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LK Education Insights

Collateral Subpoenas: Avoid Getting Caught in the Rain

Educational institutions deal with hundreds of staff, and potentially thousands of students and parents daily. This is not to mention other stakeholders such as builders, neighbours and the community at large. As it does so, a school may create or obtain access to information that becomes relevant to legal proceedings involving those stakeholders, but to which the school is not a party. A risk arises that even though it is not a party to those proceedings, the school will be asked to provide evidence by way of a subpoena. For example, parents in a dispute before the Family Court may subpoena attendance records or notes of a student counsellor. When in receipt of a subpoena, it is important that the school understands its rights and obligations in responding, as well as its obligations to others whose information may be held by the school.

What is a Subpoena?

A subpoena is a legal instrument issued by a Court at the request of a party (or with permission of the Court) which requires the recipient to 'return' the subpoena to the Court and produce evidence.

There are two kinds of subpoena:

- A subpoena to compel a witness to attend court and give oral evidence – sometimes referred to as a subpoena *ad testificandum*.
- A subpoena to produce documents or things – sometimes referred to as a subpoena *duces tecum*.

Returning a subpoena usually involves attending Court at the date, time and place listed on the subpoena and either providing the Court with the subpoenaed documents or giving oral evidence at a trial. As a subpoena is an instrument of the Court, and failure to comply may amount to contempt of Court.

Although the power to issue a subpoena is usually vested upon a Court, several Australian tribunals have the power to issue a similar instrument compelling the recipient to provide documents or evidence. For example, s 40(1) of the *South Australian Civil and Administrative Tribunal Act 2013* (SA) empowers that Tribunal to issue a summons requiring a person to appear before it to give evidence or produce evidentiary material.

When might a subpoena be issued to a school?

Most Australian Courts and Tribunals have the power to issue a subpoena or similar instrument at the request of a party to legal proceedings before them. Given the breadth of issues which may find their way before a Court, the circumstances in which a subpoena may be issued are broad.

A subpoena may be issued to a school for several reasons, by way of example:

- To provide information in relation a student's attendance record in the context of proceedings before the Family Court.
- To provide information in relation to counselling provided to a student in the context of proceedings before the Family Court.

- To provide information in relation to a former staff member in the context of workers compensation proceedings involving their current employer.
- To provide financial information in the context of a commercial dispute involving a parent or staff member.
- To provide evidence in criminal proceedings involving students, staff members or other members of the school community.

Responding to a subpoena

When in receipt of a subpoena, it is first necessary to study the document closely to understand:

- exactly what the subpoena requires you do to; and
- when is the deadline for compliance with the subpoena.

The next step is to consider whether to comply with the subpoena, or to make an application to challenge it, by asking the Court or Tribunal to set it aside. There are various reasons why the recipient of a subpoena may seek to set it aside, including:

- That the subpoena does not serve any legitimate forensic purpose in the underlying proceedings – that is, the party at whose request it was issued is just 'fishing' for documents in support of their case.
- That the subpoena is an abuse of the Court's process.
- That the subpoena is unduly broad or vague, such that compliance would be oppressive.

As an alternative to applying to set aside a subpoena, there is often merit in engaging with the party who issued it to understand exactly what they require and seek to narrow its terms by agreement. If a school does not wish to challenge the subpoena entirely, reaching agreement as to a narrower scope is often a cost-effective means of reducing the burden of compliance.

Where a subpoena will involve producing documents that are confidential or subject to legal professional privilege, ensure that any such documents are separated from the main body and clearly marked as confidential or subject to privilege as appropriate. There are different processes in each Court for objections to inspection (that is, preventing some or all other parties from viewing certain documents that have been provided to the Court). It is important to closely follow these rules, which usually have strict timing and substantiation requirements, to avoid inadvertent disclosure.

Can I produce other peoples' information?

A subpoena to produce documents requires the recipient to provide the Court with everything in their possession which is responsive to the subpoena, regardless of whether they created the documents or own the information contained in them – for example, information that might be contained in staff or student records which was provided to the school but which it did not create.

