

# Magistrates Courts

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## Practice Direction No. 3 of 2021

Issued: 2 August 2021

### Protected counselling communications

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1. This Practice Direction applies where it is likely protected counselling communications as defined in section 14A of the *Evidence Act 1977* will be contained in documents intended to be obtained by summons, subpoena or otherwise (“subpoena application”) and where a party seeks to disclose, inspect or copy, produce, adduce evidence of or use protected counselling communications (“use application”).
2. These directions assume the counselled person has legal representation. The Court is informed counselled persons may apply for a grant of legal aid for representation by solicitors and counsel in the application.<sup>1</sup>
3. A party intending to subpoena and/or use material referred to in paragraph 1 is to file: (1) an application; (2) an outline of submissions setting out the basis for the application addressing the criteria referred to in section 14H of the *Evidence Act 1977*; and (3) for a subpoena application, a draft of the proposed subpoena.
4. The applicant is to give each other party to the proceeding and the counsellor a notice complying with section 14G(3) of the *Evidence Act 1977*. The applicant must also give each other party to the proceeding a copy of the outline of submissions (and draft subpoena).
5. The applicant is to inform the registrar that notice has been given in accordance with paragraph 3. The application will be listed for directions 14 days thereafter.
6. The prosecution – the Office of the Director of Public Prosecutions or the Queensland Police Service – as the case may be, is to give the counselled person a copy of the notice and other material served by the applicant as soon as practicable.
7. At the directions hearing, the Court will list the application for hearing and give directions, for example:
  - as to whether, parties and counselled persons have leave to appear by audio or visual link at the hearing of the application;

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<sup>1</sup> Legal Aid Queensland, in partnership with Women’s Legal Service, provides a service “Counselling Notes Protect” for sexual assault counselling privilege matters.

- where applicable, orders as described in paragraph 10.
8. Each other party, the counsellor and the counselled person is to file an outline of submissions if they wish to be heard on the application two clear days before the hearing.
  9. If the counselled person wishes the Court to consider a written statement of harm the statement should be sent by email to the Court by 4:30 pm on the day before the hearing. For an oral statement of harm the Court is to be advised no later than 4:30 pm on the day before the hearing.
  10. Should the Court grant leave for the issue of a summons or subpoena compelling the production of material likely to contain protected counselling communications, further orders may be made, for example:
    - granting leave to lawyers for the counselled person to inspect and copy the documents the subject of the summons or subpoena;
    - setting a date for any use application;
    - directing the parties comply with any further step to be taken in accordance with this Practice Direction within a particular timeframe.
  11. If leave has been granted to the lawyers for the counselled person to inspect and copy the documents produced to the Court, then within 21 days of inspecting those documents, the lawyers for the counselled person and/or the counsellor are to file and serve an outline of submissions annexing a list of the documents claimed to be protected counselling communications and whether privilege is waived. If privilege is claimed over only part of a document, the relevant portion should be identified with precision.
  12. The submissions filed and served on the parties to the proceeding may be redacted if necessary. A party may apply for orders to inspect and copy the balance of the documents prior to any further hearing of the matter.
  13. The applicant may file and serve an addendum outline of submissions addressing the matters set out in section 14H of the *Evidence Act 1977* relevant to the use application.
  14. The lawyers for the counselled person will provide to the Court a paginated copy of the subpoenaed material together with an outline of submissions without redaction by 4:30 pm on the afternoon prior to the hearing.



Judge Terry Gardiner  
Chief Magistrate  
2 August 2021