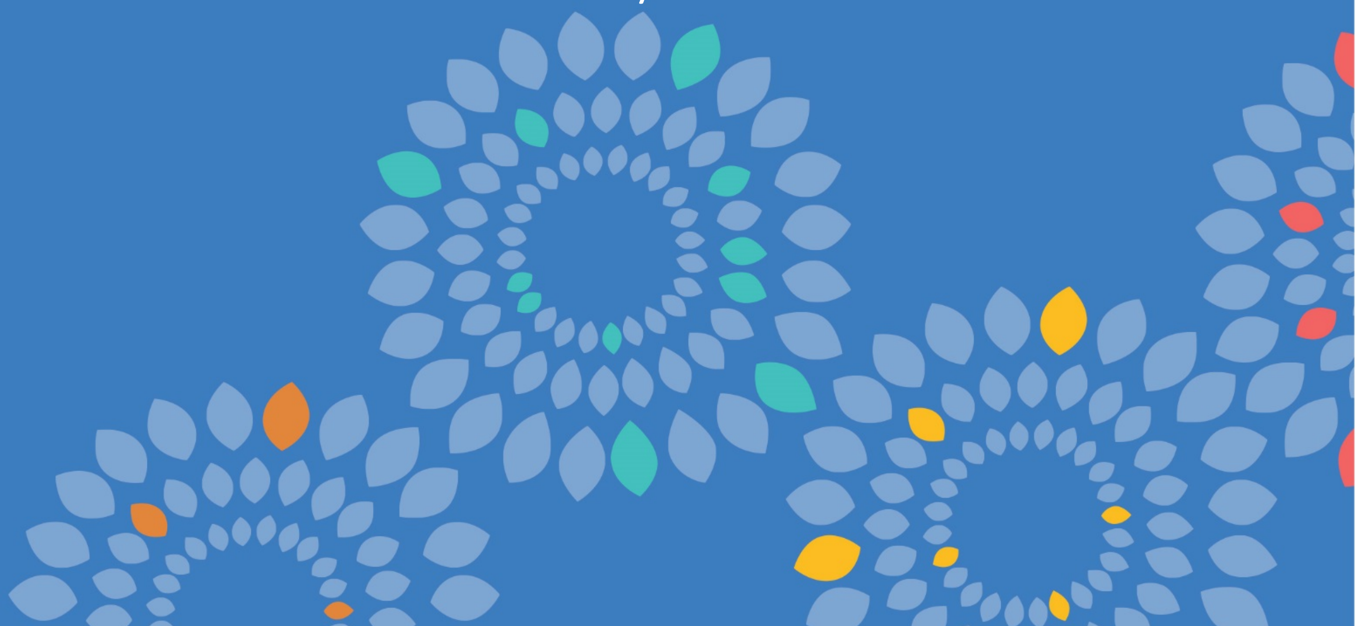
Submission to the Legal Affairs and Community Safety Committee

Victims of Crime Assistance and Other Legislation Amendment Bill 2016

16 January 2016



Introduction

knowmore is an independent, national community legal service providing free legal advice and assistance, information and referral services via a telephone advice line and face-to-face services in key locations, for people considering telling their story or providing information to the Royal Commission into Institutional Responses to Child Sexual Abuse (the 'Royal Commission'). Our service is multidisciplinary, staffed by solicitors, counsellors, social workers and Aboriginal and Torres Strait Islander Engagement Advisors, and is conducted from offices in Brisbane, Sydney and Melbourne.

knowmore has been established by the National Association of Community Legal Centres, with funding from the Australian Government, represented by the Attorney-General's Department.

Our service was launched in July 2013 and from that time until 31 December 2016 we have provided services to over 6,100 individual clients. The majority of those clients are survivors of institutional child sexual abuse. 26% of those clients live in Queensland. Around 22% of our clients identify as Aboriginal and/or Torres Strait Islanders.

Our submission will briefly address two aspects of the Victims of Crime Assistance and Other Legislation Amendment Bill 2016 (the Bill), being:

1. The amendment of various Acts, including the *Evidence Act 1977,* to insert new provisions regarding a sexual assault counselling privilege (SACP).

2. The amendment of the *Evidence Act 1977* to afford automatic recognition as a special witness to all victims of sexual offences.

knowmore supports the enacting of legislation to implement both of these reforms.

1. Sexual assault counselling privilege

General comments

We support the introduction into Queensland law of a SACP to limit the disclosure and use of sexual assault counselling communications during legal proceedings, particularly criminal trials. All other Australian jurisdictions have enacted legislation to provide some form of privilege attaching to such communications, and the introduction of legislation in Queensland is welcomed.

From our work with survivors of child sexual abuse, we are very aware of the complex trauma that results from the experience of child sexual abuse, and the life-long effects that abuse has on survivors' mental and physical health. Research has clearly established that

the mental health impacts of child abuse require specialist and long-term care.[1] Our clients' reported experiences of their needs support that view.

In this context, it is important that barriers standing in the way of survivors being able to access necessary supports are reduced or eliminated as much as possible. The introduction of a SACP in Queensland will facilitate survivors feeling more of a sense of safety when considering accessing, or when engaging with, sexual assault counselling services.

We note that the proposed legislative model will provide absolute privilege for protected counselling communications in committal and bail proceedings (Subdivision 2), with a qualified privilege for other proceedings, including at trial or sentencing (Subdivision 3). In the latter forms of proceeding, leave of the court is required to compel a person to produce a protected counselling communication to the court; to produce, adduce evidence of or otherwise use such a communication; or to otherwise disclose, inspect or copy a protected counselling communication.[2]

In our view, the Bill strikes an adequate balance between the competing public interests of protecting the privacy of survivors and facilitating their unfettered access to specialist support, and the rights of an accused to a fair trial.

