; [2021] QSC 297, considered

COUNSEL: A D Scott KC, with A J Cousen, for the appellant
 P J Wilson KC for the first respondent
 M B Lehané for the second respondent
 No appearance for the third respondent

SOLICITORS: Women’s Legal Service Queensland for the appellant
 Morrison’s Law for the first respondent
 Director of Public Prosecutions (Queensland) for the second respondent
 No appearance for the third respondent

- [1] **THE COURT:** The appellant appeals a decision dismissing an application under Pt 5 of the *Judicial Review Act 1991* (Qld) for an order in the nature of certiorari quashing orders made by a District Court judge on 24 May 2024 and 5 November 2024 and a subpoena issued for protected counselling communications (PCC) pursuant to the leave granted by the 24 May 2024 order under s 14F of the *Evidence Act 1977* (Qld) (the **Act**). Alternatively, the appellant sought a declaration that each of those orders and the subpoena were of no force or effect.
- [2] The primary judge found that no jurisdictional error was established by the appellant. The appellant contends that primary judge’s decision was in error particularly the primary judge’s construction of s 14H. The appellant contends that on its correct construction, s 14H(1) requires the Court to be satisfied of each of the preconditions for all individual PCCs in order to grant leave under s 14F of the Act for a subpoena seeking those communications.
- [3] Given the narrowness of the appeal it is unnecessary to set out in detail the findings of the Court below.
- [4] The factual underpinning of the decision is not contentious. Briefly, the appellant is the complainant in a criminal proceeding presently before the District Court. The first respondent is the defendant in the proceeding who is alleged to have committed offences against the appellant including several sexual offences on various dates

between 22 November 2020 and 23 November 2022. The second respondent has the carriage of the prosecution of the charges.

- [5] In June 2022, during the period of the alleged offending, the appellant commenced seeing a counsellor. After a few sessions with the appellant, the counsellor telephoned the appellant's mother and told her she was concerned about the first respondent's behaviour towards the appellant. She asked whether she could question the appellant further on the topic to which the mother agreed. The counsellor subsequently did so. As a result, the appellant allegedly made various disclosures to the counsellor about the first respondent. The counsellor reported the matter to the police given the nature of the disclosures.
- [6] The police commenced an investigation into the respondent's alleged offending against the applicant. After the first respondent was charged, he filed an application under s 14G(1) of the Act seeking the court's leave to:
 - (a) issue a subpoena to compel the appellant's counsellor to produce PCCs to the court; and
 - (b) produce to a court, adduce evidence of or otherwise use disclose, inspect or copy a PCC.
- [7] The revised terms of the proposed subpoena sought production of all counselling records pertaining to the appellant from the period 1 June 2022 to 2 December 2022, the date upon which the appellant provided a statement to police.
- [8] The application was originally heard by Long SC DCJ on 24 May 2024. The appellant was represented by counsel and the counsellor did not appear.
- [9] At the hearing of 24 May 2024 there was no issue that the subject records of the counsellor would contain PCCs. It was also conceded on behalf of the appellant that it was not a matter where the court would be required to exercise the power pursuant to s 14H(2A) of the Act. The critical issues for determination were whether the first respondent had satisfied the court of the matters under s 14H(1)(a) and (c) of the Act for a grant of leave namely: whether the PCCs, the subject of the application, had substantial probative value; and whether the public interest in admitting the communications into evidence substantially outweighed the public interest in preserving the confidentiality of the communications and protecting the counselled person from harm.
- [10] At the hearing, counsel appearing for the appellant, first respondent and the Office of the Director Public Prosecutions were all agreed that the case was one where it was appropriate for leave to be granted to issue the subpoena. A draft order was provided, and submissions were made to that effect to the District Court judge. Counsel for the appellant conceded that the court could be satisfied that the subject PCCs would have substantial probative value and that the balance of the public interest considerations favoured leave being granted to issue the subpoena.
- [11] The learned District Court judge however made it plain that he had to be satisfied of the required matters under s 14H(1) before leave could be granted. His Honour determined he was so satisfied and granted leave for the issue of the subpoena. The balance of the application concerning the potential use of the documents that would be produced under the subpoena was adjourned to 15 July 2024 for further hearing.

