

## **WITNESS SUMMONSES – PROTECTED COMMUNICATIONS**

*Summary: This Circular sets out the Court’s practice where a party applies for a summons to produce records or things which may include protected communications under the Evidence Act 1906 (WA)*

### **1. Background**

The Court has noticed an increasing trend of parties issuing witness summons to produce records or things which appear to include records or things containing protected communications as defined in *Evidence Act 1906 (WA)* (“EA”) s19A to s19M. Examples include a request for a “patient file” from Graylands Hospital and a “student file” from a school.

The leave of the court is required before a protected communication may be required to be disclosed by a witness summons (EA s 19C(1)). A subpoena which purports to require disclosure of a protected communication without the leave of the court is of no effect (EA s19C(2)).

### **2. Summonses which appear to require production of protected communications**

The power to issue a witness summons is delegated to “prescribed court officers”, which includes both senior Registry staff and Registrars. The court, through its prescribed court officers, will not issue a witness summons which appears to require production of a protected communication.

It is preferable that practitioners lodge all witness summonses to produce directly with the Perth registry.

To ensure uniformity of approach when processing witness summonses to produce, all summonses of this type lodged at a circuit registry of the Court will be forwarded to the Perth registry for processing.

Witness summonses can be lodged by email to [districtcourt@justice.wa.gov.au](mailto:districtcourt@justice.wa.gov.au)

Where Registry staff have a concern that the witness summons might require production of a protected communication, the summons will be referred to a legally qualified Registrar for review. The Registrar will decline to issue the summons if he or she forms the view that the records or objects required under the summons appear to include protected communications. The applicant will be notified of this decision by letter.

The applicant can either:

- (a) resubmit the summons with an amended description of the records or objects sought; or
- (b) apply to the court for leave to require production of the protected communications pursuant to EA s19C.

Alternatively, the applicant can expressly exclude protected communications from the scope of the documents sought pursuant to the witness summons by inserting the following words:

**"Except** for any document, recording or evidence which is a **protected communication** as defined in the *Evidence Act 1906* (WA) s 19A and 19B, a copy of which is annexed to this summons."

The annexure should then have the heading "**Protected Communications as defined in Evidence Act 1906 (WA)**", and be in the form attached.

### **3. Summons to Courts**

There is a rule of practice or comity that a court will not issue a witness summons or a subpoena to another court. This rule is reflected in *Rules of the Supreme Court 1971* (WA) Order 36B rule 13. Although there is no equivalent rule in the *Criminal Procedure Act 2004* (WA), the District Court will exercise its discretion to decline to issue a witness summons to another court, for example, the Supreme Court, the Family Court or the Magistrates Court. Instead, a Registrar of the District Court will write to the Registrar of the other court to request that the relevant documents be provided to the District Court.

The District Court's standard request letter will exclude Protected Communications from the request. It will however, request the other court to identify the date and type of document excluded in a covering letter when providing the balance of the documents. A copy of the letter of request will be provided to the party on whose behalf the request is made.

Documents received from another court will be treated in the same manner as documents received under a witness summons. That is, upon receipt of the documents, the District Court will notify the parties and list the matter before the duty Judge to make orders regarding custody and access.

The District Court treats the Coroner's Court, the State Administrative Tribunal and the Chief Assessor of Criminal Injuries Compensation as courts for the purpose of the issue of letters of request.

**MICHAEL GETHING**  
**Principal Registrar**

**The recipient of this Summons should obtain Legal advice as to the effect of the following provisions**

**Protected Communications as defined in *Evidence Act 1906* (WA)**

**19A. Terms used**

(1) In this section and sections 19B to 19M —

***application for leave*** means an application for leave to disclose or require disclosure of a protected communication in, or in connection with, any criminal proceedings;

***counselling communication*** means a communication —

- (a) made in confidence by a person upon or in respect of whom sexual assault was committed or is alleged to have been committed (the ***complainant***) to another person (the ***counsellor***) who is counselling the complainant in relation to any harm the complainant may have suffered;
- (b) made in confidence to or about the complainant by the counsellor in the course of the counselling process;
- (c) made in confidence about the complainant by a support person in the course of the counselling process; or
- (d) made in confidence by or to the counsellor to or by another person who is counselling, or has at any time counselled, the complainant,

and includes a communication made through an interpreter;

***counsels*** has the meaning given to that term in subsection (2);

***disclose*** a protected communication means to disclose, or adduce or produce anything that would disclose —

- (a) the protected communication; or
- (b) the contents of a document recording the protected communication;

***harm*** includes actual physical bodily harm, financial loss, stress or shock, damage to reputation or emotional or psychological harm (such as shame, humiliation and fear);

***protected communication*** means a counselling communication made by, to or about a complainant and includes —

- (a) a counselling communication made before the commission, or alleged commission, of sexual assault;
- (b) a counselling communication not made in connection with sexual assault or alleged sexual assault or any condition arising from sexual assault or alleged sexual assault; and
- (c) a counselling communication made before the protection provisions were inserted into this Act;

***protected person***, in relation to a protected communication, means —

- (a) the complainant;
- (b) any person who made the protected communication; or
- (c) an interpreter through whom the protected communication was made;

**require disclosure** of a protected communication includes —

- (a) to require (whether by the issue of a subpoena or any other process or procedure) the production of a document recording the protected communication; and
- (b) to seek an order of the court that will, if made, result in the disclosure of the protected communication or the production of a document recording the protected communication;

**support person** means a parent, carer or other supportive person who is present when a person counsels the complainant to facilitate communication between the complainant and the counsellor or to further the counselling process in some other way;

**supporting affidavit** means the affidavit accompanying an application for leave;

**the protection provisions** means this section and sections 19B to 19M.

- (2) A person **counsels** another person if —
  - (a) the person has undertaken training or study or has experience that is relevant to the process of counselling persons who have suffered harm; and
  - (b) the person —
    - (i) listens to and gives verbal or other support or encouragement to the other person; or
    - (ii) advises, gives therapy to or treats the other person, whether or not for fee or reward.
- (3) In the protection provisions, a reference to a document recording a protected communication —
  - (a) is a reference to any part of the document that records a protected communication or any report, observation, opinion, advice, recommendation or other matter that relates to the protected communication made by a protected person; and
  - (b) includes a reference to any copy, reproduction or duplicate of that part of the document.
- (4) For the purposes of the definition of **counselling communication** in subsection (1), a communication can be regarded as being made in confidence even if it is made in the presence of a support person or through or in the presence of an interpreter.

**19B. Protected communications recorded electronically**

For the purposes of the protection provisions, if —

- (a) a document recording a protected communication is stored electronically; and
- (b) a written document recording the protected communication could be created by use of equipment that is usually available for retrieving or collating such stored information,

the document stored electronically is to be dealt with as if it were a written document so created.