SUPREME COURT OF QUEENSLAND

CITATION:	*R v Baden-Clay* [2013] QSC 351
PARTIES:	**THE QUEEN** (Applicant) v **GERARD ROBERT BADEN-CLAY** (Respondent) **RELATIONSHIPS AUSTRALIA (QUEENSLAND)** (Intervener)
FILE NO/S:	467 of 2013
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	19 December 2013
DELIVERED AT:	Brisbane
HEARING DATE:	1 October 2013
JUDGE:	Douglas J
ORDER:	**That the counsellor is required to give evidence at the preliminary hearing including evidence of anything said or any admission made to her by the deceased Alison Baden-Clay or the defendant Gerard Baden-Clay in communications by them or either of them in family counselling.**
CATCHWORDS:	EVIDENCE – WITNESSES – IN GENERAL – COMPELLING ATTENDANCE – where defendant is accused of murdering his wife – where defendant and deceased attended marriage counselling with a family counsellor – where defendant and prosecution wish to examine the counsellor at a *voir dire* prior to the trial – where counsellor claims that the *Family Law Act 1975* (Cth) prohibits her giving evidence – whether the *Family Law Act 1975* (Cth) prohibits the counsellor from giving evidence at the hearing – whether the counsellor is compelled to attend the hearing EVIDENCE – WITNESSES – IN GENERAL – IMMUNITIES – where defendant is accused of murdering his wife – where defendant and deceased attended marriage counselling with a family counsellor – where defendant and

prosecution wish to examine the counsellor at a *voir dire* prior to the trial – where counsellor claims that a public interest immunity exists to prohibit her giving evidence at the hearing – whether such a public interest immunity exists – whether the counsellor is prohibited from giving evidence if such an immunity does exist

FAMILY LAW AND CHILD WELFARE – THE FAMILY LAW ACT 1975 (CTH) AND RELATED LEGISLATION – MARRIAGE COUNSELLING, MEDIATION AND ARBITRATION – where defendant is accused of murdering his wife – where defendant and deceased attended marriage counselling with a family counsellor – where defendant and prosecution wish to examine the counsellor at a *voir dire* prior to the trial – where counsellor claims that s 10D and s 10E of the *Family Law Act 1975* (Cth) operate to prohibit her giving evidence in the trial – where counsellor claims that those sections also create a public interest immunity that prohibits her giving evidence – whether a public interest immunity exists – whether the *Family Law Act 1975* (Cth) prohibits the counsellor from giving evidence – whether the counsellor is compelled to attend the hearing

Criminal Code (Qld), s 590AA
Judicature Act 1903 (Cth), s 78B
Family Law Act 1975 (Cth), s 4, s 10D, s 10E

Anglicare WA v Department of Family and Children Services (2000) 26 Fam LR 218; [2000] WASC 47, considered
Cooper v Cooper [2012] FMCAfam 789, cited
Farah Constructions Pty Ltd v Say-Dee Pty Ltd (2007) 230 CLR 89; [2007] HCA 22, followed
Fernando v Commissioner of Police (1995) 36 NSWLR 567, cited
R v Liddy (No 2) (2001) 79 SASR 401, followed
Re Alcan Australia Ltd; ex parte Federation of Industrial Manufacturing and Engineering Employees (1994) 181 CLR 96 [1994] HCA 34, followed
Sankey v Whitlam (1978) 142 CLR 1; [1978] HCA 43, followed
Unitingcare-Unifam Counselling v Harkiss 47 (2011) 252 FLR 309; [2011] FamCAFC 159, cited

Pearce and Geddes, *Statutory Interpretation in Australia* (7th ed, 2011)

COUNSEL: G P Cash for the applicant
M J Byrne QC for the respondent
G N Kalimnios for the intervener/witness

SOLICITORS: Office of the Director of Public Prosecutions for the applicant
Peter Shields Lawyers for the respondent
Heming + Hart Solicitors for the intervener/witness

[1] Gerard Baden-Clay is charged with the murder of his wife, Alison Baden-Clay. Before her death a family counsellor had counselled both of them. Police have obtained the file held by the counsellor's employer which includes her notes of the counselling sessions.

[2] Both the prosecution and defence in Mr Baden-Clay's criminal trial want the counsellor to be available to give evidence at the trial. The matter came before me as a preliminary hearing pursuant to s 590AA of the *Criminal Code* to hear the evidence she would be able to give at the trial. The counsellor argues that she should not give evidence, either because s 10D and s 10E of the *Family Law Act* 1975 (Cth) ("the Act") prohibit her from doing so, or because she is entitled to claim privilege against giving evidence because a public interest immunity exists against it.