- [12] After being served with the subpoena, the counsellor wrote to the court objecting to the production of her therapy notes in relation to the appellant. On 15 July 2024, the appellant, first and second respondents and the counsellor appeared before the District Court judge for the next stage of hearing. The counsellor did not produce any documents in response to the subpoena. The appellant made an oral application to vacate the order of 24 May 2024, and for an order instead to be made under s 14H(2A) of the Act for the production of the records to the court so that the court could consider their contents before determining whether leave should be granted in respect of their use. The judge reserved his decision until 5 November 2024.

The decision of 5 November 2024

- [13] The District Court dismissed each of the applications to vacate the order made at the first hearing and dismissed the counsellor's effective application to narrow the terms of the subpoena.
- [14] The District Court judge considered in detail s 14H and the balancing exercise required involving competing public interests.
- [15] The District Court judge determined that leave to issue and serve the subpoena by his order on 24 May 2024 had not been demonstrated to be invalidly made. He also rejected the counsellor's submission as to the narrowing of the subpoena.
- [16] The appellant sought judicial review of the District Court judge's decision. It was refused for reasons identified below.

This Appeal

- [17] The sole ground of appeal is whether the primary judge erred in construing s 14F of the Act as not requiring satisfaction under s 14H of the Act in respect of all PCCs the subject of the grant of leave under s 14F of the Act. At the end of the hearing of the appeal the appellant's counsel clarified that by "all" he meant each individual PCC.
- [18] The present appeal was slightly unusual. The first respondent did not take part in the appeal due to what the court was informed was a lack of resources. The first respondent's counsel was permitted to withdraw from the hearing after confirming his instructions that he did not wish to appear. At the invitation of the court the second respondent provided submissions on the construction of the protected counselling provisions, s 14H, to assist the court. It supported the appellant's construction. Thus, the matter proceeded without a proper contradictor but of course the parties had the benefit of a very detailed judgment of the Court below.

Legislation

- [19] The provisions of Part 2, Division 2A of the Act deal with sexual assault counselling privilege (**SACP**). The provisions of Subdivision 3 (s 14E to s 14H) apply specifically to the trial or sentencing of a person for offences of the kind which the first respondent is charged.
- [20] As was stated by the primary judge below, depending on the nature of the relevant proceeding, the SACP provisions create either an absolute privilege or a qualified privilege in respect of a PCC. The nature and extent of the qualified privilege that

applies in respect of the trial of a person for an offence is established by s 14F, which provides:

“14F Sexual assault counselling privilege

- (1) A person can not do any of the following things in connection with the proceeding, other than with the leave of the court hearing the proceeding—
 - (a) compel, whether by subpoena or otherwise, another person to produce a protected counselling communication to a court;
 - (b) produce to a court, adduce evidence of or otherwise use, a protected counselling communication;
 - (c) otherwise disclose, inspect or copy a protected counselling communication.”

[21] The meaning of “protected counselling communication” is provided by s 14A, which relevantly states:

“14A Meaning of *protected counselling communication*

- (1) A *protected counselling communication* is an oral or written communication made in confidence—
 - (a) by a counselled person to a counsellor; or
 - (b) by a counsellor to or about a counselled person to further the counselling process; or
 - (c) about a counselled person by a parent, carer or other support person who is present to facilitate communication between the counselled person and a counsellor or to otherwise further the counselling process.
- ...
- (3) For subsection (1) it does not matter whether the communication was made—
 - (a) before or after the act or omission constituting the sexual assault offence committed or allegedly committed against the counselled person occurred; or
 - (b) in connection with the sexual assault offence, or a condition arising from the sexual assault offence, committed or allegedly committed against the counselled person.
- (4) A reference in this division to a protected counselling communication includes a reference to—
 - (a) a document to the extent it contains a protected counselling communication; or

- (b) evidence to the extent it discloses a protected counselling communication.”