Although another person's confidentiality is not generally a reason to object to production of documents under a subpoena, confidentiality concerns ought to be raised with the issuing party or the Court. These concerns can be addressed in several practical ways, such as by narrowing the scope of the subpoena or applying redactions to the confidential information. There is also often merit in informing the owner of the information about the subpoena, so that they may obtain their own legal advice and take steps as necessary to protect the information.

Can I recover my costs of complying with a subpoena?

In most jurisdictions, the Court or Tribunal may order that the party who issues the subpoena pay the amount of any reasonable loss or expense incurred in complying with the subpoena.[1] Those costs, including legal fees relating to advice in complying with the subpoena, are usually claimed after the subpoena has been complied with and the amount of costs recoverable is a matter for the discretion of the Court.

Separately, the recipient of a subpoena to attend court to give evidence may require the party who issues the subpoena to tender 'conduct money' – a sum of money sufficient to meet the reasonable expenses of attending court as required by the subpoena and returning after so attending.

[1] For example, rule 156.12(1) of the Uniform Civil Rules 2020 (SA).

Subpoenas to school counsellors

One circumstance in which a school may receive a subpoena is to seek copies of notes in relation to counselling provided to a student. If those notes relate to a victim or alleged victim of a sexual offence, it is important for the school to be aware of Part 7, Division 9 of the *Evidence Act 1929* (SA).

Section 67E of that Act protects communications relating to such a person from disclosure where the communications were made in a 'therapeutic context'. A communication is made in a therapeutic context if it is made:

- to enable a counsellor or therapist to assess the nature and severity of the trauma suffered by the victim or alleged victim, or consequent psychiatric, psychological or emotional harm; or
- for the purposes, or in the course, of psychiatric or psychological therapy provided to the victim or alleged victim; and
- the communication is made in circumstances that give rise to a duty of confidentiality or a reasonable expectation of confidentiality.

A counsellor or therapist means a person whose profession or work consists of, or includes, providing psychiatric or psychological therapy to victims of trauma. The Court of Appeal has held that a school counsellor who held a Bachelor of Social Work and whose role includes "*the therapeutic management of states of mind and behaviours which are not illnesses*" was a counsellor or therapist for the purposes of s 67E.

The protection afforded to a communication by public interest immunity cannot be waived by the counsellor or therapist, a party to the protected communication or the victim or the alleged victim of the offence. It is therefore important that when asked to produce a protected communication a school invokes s 67E to refuse production.

These provisions have a long and complicated history, if you think that they may apply to a subpoena issued to you, we recommend seeking legal advice.

Key Contacts



Brooke Hall-Carney

Brooke is an experienced commercial litigator and technologist, who advises clients on data governance, privacy, cyber risk and strategy. She advises clients on the unintended consequences of their AI programs and other emerging technology. Brooke presents locally and internationally on cyber and emerging technologies and her experience includes sitting on the board of a large private school.

Principal
E bhall-carney@lk.law
T +61 8 8239 4687



Patrick Leeson

Patrick is a skilled commercial litigator with broad experience with matters involving public law, breach of contract, professional negligence, trusts, criminal law and public inquiries. His experience includes three years at the South Australian Crown Solicitor's Office.

Principal
E pleeson@lk.law
T +61 8 8239 4654



Patrick Leader-Elliott

Patrick has broad experience as a commercial litigator, including advising public and private clients on disputes arising from the construction of large infrastructure and projects, major corporate collapses and employee fraud. Patrick was previously a lecturer in law at the University of Adelaide.

Special Counsel
E pleader-elliott@lk.law
T +61 8 8239 4692



Maddie Donovan

Maddie advises clients on managing risk and resolving disputes arising from corporate and commercial arrangements, contested estates, complex trusts and insolvencies. Her regular clients include high net worth individuals, family groups, trustees, company directors and insolvency professionals.

Special Counsel
E mdonovan@lk.law
T +61 8 8239 4655

If you would like further information about the matters raised in this issue of Education Insights, please contact us through one of the key contacts listed above.