[3] In my view both arguments are misconceived.

The legal background

[4] Sections 10D and 10E of the Act provide:[1]

> "**10D Confidentiality of communications in family counselling**
>
> (1) A family counsellor must not disclose a communication made to the counsellor while the counsellor is conducting family counselling, unless the disclosure is required or authorised by this section.
>
> (2) **A family counsellor must disclose a communication if the counsellor reasonably believes the disclosure is necessary for the purpose of complying with a law of the Commonwealth, a State or a Territory.**
>
> (3) A family counsellor may disclose a communication if consent to the disclosure is given by:
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> (a) if the person who made the communication is 18 or over – that person; or
>
> (b) if the person who made the communication is a child under 18:
>
> (i) each person who has parental responsibility (within the meaning of Part VII) for the child; or
>
> (ii) a court.
>
> (4) A family counsellor may disclose a communication if the counsellor reasonably believes that the disclosure is necessary for the purpose of:
>
> (a) protecting a child from the risk of harm (whether physical or psychological); or
>
> (b) preventing or lessening a serious and imminent threat to the life or health of a person; or

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1 Emphasis added.

(c) reporting the commission, or preventing the likely commission, of an offence involving violence or a threat of violence to a person; or

(d) preventing or lessening a serious and imminent threat to the property of a person; or

(e) reporting the commission, or preventing the likely commission, of an offence involving intentional damage to property of a person or a threat of damage to property; or

(f) if a lawyer independently represents a child's interests under an order under section 68L – assisting the lawyer to do so properly.

(5) A family counsellor may disclose a communication in order to provide information (other than personal information within the meaning of section 6 of the *Privacy Act* 1988) for research relevant to families.

(6) Evidence that would be inadmissible because of section 10E is not admissible merely because this section requires or authorises its disclosure.

Note: This means that the counsellor's evidence is inadmissible in court, even if subsection (2), (3), (4) or (5) allows the counsellor to disclose it in other circumstances.

(7) Nothing in this section prevents a family counsellor from disclosing information necessary for the counsellor to give a certificate of the kind mentioned in paragraph 16(2A)(a) of the *Marriage Act* 1961.

(8) In this section:
"*communication*" includes admission.

10E Admissibility of communications in family counselling and in referrals from family counselling

(1) **Evidence of anything said, or any admission made, by or in the company of:**

(a) a family counsellor conducting family counselling; or

(b) a person (the *professional*) to whom a family counsellor refers a person for medical or other professional consultation, while the professional is carrying out professional services for the person;

is not admissible:

(c) in any court (whether or not exercising federal jurisdiction); or

(d) in any proceedings before a person authorised to hear evidence (whether the person is authorised by a law of the Commonwealth, a State or a Territory, or by the consent of the parties).

(2) Subsection (1) does not apply to:

(a) an admission by an adult that indicates that a child under 18 has been abused or is at risk of abuse; or

(b) a disclosure by a child under 18 that indicates that the child has been abused or is at risk of abuse;

> Unless, in the opinion of the court, there is sufficient evidence of the admission or disclosure available to the court from other sources.
>
> (3) Nothing in this section prevents a family counsellor from disclosing information necessary for the counsellor to give a certificate of the kind mentioned in paragraph 16(2A)(a) of the *Marriage Act* 1961.
>
> (4) A family counsellor who refers a person to a professional (within the meaning of paragraph (1)(b)) must inform the professional of the effect of this section."

[5] The word "court" is also defined in s 4 of the Act as follows:

> "In relation to any proceedings, means **the court exercising jurisdiction in those proceedings by virtue of this Act**."

[6] In *R v Liddy (No 2)* the South Australian Court of Criminal Appeal interpreted the word "court" in the predecessor to this section, s 19N of the Act, which was expressed in effectively the same terms as s 10E(1), to be limited to a court exercising jurisdiction under the Act unless a contrary intention appeared.[2] The particular sub-section considered in *R v Liddy (No 2)* was s 19N(2), which provided:

> "(2) Evidence of anything said, or any admission made, at a meeting or conference conducted by a person to whom this section applies[3] while the person is acting as such a person is not admissible:
>
> (a) in any court (whether exercising federal jurisdiction or not) …"

[7] In his reasons Debelle J, with whom Williams J agreed, said:[4]