- [22] Section 14G allows a party to the proceeding to apply for the court’s leave to do one of the matters under s 14F. Pursuant to s 14G(2), the applicant must give the counsellor notice of the application, and s 14G(3) provides that the applicant must give the counsellor and the counselled person a written notice advising each of those persons of a number of things including that “an application for leave under this subdivision has been made in relation to a protected counselling communication”.
- [23] Section 14L provides that if a counselled person or counsellor is not a party to a proceeding to which Subdivision 2 or 3 applies, they may each appear in the proceeding when the court is deciding whether a document or evidence relating to the counselled person is a PCC or in an application for leave under subdivision 3.
- [24] In respect of such an application, s 14H relevantly provides:

“14H Deciding whether to grant leave

- (1) The court can not grant an application for leave under this subdivision unless the court is satisfied that—
 - (a) the protected counselling communication the subject of the application will, by itself or having regard to other documents or evidence produced or adduced by the applicant, have substantial probative value; and
 - (b) other documents or evidence concerning the matters to which the communication relates are not available; and
 - (c) the public interest in admitting the communication into evidence substantially outweighs the public interest in—
 - (i) preserving the confidentiality of the communication; and
 - (ii) protecting the counselled person from harm.
- (2) In deciding the matter mentioned in subsection (1)(c), the court must have regard to the following matters—
 - (a) the need to encourage victims of sexual assault offences to seek counselling;
 - (b) that the effectiveness of counselling is likely to be dependent on maintaining the confidentiality of the counselling relationship;
 - (c) the public interest in ensuring victims of sexual assault offences receive effective counselling;
 - (d) that disclosure of the protected counselling communication is likely to damage the relationship between the counsellor and the counselled person;
 - (e) whether disclosure of the communication is sought on the basis of a discriminatory belief or bias;
 - (f) that the disclosure of the communication is likely to infringe a reasonable expectation of privacy;

- (g) the extent to which the communication is necessary to enable the accused person to make a full defence;
 - (h) any other matter the court considers relevant.
- (2A) For deciding the application, the court may do any of the following—
- (a) order a person to produce the protected counselling communication to the court;
 - (b) consider the protected counselling communication;
 - (c) make any other order it considers appropriate to facilitate its consideration of the protected counselling communication.
- (2B) If the protected counselling communication is produced to the court under subsection (2A), the court must not disclose it, or make it available to a party to the proceeding, before deciding the application.
- (3) Also, for deciding the application, the court may consider a written or oral statement made to the court by the counselled person outlining the harm the person is likely to suffer if the application is granted.
- ...
- (8) In this section—

harm includes physical, emotional or psychological harm, financial loss, stress or shock, and damage to reputation.”

The Supreme Court Decision

- [25] In the Court below, the appellant contended that the District Court judge’s orders were affected by jurisdictional error for two reasons:¹
- (a) first, the District Court judge misconstrued s 14H of the Act and thereby misapprehended the nature of, and limits on, the court’s powers. She contended that the District Court judge did so by erroneously regarding the requirements of a grant of leave in respect of PCCs, in particular, that a court could be satisfied that communications will have substantial probative value and that the public interest in admitting the communications into evidence, substantially outweighs the countervailing public interest considerations in s 14H(1)(c), as capable of satisfaction without the court first ascertaining the actual content of the communications; and
 - (b) second, the judge misconstrued s 14H(1)(a) by equating the requirement that the PCC “will have substantial probative value” with a “high degree of expectation” as to the probative value of the material.
- [26] Before the learned primary judge, the appellant argued that actual knowledge of the content of each document in a PCC is a prerequisite to satisfaction of the matters in

¹ *SWN v CJA* [2025] QSC 218 (**Reasons**) at [74].

s 14H, and is therefore a prerequisite to the exercise of the court's jurisdiction to grant leave to issue a subpoena in respect of PCCs. As the counsellor's records in this case spanned a period of some six months between July and December 2022, the appellant contended that the District Court judge could not rationally have been satisfied of those matters in respect of each document containing a PCC without first considering the actual contents of the documents, and thus acted without jurisdiction when his Honour granted leave on 24 May without engaging in that exercise.² According to the appellant in her argument made below the words in s 14H(1)(a) "will...have substantial probative value" should, since the introduction of s 14H(2A), be construed as requiring the court to know the content of the PCC before it can reach the necessary satisfaction level required to grant leave.

