

**LEADERSHIP IN FAMILY LAW**

06 January 2020

Committee Secretary
Legal Affairs and Community Safety Committee
Parliament House
Brisbane QLD 4000

By Email: lacsc@parliament.qld.gov.au

Dear Chairperson,

This Submission is made by the Family Law Practitioners' Association of Queensland (FLPA), an organisation with approx. 900 members from the legal profession (solicitors and barristers) and allied professions (psychiatrists, psychologists, social workers and social scientists), established to achieve the core objective of the continuing education of its members in relation to family law issues.

It is noted, that on 27 November 2019, the Hon. Yvette D'Ath, Attorney-General and Minister for Justice, introduced the Criminal Code (Child Sexual Offences Reform) and Other Legislation Amendment Bill 2019 into the Queensland Parliament. As an Association which deals with family law practitioners, the only provision within the Bill which the Association considers may impact family law practitioners is 229BC. As such, this submission solely deals with this specific provision.

This provision within the Bill, relevantly, provides:

229BC Failure to report belief of child sexual offence committed in relation to child

(1) This section applies to an adult if—

- (a) the adult gains information that causes the adult to believe on reasonable grounds, or ought reasonably to cause the adult to believe, that a child sexual offence is being or has been committed against a child by another adult; and*
- (b) at the relevant time, the child is or was*
 - (i) under 16 years; or*
 - (ii) a person with an impairment of the mind.*

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(2) *If, without reasonable excuse, the adult fails to disclose the information to a police officer as soon as reasonably practicable after the belief is, or ought reasonably to have been, formed, the adult commits a misdemeanour.*

In family law proceedings, particularly parenting proceedings, sexual abuse allegations are made not infrequently. Those allegations can, in many instances, be made for the first time, by a parent, against another parent or person, during the process of a legal professional taking instructions from clients.

It is noted that a confession made during religious confession is not exempt from this provision.¹ However, the provision gives no other clarity in terms of legal professional privilege. The question therefore arises, as to whether a legal practitioner, who is taking instructions and is informed of alleged sexual offending, which they do not report, commits an offence against this provision. It is the association's view, that it would be a breach of legal professional privilege to make such report without the consent of the client to waive the privilege.²

The wording of the section is ambiguous. Questions arise as to what is "reasonable grounds" or "ought reasonably to cause the adult to believe" that a child has been sexually abused. Many legal practitioners, in the early stages of taking instructions, will be presented with nothing more than an allegation made by a parent. At that time, there may be no other external information, such as doctors' records, available. An adviser may have formed the view that the extent of the evidence is insufficient to permit any disclosure without breaching their duty of confidence (for example, under Rule 9.2.5 of the *Australian Solicitors Conduct Rules*). The question then arises, as to whether a solicitor, on those allegations alone, will be committing an offence against section 229BC if they fail to disclose the information to police immediately.

Where section 229BC makes reporting by an adult mandatory, the further question arises whether, if the instructions to a legal practitioner comprise more than a mere allegation, and involve a higher degree of supporting evidence (for example, a form of written or taped admission/confession by a parent), but where the adviser nevertheless maintains adviser-client confidentiality, the adviser will have committed an offence by not reporting the conduct to police. This question arises because section 229BC invokes a *mandatory* reporting requirement, but where rules relating to exemptions from legal professional privilege are cast in *discretionary* terms (e.g. Rule 9.2.5 of the *Australian Solicitors Conduct Rules* recording that a solicitor "may" disclose confidential information for the purpose of "*preventing imminent serious physical harm to...another person*").

¹ S. 229BC(3)

² See for example, *Australian Solicitors Conduct Rules 2012*, Rule 9 and *Bar Association of Queensland, Barristers' Conduct Rules*, Rules 108 & 109



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It is recommended that clarity be provided around this issue, and an amendment be made to the section to confirm the provision does not require a legal practitioner to waive legal professional privilege (sometimes also known as client legal privilege).

As an alternative, it is recommended that the provision clearly state that a legal practitioner does not commit an offence if they are provided information in the course of taking instructions from a client for the dominant purpose of providing advice, and fail to disclose the information obtained to police.

Such amendment could be made by the addition of a further subsection in section 229BC(4), which provides that the maintenance of legal professional privilege (or client legal privilege) constitutes a reasonable excuse for non-compliance to legal practitioners in the circumstances described above.

Yours faithfully

A handwritten signature in black ink, appearing to read 'James Steel', written over a horizontal line.

James Steel
FLPA President