> "[10] I turn to the question whether s 19N renders any notes or records of the counselling session inadmissible. On its face, the terms of s 19N(2) are very wide, in that the documents are not admissible in any court whether exercising federal jurisdiction or not. The expression 'any court (whether exercising federal jurisdiction or not)' in s 19N(2) is capable of including any court in the Commonwealth. However, the word 'court' is defined in s 4 of the *Family Law Act* in these terms:
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> *'court,* in relation to any proceedings, means the court exercising jurisdiction in those proceedings by virtue of this Act.'
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> The word 'proceedings' is also defined and means:
>
> 'a proceeding in a court, whether between parties or not, and includes cross-proceedings or an incidental proceeding in the course of or in connection with a proceeding.'
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> Those definitions apply unless the contrary intention appears. I do not think that the definition of 'proceeding' is of any assistance in reviewing the present issue. Thus, the word 'court', when used in the *Family Law Act,* is intended to be limited to a court exercising jurisdiction in proceedings instituted under the *Family Law Act*

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2 (2001) 79 SASR 401.

3 This included family counsellors; see s 19N(1)(a).

4 (2001) 79 SASR 401, 404-405 at [10]-[13] (emphasis added).

unless a contrary intention appears. **If the definition of 'court' is inserted in s 19N(2)(a) the non-admissibility of evidence of anything said or admissions made at a meeting or conference to which s 19N applies would operate in 'any court exercising jurisdiction in proceedings by virtue of this Act (whether exercising federal jurisdiction or not)'. When the definition of 'court' is inserted in this way, it is readily apparent that s 19N(2) does not govern the admissibility of evidence in courts not exercising jurisdiction under the *Family Law Act.***

[11] I tum to the question whether s 19N discloses any contrary intention. An examination of s 19N(2)(a) discloses that it does not. Generally speaking, the use of the expression 'in any court' would impose an absolute prohibition on admissibility in any court: see, for example, the prohibition against disclosure in s 16(3) of the *Income Tax Assessment Act* 1936 (Cth), and in s 17(3) of the then *Social Services Act* 1947 (Cth) (now repealed) and discussed in *R v Clarkson (No* 2) [1982] VR 522 and in *Smith v Swinjield* (1981) FLC 91-084.

[12] Thus, had s 19N(2)(a) simply read 'in any court' that **might** have been an indication of the expression of a contrary intention. **The words 'whether exercising federal jurisdiction or not' add nothing to advance the goal of preventing disclosure of what transpires at counselling sessions and at other meetings to which s 19N applies. However, it is the addition of those words which indicates that s 19N(2) is not expressing an intention to apply to courts other than courts exercising jurisdiction under the *Family Law Act.*** There is a particular reason for the inclusion of those words. It lies in the fact that the Family Court of Western Australia exercises both State and federal jurisdiction, the former being conferred by s 36 of the *Family Court Act* 1997 (WA). **In my view, the reason why the expression 'whether exercising federal jurisdiction or not' was included in s 19N(2) was to ensure that the section operated to the limit of Commonwealth power in proceedings where the Family Court of Western Australia is exercising both State jurisdiction and there has been a meeting to which s 19N applies. For those reasons, there is no expression of a contrary definition of the word 'court'.**

[13] In addition, I do not think that the fact that s 19N protects the confidentiality of meetings at which counselling occurs, mediations, or medical or other professional consultants to whom a party to a marriage has been referred, requires a different conclusion. In my view, Parliament has decided that the balance between prescribing absolute confidentiality or limited confidentiality in respect of anything said at meetings or conferences conducted by a person to whom s 19N applies in favour of limited confidentiality. There are obvious policy reasons which justify prescribing a limited confidentiality only. For example, in the course of a meeting or conference to which s 19N applies, a person may state an intention to

> commit a serious crime. It would be an extreme step to provide that such a statement would not be admissible in criminal proceedings, particularly as not even legal professional privilege is available if a client seeks advice in order to facilitate the commission of a crime, fraud or civil offence whether the adviser knows of the unlawful purpose or not: *R v Cox* (1884) 14 QBD 153; *Bullivant v Attorney-General (Vic)* [1901] AC 196; *Day v Dalton* [1981] WAR 316. This does not mean that there is no limit upon the ability of a party to tender evidence of what has been said at a meeting or conference to which s 19N applies. If such an application is made, it is open to the counsellor to apply to protect disclosure on the ground of public interest immunity."

