

5 November 2009

Mr Laurie Glanfield AM
Director-General
Department of Justice and Attorney General
c/o Monika Ciolek (monika_ciolek@agd.nsw.gov.au)

Dear Mr Glanfield AM

Re: Consultation on Model Protection for Sexual Assault Counselling Communications

Thank you for inviting Community Legal Centres NSW Inc (**CLCNSW**) to comment on the draft amendments to the Model Uniform Evidence Bill.

CLCNSW is the peak body for 39 community legal centres (**CLCs**) across NSW. Our members provide a variety of free legal services to disadvantaged clients and communities across the State including legal advice, casework, referral, community legal education, resources and law reform activities.

CLCs are involved with providing advice and assistance to victims of sexual assault. For the past 5 years, CLCs in NSW have provided advice and/or assistance with approximately 320 matters categorized as “sexual and indecent assault” per year.¹

We welcome the opportunity for a national approach to this issue, and the potential for strengthening the current protection for counseling / therapeutic records in sexual assault proceedings.

As you will be aware, Womens Legal Service NSW, one of our member centres, coordinates the Sexual Assault Communications Privilege Pro Bono Referral Pilot.

On behalf of our 39 member centres, we endorse the detailed submission which Womens Legal Service NSW has made to this consultation on the immunity for sexual assault counseling communications.

We also attach a case study provided by Redfern Legal Centre, which highlights many of the points made in the Womens Legal Service NSW submission, particularly:

¹ Law and Justice Foundation of NSW, Data Digest Online (DDO) - CLC Legal Matters Trends Report, 2/11/09. Produced with the permission of the Law and Justice Foundation and Community Legal Centres NSW Inc. This data is not for further distribution except by permission of these two organisations.

- the importance of a process whereby the alleged victim (and their advocate) receive timely notice that their personal records may be produced in court.
- the importance of legal representation with standing to effectively represent the victim's views and interests in relation to the sexual assault communications privilege.
- the importance of free legal representation to assist an alleged victim, including through adequately-funded Community Legal Centres, Legal Aid, Aboriginal Legal Service, and other public legal service providers.
- that an express exemption for medical counseling, therapy or treatment is not appropriate.
- that preliminary examination should be mandatory.
- the importance of conducting these issues with an appropriate level of sensitivity for the impact of the argument on the complainant.

Yours sincerely,

Roxana Zulfacar
 Advocacy and Human Rights Officer
 Combined Community Legal Centres Group Inc (NSW)

Case Study - Sexual assault communications privilege

Our client was a young woman with a diagnosed (but well-managed) mental illness at the time of the sexual assault. She was assaulted by her then boyfriend.

The accused was brought to trial in the District Court. While the case was being prepared for trial, the accused person's legal team subpoenaed medical records (and specifically counselling notes) from our client's GP, psychologist, and a counsellor. Our client found out about the subpoenas only a day or so before they were due for return. She approached us for assistance and we agreed to represent her with pro bono counsel.

At the first return, our presence was critical. The court registry staff were prepared to make access orders in chambers (without hearing anyone on the issue) until we insisted that the subpoenas be listed before the duty judge.

We sought leave to appear for the complainant. Leave was granted but the subpoenas were not called upon because of outstanding issues (concerning the service of evidence) between

the prosecution and defence. The subpoenas were adjourned. They were then listed and adjourned approximately 5 more times over about 3 months. This was really difficult for us, as we kept having to find pro bono counsel to prepare for an argument on this issue, only to find that they kept getting adjourned.

The subpoenas were finally called upon. We were heard on the objection. Our submissions were somewhat hampered by our lack of knowledge about the evidence in the matter - we were unable to comment on the relative probative value of the documents as we didn't know what was relevant to the case.

After reading the documents himself, the judge decided the argument in favour of the complainant. The documents were marked 'no access'.

A short time later, the trial commenced. Under cross-examination, the complainant made a passing reference to her mental illness. The defence then used this as an excuse to revisit the question of access to the documents. The whole argument had to be run again, in front of the trial judge.

Once again, the complainant was only notified about the defence's intention to call upon the subpoenas at the very last minute (we got less than half a day's notice). We tried to find pro bono counsel. I attended and asked that the matter be adjourned for a few hours so that counsel could attend on behalf of the complainant. The defence attempted to run the argument in the absence of the complainant's counsel.

In the course of running the argument, the defence counsel made some suggestions about the contents of the documents which would have been very upsetting for the complainant if she had been present in court (for example, it was submitted that the documents showed that the complainant tended to pick at pimples or sores on her face when she was upset or stressed. The defence submitted that this would support an inference that the complainant could have caused the genital injuries which were observed on her body shortly after the assault).

The judge read the documents himself and indicated that there was nothing in them of any probative value, and so the defence withdrew its call upon the subpoena.

The whole process was most upsetting for the complainant. She had a relapse of her illness and spent some time in hospital. From the perspective of Redfern Legal Centre, as a free

legal service providing representation, it was tremendously difficult to obtain information about the matter (as we were not a party) and to adequately make submissions about the relative importance of the documents to the case. The lack of legal aid funding meant that we had to find pro bono counsel, always on less than 24 hours notice.