- [27] The primary judge identified the proper construction and application of s 14H(1)(a) as central to the issues raised by the appellant³ and in particular what must be demonstrated to satisfy the test in s 14H(1)(a) that a PCC "will...have substantial probative value".⁴ He approached the question of construction in the conventional way.⁵
- [28] Although one aspect of the primary judge's construction is the subject of this appeal, an analysis of his Honour's reasons is important to determining the context of any alleged error.
- [29] The primary judge identified the purposes of the provision and the SACP provisions as a whole and that those purposes include encouraging victims of sexual assault offences to seek counselling and to protect victims from potential harm if matters disclosed by them in counselling are revealed and able to be used as evidence in a criminal proceeding.⁶ The primary judge identified that:⁷
- "Those purposes are achieved through the qualified privilege that applies in respect of a PCC (s 14F), whereby the confidentiality and privacy of a PCC is safeguarded, subject to leave being granted in accordance with a strict statutory test (s 14H). That test is weighted heavily in favour of preserving the confidentiality of the PCC and protecting the counselled person from harm but 'seeks to ensure the appropriate balance in each case between the right to a fair trial and the public interest in preserving the confidentiality of counselling communications.'" (footnotes omitted)
- [30] In construing s 14H the primary judge:
- (a) determined that for the purposes of an application for leave under s 14G of the Act, satisfaction of the matters in s 14H(1)(a) and (c) are jurisdictional facts;
 - (b) stated that s 14H(1)(c) makes it plain that the ultimate issue with respect to the use to be made of a PCC is whether it ought to be admitted into evidence, thus requiring a judge to consider the evidentiary use that is to be made of the PCC in deciding an application for leave;

² Reasons at [13]-[14].

³ Reasons at [22].

⁴ Reasons at [86].

⁵ Applying the approach stated by the majority in *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362.

⁶ Reasons at [89].

⁷ Reasons at [89].

- (c) considered it was implicit that an applicant for leave necessarily bears the onus of satisfying the court of the statutory criteria;
- (d) considered that the language of s 14H(1)(a) makes plain that the court must be satisfied that the PCC “the subject of the application” will have substantial probative value, which indicates the necessity for an applicant to specify the PCC in respect of which leave is sought and for the court to assess the probative value of that particular PCC. His Honour observed that the subpoena will generally contain a schedule describing the subject documents with sufficient particularity as to whom or what they relate, their date range and their subject matter and type to enable compliance with the subpoena and the production of relevant documents;
- (e) considered that the definition of PCC in s 14A is to be read with s 14H. Although s 14A and s 14H refer in singular terms to “a PCC” and “the PCC” respectively, those terms necessarily include the plural PCCs, his Honour stating that there was nothing in the Act to indicate a contrary intention to displace the singular being read as the plural as provided in s 32C of the *Acts Interpretation Act 1954* (Qld). His Honour observed that was consistent with the fact that in many cases where leave is sought to subpoena counselling records it is likely that there will be more than one PCC that is the subject of the application for leave in which case “each individual document containing a PCC will together comprise ‘the PCCs the subject of the application’”;
- (f) analysed the phrase “...will, ‘by itself or having regard to other documents or evidence produced or adduced by the applicant’ have substantial probative value”. His Honour observed that the words “by itself” suggest that the court might be so satisfied having regard solely to the contents of the subject PCC. However the other terms of the subsection made it clear that there is no requirement for the court to consider the actual contents of the subject PCC before it may be satisfied that the PCC will have substantial probative value. By employing the conjunction “or” the subsection expressly provides for the court to make the necessary assessment “having regard to other documents or evidence”. In those circumstances the Court may be satisfied that the subject PCC will have substantial probative value on the basis of reasonable inferences or conclusions that may be drawn from the known circumstances of the case and other material before the court. That view was supported by the observations of Beech-Jones J in *KS v Veitch (No 2)*⁸ and by Applegarth J in *TRKJ v Director of Public Prosecutions (Qld)*;⁹
- (g) considered that the test of “substantial probative value” was correctly analysed by Cash DCJ in *R v TRKJ (No 2)*¹⁰ who after having regard to the earlier decision concluded that “the test will be satisfied where the judge concludes that the worth of the PCC, in the context of all relevant information, goes beyond mere relevance or having some probative value – it is necessary for the judge to be persuaded the PCC has some real worth or value sufficient to make it substantially probative”;
- (h) considered the phrase “will...have substantial probative value” requires that the court must be positively satisfied of the prospective future capacity of the

⁸ (2012) 84 NSWLR 172 at [86].