Comments upon the operation of the NSW provisions

We note from the Explanatory Note that the provisions in the Bill introducing a SACP are based on the New South Wales (NSW) legislative model. From our service's work in relation to the Royal Commission, we are aware of some reported difficulties in the application of that model in practice (from the perspective of survivors and counselling services), to which we wish to draw the Committee's attention.

These difficulties have been noted in submissions made, and evidence given, to the Royal Commission. In looking at this issue, we note particularly the submission dated 15 June 2015 from the Law Society of New South Wales responding to the Royal Commission's Issues Paper 8, concerning *Experience of Police and Prosecution Responses*.[3] The Society's submission was specifically directed towards widespread failures by relevant parties to comply with the SACP provisions in the *Criminal Procedure Act 1986 (NSW)* in respect of subpoenas. The Law Society stated:

> *As a result, privileged material routinely comes before the parties and the Court without the consent of the alleged victim/protected confider. The* [Society's Criminal Law] *Committee notes that the failure to comply occurs at a number of levels, including:*

[1] See, for example, the report of the Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation,* September 2015, at p.181

[2] Section 14F of the Bill

[3] Submissions responding to this Issues paper have been published by the Royal Commission at http://www.childabuseroyalcommission.gov.au/policy-and-research/consultations/issues-papers-submissions/issues-paper-8

> 1) *The party seeking to issue the subpoena failing to seek leave under section 298*[4] *and not giving notice under section 299C.*[5]
> 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.*
> 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.*[6]

Further, the Society said:

> *… 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 the parties to comply with the sexual assault communications privilege provisions.*[7]

The Society suggested a number of possible reforms to address the problem. These included:

- *Implementing regulations requiring a standard form to be sent with any such subpoenas outlining the sexual assault communications privilege provisions to the subpoenaed party.*
- *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.*
- *Addressing the failure to comply with the sexual assault communications privilege in the* Criminal Procedure Act 1986 *through better education of the judiciary, court staff, prosecutors and defence practitioners.*[8]

[4] A provision similar to s.14F of the Queensland Bill
[5] Similar to s.14G of the Queensland Bill
[6] Law Society of New South Wales submission, Issues Paper 8, at p.1.
[7] Law Society of New South Wales submission, Issues Paper 8, at p.2.
[8] *Ibid.*

While there are some significant differences between the NSW provisions and the current Queensland Bill, the intent of both statutory schemes is clearly that:

- there is an absolute prohibition upon a person seeking to compel the production of protected counselling communications or their use in a preliminary criminal proceeding;[9] and
- leave of the court is required before seeking to compel another person, including by subpoena, to produce a protected counselling communication to the court; or to produce or otherwise use such a communication.[10]

Nevertheless, it would seem clear that within New South Wales parties are regularly issuing subpoenas requiring production of protected communications, in either ignorance or disregard of the relevant provisions, and that those subpoenas are being processed in the same manner as others, by the parties and officers of the court, despite their apparent invalidity.

These problems were also addressed in a submission made by Legal Aid New South Wales, responding to the Royal Commission's Issues Paper 8.[11] A number of lawyers also gave evidence about these problems at a recent hearing of the Royal Commission examining criminal justices issues.[12]

While these reported problems in the New South Wales' jurisdiction appear to be ones of practice rather than drafting, they have the effect of circumventing the legislation's intent to protect counselling communications and only to allow the production or use of those communications after proper consideration by the court and after the giving of notice to the counsellor and the counselled person. For those reasons we draw the Committee's attention to these matters and suggest that when the Bill is enacted in Queensland, attention be given by all of the relevant parties to the undertaking of steps that would prevent the problems identified above occurring in practice in Queensland.

In this respect, there appears to be merit in the NSW Law Society's suggestion that the prescribed form for subpoenas (and the accompanying notice under the *Criminal Practice Rules 1999)* be adapted to specifically refer to either the granting of leave to issue the subpoena in cases involving an issue of SACP or a declaration that the subpoena does not seek production of material to which SACP may apply.

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[9] Defined in s.295 of the *Criminal Procedure Act 1986 (NSW)* in similar terms to s.14C of the Bill

[10] Section 14F of the Bill and s. 298 of the NSW Act

[11] The Legal Aid NSW submission can be viewed at http://www.childabuseroyalcommission.gov.au/policy-and-research/consultations/issues-papers-submissions/issues-paper-8

[12] See the transcript of 2 December 2016/Day 237 of the Commission's hearings, at pp 24259 – 24266, which can be viewed at: http://www.childabuseroyalcommission.gov.au/case-study/80a5ce56-638a-4fbb-a40b-cb0ad7e5dbd3/case-study-46,-november-2016,-sydney

Legal representation

We are pleased to see that funding has been provided for a SACP legal assistance service. It would seem to us, from our experience in working with survivors, that few would be able to adequately understand and pursue their rights to seek to protect the privacy of their sexual assault counselling records without specialist legal advice and, if necessary, representation before the Court to argue the issues and their interest. It is important that counsellors, counselling organisations and survivors ('counselled persons') have ready access to free, independent and expert assistance to help them protect what are usually records of the utmost personal and private nature.

The provision of independent legal assistance to survivor witnesses in these matters would also be likely to assist the Court; through the resolution of issues between the parties; and in ensuring the Court hears from the victim, through a lawyer experienced in the application of the specific provisions.

2. Evidence of special witnesses

We note that Clause 8 of the Bill will amend s.21A of the *Evidence Act 1977* to broaden the definition of a 'special witness' to include all victims of offences of a sexual nature.

We fully support this amendment. As the Explanatory Note states, the amendment acknowledges the particular vulnerability of victims of sexual offences and the need to reduce the trauma of the legal process on them, as far as practicable.