[8] Wicks J dissented on the ground that the words "(whether exercising Federal jurisdiction or not)" expanded the meaning of the word "court" to courts generally, including the "entire spectrum of courts" such as State Supreme Courts.[5]

[9] Section 10D and s 10E(1) set out earlier in this decision were introduced from 1 July 2006 by the *Family Law Amendment (Shared Parental Responsibility) Act* 2006 (Cth) after the decision in *R v Liddy (No 2)*. Its relevant provisions are to the same effect as those in s 19N(2). In those circumstances, the normal rule of construction applied is that:[6] "[W]here the Parliament repeats words which have been judicially construed, it is taken to have intended the words to bear the meaning already 'judicially attributed to [them]'". Although that rule has been criticised it continues to be applied.[7]

Submissions

[10] The submission for the counsellor was that the decision in *R v Liddy (No 2)* was plainly wrong. It focused on the reference to the words "any court (whether or not exercising federal jurisdiction)" in s 10E(1)(c) and the passage in Debelle J's reasons at [12]: "had s 19N(2)(a) simply read 'in any court' that might have been an indication of the expression of a contrary intention." The argument was that, if the use of the word "any" was a sufficient indication of an intention that the relevant courts for the purposes of this section extended beyond those exercising jurisdiction under the Act, then the addition of the words "whether exercising federal jurisdiction or not" did nothing to detract from that conclusion and rather reinforced it.

[11] Mr Kalimnios for the counsellor also drew my attention to para 126 of the Revised Explanatory Memorandum for the *Family Law Amendment (Shared Parental Responsibility) Bill* 2005 which provided at p 90 that s 10E(1) provided that a "communication made in family counselling is not admissible in any court or

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5 (2001) 79 SASR 401, 407 at [26].

6 *Re Alcan Australia Ltd; ex parte Federation of Industrial Manufacturing and Engineering Employees* (1994) 181 CLR 96, 106.

7 See the discussion in Pearce and Geddes, *Statutory Interpretation in Australia* (7th ed, 2011) at pp 108-115, paras [3.43]-[3.50].

proceedings, in any jurisdiction". That passage did not, however, deal with the issue raised here or express any different view from that decided in the South Australian Court of Criminal Appeal.

[12] Mr Kalimnios also criticised the reliance by the majority in *R v Liddy (No 2)* on the Act's definition of "court" as "the court exercising jurisdiction in those proceedings by virtue of this Act", submitting that the preferable explanation for the additional words "(whether exercising federal jurisdiction or not)" was to expand the scope of the word "court" in context to all Australian courts rather than being explained by reference to the fact that the Family Court of Western Australia exercised both State and Federal jurisdiction. He submitted that the dissenting judgment of Wicks J in *R v Liddy (No 2)* should be preferred.

[13] He also relied on a number of decisions of the Family Court emphasising the strength of the prohibition against the admissibility of such evidence "in all courts", such as *Unitingcare-Unifam Counselling v Harkiss*[8], where the particular issue debated here was not raised.

[14] Mr Cash for the prosecution, as a respondent to the counsellor's application that she not give evidence, drew my attention to s 10D(2) of the Act which requires a counsellor to disclose a communication if the counsellor "reasonably believes the disclosure is necessary for the purpose of complying with a law of the Commonwealth, a State or a Territory" and relied on the majority decision in *R v Liddy (No 2)*.

[15] Mr Byrne QC for Mr Baden-Clay adopted a similar approach and pointed to what was said by McKechnie J in *Anglicare WA v Department of Family and Children Services*:[9]

> "28 In the present case there is another reason why a court would be slow to go beyond the plain or literal meaning of the *Family Law Act*. The *Family Law Act* is a statute of Federal Parliament. There are good reasons why the Commonwealth would seek to limit the reach of the Federal Act into the jurisdiction of State courts. Such a reach would have constitutional implications. I would be reluctant to interpret s 19N to extend its ambit into proceedings in the Children's Court of Western Australia without clear and express words being used by Parliament to achieve that purpose."

[16] As to the argument that there is a public interest privilege based on s 10D and s 10E, he characterised the privilege as one where the counsellor could claim to refuse to give evidence in order to protect the confidentiality of counselling services and improve the chances of reconciliation of the parties. He submitted that, if such a privilege existed separate from the statutory provisions, which had not been established,[10] the facts here did not support its application. One of the parties to the

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8 (2011) 252 FLR 309; [2011] FamCAFC 159 at [66].

9 (2000) 26 Fam LR 218; [2000] WASC 47 at [28].