⁹ (2021) 9 QR 472 at [144].

¹⁰ [2023] QDC 231 at [27].

PCC to have substantial probative value under s 14H(1)(a). That assessment is to be made by the court at the time the application for leave is made and on the basis of the information and material then known. His Honour stated in that regard:¹¹

“In contrast, where, as here, leave is sought to subpoena documents, and the court does not know or consider the actual contents of the material, an assessment of the likelihood or probability of what is expected to be contained within those documents will necessarily form part of the court’s inquiry and the antecedent reasoning process by which the court may ultimately infer that the documents will contain a PCC that will have substantial probative value.”

- (i) considered that the phrase “will...have substantial probative value” does not require the court to consider the actual content of the PCC. The court may be satisfied by drawing inferences from the other information and material available and known to the court about the expected or likely content of the subject PCC, without considering the PCC itself.
- [31] The primary judge concluded that the District Court judge had been cognisant of the criterion requiring him to be presently satisfied that the PCCs expected to be contained within the documents to be subpoenaed will have the requisite prospective substantial probative value to the defendant’s trial.¹²
- [32] The primary judge did not consider s 14H(2A) warranted a different approach to s 14H(1)(a) and rejected an argument that the court should exercise the powers under s 14H(2A) to order that the documents be produced to the court and to then consider them in order to decide whether their contents contain PCCs that will have substantial probative value. He stated that there was nothing in the text of s 14H or in its purpose or context which supported it and that “The clear words of s 14H(1)(a) permit the court to make the necessary assessment of substantial probative value on the basis of the subject PCC itself or having regard to other documents or evidence produced or adduced by the applicant. There is no express or implied requirement for the court to consider the actual contents of the PCC”.¹³ That was supported by the Explanatory Note to the relevant Bill for the amending legislation,¹⁴ which clarified that the purpose of introducing s 14H(2A) and giving the court express powers was to put beyond doubt what Applegarth J in *TRKJ* had considered the Court had an implied power to do.
- [33] In that regard the primary judge noted that the power in s 14H(2A) should only be used by the court if it was necessary in the circumstances of a case to advance the purposes and objects of the legislative scheme. His Honour stated that a fundamental purpose of the scheme was to prioritise the preservation of the confidentiality of a PCC and to avoid potential harm to a counselled person through disclosure and use of the PCC in connection with the proceeding and that the provisions of the Act appeared to be deliberately designed to require an applicant to satisfy the court that the subject PCC will have substantial probative value without themselves having knowledge of or access to the actual contents of documents

¹¹ Reasons at [118].

¹² Reasons at [120].

¹³ Reasons at [125].

¹⁴ Explanatory Notes, *Integrity and Other Legislation Amendment Bill 2023* (Qld).

containing the PCC. If the Court was required to order the production of documents to consider the content of the documents, that would undermine the legislative purpose.¹⁵

- [34] The primary judge concluded that there was no jurisdictional error by the District Court judge in his determination not to set aside the subpoena.
- [35] The primary judge rejected the applicant's argument that, without first considering the actual contents of the documents, the District Court judge could not rationally have been satisfied that the documents containing PCCs that would be produced in response to the subpoena will have a substantial probative value. His Honour stated that:¹⁶

“In my opinion, it erroneously proceeds on the basis that the phrase ‘will...have substantial probative value’ required the judge to have certainty as to the contents of the documents that were the subject of the application for leave to issue a subpoena. As I have already concluded, I do not consider that is, or was, required on the proper construction of s 14H(1)(a).

