



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: CrimJErg:1009003

15 June 2015

Royal Commission into Institutional Responses to Child Sexual Abuse
GPO Box 5283
Sydney NSW 2001

By email: solicitor@childabuseroyalcommission.gov.au

Dear Sir/Madam,

Issues Paper 8: Experience of police and prosecution responses

I write to you on behalf of the Criminal Law Committee of the Law Society of NSW ("Committee"). The Committee represents the Law Society on criminal law issues as they relate to the legal needs of people in NSW and includes experts drawn from the ranks of the Law Society's membership.

The Committee has some brief comments in relation to question 9 of the Issues Paper, which asks the following:

9. What are your observations of, and suggestions for improvements or reforms to, prosecution processes in relation to charges relating to child sexual abuse in an institutional context?

An issue that Committee members are concerned about, which relates to child sexual abuse in both an institutional and non-institutional context, is the failure to comply with the sexual assault communications privilege provisions in the *Criminal Procedure Act 1986* in respect of subpoenas. As a result, privileged material routinely comes before the parties and the Court without the consent of the alleged victim/protected confider. The Committee notes that the failure to comply occurs at a number of levels, including:

- (1) The party seeking to issue the subpoena failing to seek leave under section 298 and not giving notice under section 299C.
- (2) No oversight at the Court Registry when the subpoenas are stamped.
- (3) The subpoenaed parties are often not aware of sexual assault communications privilege. Despite section 305A appearing to envisage that Regulations be made to require information about the sexual assault communications privilege to be sent with such subpoenas, no Regulations have been made to this effect.

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- (4) The Registrar or Judge often grants access to the parties without consideration of sexual assault communications privilege as an issue. On occasions where it has been raised, the Registrar or Judge grants access on a 'first access to protected confider' basis which allows the other parties to access the documents after the protected confider. The Committee notes that this is contrary to section 299B which provides that the Court must not allow access to anyone but the protected confider unless the Court determines that the document does not record a protected confidence.
- (5) Where it is a defence subpoena, the prosecution often fails to direct the Court to the relevant provisions.

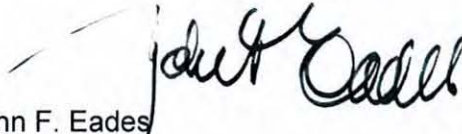
Often material that is prima facie privileged, such as counselling notes, will be relevant to the proceedings and ultimately will be made available. However, the Committee's concern is that the alleged victim/protected confider has standing to protect their privilege or provide their consent if so minded, but their right to do so is often circumvented by the failure of parties to comply with the sexual assault communications privilege provisions.

The Committee suggests that possible reforms to address this issue include:

- (1) Implementing Regulations requiring a standard form to be sent with any such subpoenas outlining the sexual assault communications privilege provisions to the subpoenaed party.
- (2) The creation of a prescribed form for a subpoena in criminal proceedings. Such a form could include a declaration by the party seeking the issue of the subpoena that either the material subpoenaed does not call for production of material which may be subject to sexual assault communications privilege, or that it does and that leave to issue it has been granted.
- (3) Addressing the failure to comply with the sexual assault communications privilege provisions in the *Criminal Procedure Act 1986* through better education of the judiciary, court staff, prosecutors and defence practitioners.

I trust these comments are of assistance. Any questions may be directed to Rachel Geare, policy lawyer for the Committee, on (02) 9926 0310 or rachel.geare@lawsociety.com.au.

Yours sincerely,


John F. Eades
President