

ISSUING SUBPOENAS FOR PROTECTED CONFIDENCES IN SEXUAL ASSAULT TRIALS

When seeking leave to issue specify precisely what orders you are seeking. Don't leave it to the last minute - 14 days' notice provisions S299C(4). To obtain leave to issue a subpoena, you must file a Notice of Motion along with a supporting affidavit. The Judge will base their decision on whether to grant leave on what's contained in your supporting affidavit. Do this properly and it will hold you in good stead on your application.

NOTICE OF MOTION / ORDERS SOUGHT:

1. Pursuant to S298(1) CPA 1986 leave be granted to issue a subpoena on
2. Pursuant to S299B(4) CPA 1986 Documents to be delivered to the Court and first access granted to the protected confider, returnable...
3. Pursuant to S298(3) CPA 1986 leave be granted to admit into evidence, the material produced under the subpoena to produce referred to in order 1.

YOUR AFFIDAVIT (Address S299D factors here)

S299D(1)(a):

s299D(1)(b):

s299D(1)(c):

Does/will the material have Substantial probative value &

Are the documents available elsewhere &

Why the public interest in compelling or admitting the evidence substantially outweighs the public interest in maintaining the confidentiality of the protected confidence and protecting the principal protected confider from harm (being harm resulting from the disclosure of the protected confidences: s299D(1)(c), s299D(2).

Include the following in your affidavit:

1. Short chronology of events
2. Discrepancies in the evidence/ Prior inconsistent statements
3. Anything that may challenge the credibility of the complainant
4. List what you expect to find & why & indicate with specificity WHY you expect this material will assist in the defence of the accused

Don't forget once the PPC has reviewed the material they may provide written consent under S300 CPA.

CASE LAW:

KS & Veitch (No 2) [2012] NSWCCA 266

Key case - Extensive discussion and analysis of provisions

NAR v PPC1 [2013] NSWCCA 25

Relevance of consent initially made to the police & the necessity of inspection of documents to determine leave. Also authority for counsellor to be performing counselling role - qualifications necessary but not sufficient.

PPC v Williams [2013] NSWCCA 286

Global approach incorrect / admissibility

ER v Khan [2015] NSWCCA 230

Definition of counselling - qualifications not sufficient, (FACS) Onus on person asserting privilege

Rohan v R [2018] NSWCCA 89

Provides a detailed analysis of S299B4 - enabling the Court to order production of documents on itself. Where complaint not disclosed to a counsellor - S294 direction.

PPC v Stylianou [2018] NSWCCA 300

Production is to the Court S299B4 to facilitate consideration of docs. Courts MUST INSPECT docs and engage with S299D

R v Bonanno, ex parte protected confider [2020] NSWCCA 156 Reaffirms purpose of legislation. Duty on practitioners to understand and assist Court in the application of the legislation.

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