In my view, the real flaw in the applicant's argument and reasoning is to approach that matter as if the judge was required to be satisfied that each individual document containing a PCC will itself have substantial probative value. While that might be required in another case, in my view it is not required in every case and was not required in this case. Here the nature of the case and the material provided to the judge to determine the application clearly revealed a logical basis for the judge to be satisfied that the counselling records would contain PCCs that will have substantial probative value. There was of course no doubt that the records would contain PCCs, even though the precise details of those PCCs was not yet known. However, to proceed as the judge did involves no impermissible speculation about the contents of individual documents. In my opinion, at this first stage of the leave application, his Honour was entitled to consider whether the PCCs that would be contained within the counsellor's records will, as a whole, have substantial probative value. As I have already noted, the singular references to ‘a PCC’ or ‘the PCC’ must be read as to include the plural. The judge was therefore required to consider whether the PCCs the subject of the application will have substantial probative value. In making that assessment, the judge was required to consider the nature and expected content of the PCCs that would inevitably be contained in the documents to be produced if leave were granted and the other information and material then provided and known to the court to decide the application.” (emphasis added)

- [36] The appellant contends that underlined parts of his Honour's reasons demonstrate error.

Was there error in the construction of s 14H?

¹⁵ Reasons at [127].

¹⁶ Reasons at [136]-[137].

- [37] In circumstances where the PCC is relevant to preliminary complaint by the appellant, the appellant properly made concessions that the requirements of s 14H had been satisfied at the hearing of 24 May 2024. At the hearing of 15 July 2024, the appellant conceded that it was likely that there were records responsive to the subpoena which satisfied the requirements of s 14H. At the 15 July 2024 hearing it was contended that the District Court could not be satisfied that all of the records within the date range met the requirements of s 14H in circumstances where it was improbable that all of those records related to allegations against the first respondent and the court had not exercised its power to inspect the records. That was rejected by the District Court judge which led to the judicial review application on the basis of jurisdictional error, which was rejected by the primary judge.
- [38] The appellant contends that the primary judge erred in identifying the “real flaw” in the appellant’s argument as that s 14H(1)(a) could be satisfied if the “the PCCs that would be contained within the counsellor’s records will, as a whole, have substantial probative value”. In particular she challenges the determination of the primary judge as reading “protected counselling communication” where applicable in the plural because on that reading it was not necessary for all communications the subject of the application to satisfy the requirements of s 14H. She contends that on that approach “if, when those records are considered as a whole, there are records that satisfy the requirements of the section, all of the records the subject of an application for leave may be the subject of a grant of leave”. She contends that the approach of the primary judge will lead to absurd consequences and that there is another reasonably open interpretation which better conforms to the intent of the provision interpreted. She refers to the Explanatory Notes of the Bill¹⁷ identifying that the provisions were part of the implementation of the recommendations in the report “Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland”. The provisions in the Act were introduced to address the absence of protection of communications between counsellors and victims of sexual assault, which may deter victims from seeking counselling because what they say may be disclosed to the accused in court. According to the appellant, the object of s 14F and s 14H would be open to defeat if an applicant could obtain leave for documents within a date range which is likely to include documents that do meet the requirements of s 14H even though other documents in the same date range do not.
- [39] The appellant contends that another interpretation which is reasonably open and does not give rise to such consequences is to construe “application” in s 14H as a “request” or “act of requesting” rather than a formal legal document filed in court containing the request. On this approach, if there is more than one communication document, the application will contain more than one request and the court will need to be satisfied of the requirements in s 14H in respect of each document the subject of a request. She submits that a court can readily satisfy itself of the requirements of s 14H for individual documents by exercising the power granted to it by s 14H(2A) to require production of the documents to the court and then by considering the documents, consistent with the power of the court where there is a claim for public interest immunity once it appears to be “on the cards” that those documents will help the defence. While the court could not disclose the contents of those documents, it could have the benefit of the parties and the counselled person and the counsellor identifying the issues in the proceeding. It appears the

¹⁷ Explanatory Notes, *Integrity and Other Legislation Amendment Bill 2023* (Qld).

appellant's argument on appeal has changed emphasis from what was argued at first instance to this appeal.