10 See *Cooper v Cooper* [2012] FMCAfam 789 at [124].

counselling was dead and the other was being tried for her murder. In those circumstances disclosure of what had occurred in the counselling could not injure the interest in retaining the confidentiality of the counselling to enable reconciliation to occur.

[17] Further, he submitted, the balancing exercise required in determining whether such a privilege should prevail over the public interest that "a court of justice in performing its functions should not be denied access to relevant evidence"[11] should clearly result in the admissibility of the evidence in a case of a criminal trial for murder.

Consideration

[18] There are at least two considerations which lead to the conclusion that I should follow the majority decision in *R v Liddy (No 2)*. The first is the rule that "intermediate appellate courts and trial judges in Australia should not depart from decisions in intermediate appellate courts in another jurisdiction on the interpretation of Commonwealth legislation or uniform national legislation unless they are convinced that the interpretation is plainly wrong".[12] The second is the rule that applies where a statutory provision has been re-enacted after a judicial decision as to its meaning.

[19] None of the parties argued that the case necessarily involved a matter arising under the *Constitution* or involving its interpretation,[13] but the radical consequences of the interpretation advanced by Mr Kalimnios on the proper functioning of the criminal justice system at the State level also seem to me to justify the need for clear and express words to be used to justify such an interpretation.[14]

[20] The reliance by the majority in *R v Liddy (No 2)* on the existence of the Western Australian Family Court exercising both federal and state jurisdiction to explain the use of the words "whether exercising federal jurisdiction or not" does not strike me as being clearly wrong. It amounts to a reading of s 10E(1) with the s 4 definition of "court" so that it means "in any court exercising jurisdiction in those proceedings by virtue of this Act, whether exercising federal jurisdiction or not". That limits the application of the sections to courts exercising jurisdiction by virtue of the Act. This Court in its criminal jurisdiction is not exercising any jurisdiction under the Act.

[21] The error in the argument based on his Honour's statement that the words "'in any court' might have been an indication of the expression of a contrary intention" is to treat what his Honour said as a necessary acceptance of the argument that the use of the word "any" widened the scope of the term "court" beyond courts exercising

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11 See *Sankey v Whitlam* (1978) 142 CLR 1, 38-39.

12 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 151-152 at [135] and *Fernando v Commissioner of Police* (1995) 36 NSWLR 567, 590D.

13 See s 78B of the *Judicature Act* 1903 (Cth).

14 *Anglicare WA v Department of Family and Children Services* (2000) 26 Fam LR 218; [2000] WASC 47 at [28].

jurisdiction under the Act in this context. The submission ignores his Honour's use of the word "might" as positing a possible approach to the question of interpretation rather than one that he favoured. I read that passage as simply part of his Honour's explanation for concluding, in context: "that s 19N(2) is not expressing an intention to apply to courts other than courts exercising jurisdiction under the *Family Law Act.*"[15]

[22] The Commonwealth Parliament did not take the opportunity to change the wording of the sections to reflect a different approach from that expressed in *R v Liddy (No 2)* when s 10D and s 10E were inserted in the Act instead of s 19N in 2006. This is a further compelling reason why s 10E should not be construed to prohibit the counsellor from giving evidence.

[23] There remains the argument that there is a public interest privilege in preventing family counsellors from giving evidence based on these provisions in the Act. If such a privilege exists, which was not established before me,[16] then the balancing exercise required by *Sankey v Whitlam*[17] falls clearly in favour of the public interest that a court in performing its functions in a criminal trial for murder should not be denied access to relevant evidence.

[24] The submission that the facts here did not support the application of the claimed privilege because one of the parties to the counselling was dead and the other was being tried for her murder, so that there was no chance of their reconciliation, is not as conclusive. That is only one of the considerations relevant to retaining the confidentiality of the counselling. There would remain the general importance of encouraging parties to engage in counselling more readily, knowing that it was confidential.

[25] In the present circumstances, however, even if such a privilege existed separate from the Act, the balance is decisively in favour of permitting access to the evidence for the purposes of Mr Baden-Clay's trial on the charge of murder.

Ruling

[26] My ruling is then that the counsellor is required to give evidence at the preliminary hearing including evidence of anything said or any admission made to her by the deceased Alison Baden-Clay or the defendant Gerard Baden-Clay in communications by them or either of them in family counselling.

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15 *R v Liddy (No 2)* (2001) 79 SASR 401, 405 at [12].

16 See also *Cooper v Cooper* [2012] FMCAfam 789 at [124].

17 (1978) 142 CLR 1, 38-39.