- [40] The appeal in this matter should be dismissed for the following reasons.
- [41] First, the appellant's focus on the statements by the primary judge as to the "real flaw" and "on the counsellor's records as a whole" takes the comments of his Honour out of context and incorrectly focusses on individual documents rather than the subject of the privilege being PCCs. The primary judge's comments were directed to the contention of the appellant that s 14H in effect requires a judge to be satisfied that each individual document containing a PCC will have substantial probative value. That is not the approach required by s 14H. The SACP contained in Division 2A of the Act creates a privilege in respect of a PCC, not a document. As recognised by the definition of PCC, it may be a document to the extent it contains a PCC or evidence to the extent it discloses a PCC. Everything in the documents sought or the evidence may not contain PCCs and would not be the subject of the privilege. The primary judge construed s 14H to demonstrate that the requirements in s 14H(1)(a) extend to the court not being limited to being satisfied not only on the basis of the PCC itself but "having regard to other documents or evidence produced or adduced by the applicant". That makes it clear the court cannot only be satisfied on the basis of the individual document. As his Honour stated, the court may be satisfied that the subject PCC will have substantial probative value on the basis of reasonable inferences or conclusions that may be drawn from the known circumstances of the case and other material before the court. That accords with the fact that the PCCs may be spread over a number of sources and that the content of individual documents is unlikely to be known by the person issuing the subpoena.
- [42] The comments of the primary judge also need to be seen in the context of the reference by his Honour to the District Court judge having been cognisant "that the criterion required the court to be presently satisfied that the PCCs expected to be contained within the documents to be subpoenaed will have the requisite prospective substantial probative value in the defendant's trial".¹⁸ As to the reference to "as a whole", that comment was made in the context of where the only records being sought were the counselling records for a period which was book-ended by when the complainant started counselling and when she made a statement to the police. The comment is made in the context of the evidence as to the records' content of PCCs "where it is known by the court in the present case that the complainant was receiving counselling during the period of the alleged offending, and where the counsellor contacted police on the basis of what had been disclosed to her by the complainant during counselling sessions".¹⁹ That conclusion was strengthened by concessions made by the appellant, even if other matters may also have been discussed in the counselling sessions, where the District Court judge drew inferences that the subject PCCs recorded in those documents will have substantial probative value.
- [43] Secondly, his Honour construing "protected counselling communication" in s 14H as comprehending, where applicable, the plural "protected counselling communications" is plainly correct as there is no contrary intention to be found in the Act and where PCCs are the subject, pursuant to s 14H(1)(a), of what the court must be satisfied has "substantial probative value", not the application. The

¹⁸ Reasons at [120].

¹⁹ Reasons at [101].

appellant's contention that "application" should be read in the plural and as a request does not accord with a natural reading of the section, which supports "application" being the actual filed application, not merely a "request". "Application" in the context of the provision is clearly referring to the mechanism by which leave is sought. That is supported by the wording in s 14G(2), which requires the giving of notice of the application.

- [44] Thirdly, while the Queensland legislation did model itself on the New South Wales legislation, the cases to which the Court was referred that were relied upon by the appellant, *PPC v Williams*²⁰ and *JK v R*²¹ were both appeals directed to a determination of whether access to documents said to contain PCCs should be given, where documents had actually been produced to the Court. While Gleeson JA in *Williams* considered that it was necessary for a judge to be satisfied that each document or category of documents, where the documents related to the same incident or issue concerning the applicant, satisfied the "substantial probative value" requirement of the NSW legislation,²² that was in the context where "A number of the incidents were unrelated to the incident giving rise to the charges against the respondent".²³ Gleeson JA also observed that:²⁴

"Furthermore, the approach of allowing access to documents in their 'totality' to make some of the material comprehensible, is inconsistent with the focus required by the more restrictive approach in s 299D(1)(a). This requires satisfaction of the 'substantial probative value' test in respect of each document in respect of which access is allowed to the parties, rather than the broader 'legitimate forensic purpose' test generally applied to production of documents under subpoena: *KS v Veitch (No 2)* at [32]."

- [45] The NSW Court of Criminal Appeal in *JK v R* expressed the view that it was difficult to envisage how a judge can decide whether a document to which access is sought contains a "protected confidence" or has substantial probative value and to decide the matters under s 299D if the judge did not examine the document.²⁵ Neither case expressed the view that the proper construction of the provision required, in every case, that each and every document had to be examined in order to be satisfied of the test for the purpose of issuing a subpoena.
- [46] *KS v Veitch (No 2)*²⁶ concerned a subpoena issued without leave. The primary judge referred to Beech-Jones J, who stated that:²⁷

"...the apparently high threshold presented by the criteria in s 299D may not be as difficult to overcome as first appears if the relevant application was supported by evidence identifying the accused's defence to the relevant allegation, what the accused expects will be obtained from the material sought to be produced or inspected and

²⁰ [2013] NSWCCA 286.

²¹ [2025] NSWCCA 44.

²² Section 299D(1)(a) *Criminal Procedure Act 1986* (NSW).

²³ [2013] NSWCCA 286 at [69].

²⁴ [2013] NSWCCA 286 at [67].

²⁵ [2025] NSWCCA 44 at [24] referring to *PPC v Williams*.

²⁶ (2012) 84 NSWLR 172.

²⁷ (2012) 84 NSWLR 172 at [86]. His Honour agreed with Basten JA who did not comment on this aspect of the decision.

what other documents or evidence are or are not available relating to those issues and the material sought. That is not to say that those matters must be deposed to before such an application will be granted but, as a practical matter, if they were an application for leave would appear to have a greater chance of success.”

- [47] Justice Applegarth in *TRKJ* also disagreed with the view that the Court could not be satisfied of the requirements of s 14H without viewing the documents, observing that “Depending on the evidence and submissions, the conditions may be satisfied by extrinsic evidence and inferences about what the counselled person said to the counsellor”.²⁸ That observation has some relevance to the present case.
- [48] The context of the leave sought may well bring different results at various stages of proceedings as knowledge of the conduct of the trial unfolds and other information may become available or of more weight to the assessment to be made. The primary judge in the present case recognised that while the same threshold had to be met whether for the issuing of a subpoena or the production of documents it did not necessarily follow that the same issues would need to be considered once the documents had been produced and in fact different matters may then become of relevance.²⁹
- [49] Fourthly, the primary judge’s construction supports and does not undermine the purpose of the provisions, which is to not discourage victims of assault from seeing a counsellor but to still allow access to PCCs in certain circumstances by imposing a requirement of leave to issue a subpoena with a higher threshold than would normally be the case. That is achieved by requiring the court be satisfied that a PCC has substantial probative value and that, recognising the need to avoid harm to the counselled person, disclosure of the PCC weighs in favour of leave being granted. Section 14F also provides that leave has to be obtained not only to issue the subpoena but to access a PCC and to produce evidence of the PCC to a court.
- [50] Fifthly, the submission that the object of s 14F and s 14H would be open to defeat if an applicant could obtain leave for documents within a date range which is likely to include documents that meet the requirements of s 14H even though other documents in that same date range do not, fails to comprehend that the documents containing PCCs may contain other material which does not have to meet the same high threshold for a subpoena and if that material is not relevant, steps may be taken to restrict access to that material or redact it by virtue of the leave requirement in s 14F(1)(c). That process may be informed by the counsellor or the counselled person.
- [51] Sixthly, while the appellant does not contend that the court must exercise the power in s 14H(2A) to require the production of documents to the court and consider those documents before being able to grant leave, the construction of the appellant would inevitably lead to that having to be the case given it is unlikely in the majority of cases that the person subpoenaing the material will have knowledge of the contents of each individual document. That power was not introduced as a general power but to make clear that there was such a power, which Applegarth J in *TKRJ* had found was an implied power but one that would be used sparingly. That is consistent with minimising disclosure of PCCs, even to the court, where the high

²⁸ (2021) 9 QR 472 at [144].

²⁹ Reasons at [132].

threshold of substantial probative value is not met. The appellant's approach again suffers from being framed by reference to documents rather than to PCCs.

- [52] Seventhly, the construction put forward by the second respondent suffers from the same difficulty as the appellant's in conflating documents with PCC the latter being the subject of s 14H. While it refers to support from interstate authorities particularly in New South Wales, which include those referred to above they do not address the granting of leave to issue a subpoena as opposed to access to documents, where even though the same test applies for the requirement of leave the context of determining production of actual documents is different. The question of access of course remains a matter to be determined upon the return of the subpoena at which time further submissions can be made in relation to the access to be given to the documents.
- [53] The appellant has not established any error by the primary judge. The appeal should therefore be dismissed.

Order

- [54] The order of the Court is:
1. The appeal is dismissed.