Queensland Law Society

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Office of the President

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Committee Secretary
Legal Affairs and Community Safety Committee
Parliament House
George Street
Brisbane Qld 4000

By email: [redacted]

Dear Committee Secretary

Criminal Code (Child Sexual Offences Reform) and Other Legislation Amendment Bill 2019

Thank you for the opportunity to provide comments on the Criminal Code (Child Sexual Offences Reform) and Other Legislation Amendment Bill 2019 (**the Bill**). The Queensland Law Society (**QLS**) appreciates the opportunity to comment on this important legislation.

QLS is the peak professional body for the State's legal practitioners. We represent and promote over 13,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide. QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

This response has been compiled by the QLS Criminal Law Committee whose members have substantial expertise in this area.

Prior to the introduction of the Bill we note that the Department of Justice and Attorney-General conducted a public consultation process on a draft of this bill between 22 August and 20 September 2019. We understand that this consultation resulted in significant feedback including from the QLS. In this regard, we respectfully submit that for future processes, publishing a tracked changes version of the introduced Bill would have greatly assisted stakeholders to understand the changes and provide responses, particularly given the Bill's introduction on 27 November 2019 when many of our volunteers are beginning to take leave for the holiday period.

With respect to the Bill we raise the following:

- QLS acknowledges the important policy intent behind the Bill to protect vulnerable members of our community. That policy objective is supported by QLS.

- There are unintended consequences arising from proposed new sections 229BB and 229BC of the Criminal Code which have the potential effect of over-riding client legal

privilege. As drafted, these clauses mean that a legal practitioner who is approached for legal advice on the operation of these offences would be subject to the reporting obligations proposed in section 229BC. QLS calls for express clarification in the Bill to exclude legal practitioners from the operation of these provisions, for the policy reasons outlined below.

- The Bill introduces a new offence for failure to report the belief of a child sexual offence (or offences) committed in relation to a child by another adult. While recognising the policy intent, QLS considers that as it is currently drafted, the proposed offence (proposed section 229BC) risks unintended consequences and may be contrary to the policy intent. This proposal goes beyond the recommendation of the Royal Commission into Institutional Responses to Child Sexual Abuse (**Royal Commission**).

- The Bill proposes a new offence of failure to report a belief of child sexual offences even if the information is gained during, or in connection with, a religious confession (proposed section 229BC). This proposal will cause debate in the community and amongst our members. We identify some of the concerns below and recommend that no final decision be made until the Council of Attorneys-General working group publishes its report and further public consultation occurs.

- New section 132BA of the *Evidence Act 1977* alters the well-established common law approach to jury directions. QLS acknowledges that the Royal Commission held a number of concerns about certain jury directions. Given the significance of these proposed reforms, QLS recommends that the Queensland Law Reform Commission consider the scope and consequences of these proposed changes with a longer period of public consultation.

Amendment of Criminal Code – Proposed section 229BB – Failure to protect child from child sexual offence

A 'child sexual offence' is defined as an offence of a sexual nature which is committed in relation to a child, including offences under Chapter 22 (Offences against morality) of the Criminal Code, such as offences relating to the making, distribution and possession of child exploitation material, and Chapter 32 (Rape and sexual assaults) of the Criminal Code.

The drafting of the Bill has the effect that an *accountable person* commits a crime for failing to identify that an offence will occur in the future, as the offence appears to arise even if no child sexual offence has yet occurred.

The provision requires the accountable person to *know* that there is a significant risk that another adult *will* commit an offence, which effectively requires an accountable person to assess *if* someone might commit an offence (emphasis added). It also imposes a civil burden of proof in subsection 229BB(1)(f) by providing that the accountable person commits the crime if, in addition to the factors in (a) to (e), the person wilfully or *negligently* fails to reduce or remove the risk (emphasis added).

QLS acknowledges the policy intent of the section but is concerned that there are significant difficulties with an offence requiring the assessment of potential future offences by an "alleged

offender", particularly where the offence may be satisfied by a lesser burden of proof. Our concern is heightened by the significant period of imprisonment proposed (maximum 5 years). The definition of *accountable person* extends to volunteers with organisations including sporting clubs and youth organisations. This offence provision is likely to have a negative effect on the willingness of volunteers to serve in organisations of this kind, in circumstances where organisations are already subject to a wide range of child protection compliance burdens.

In this regard, we also note recent changes to the *Civil Liability Act 2003* which impose further civil obligations on institutions to prevent child abuse in an institutional setting (see the insertion of new chapter 2, part 2A as part of the *Civil Liability and Other Legislation Amendment Act 2019*).

In light of these civil liability changes and the proposed section 229BC, QLS suggests that further consideration be given to the drafting of section 229BB to give guidance as to when a person "knows", what might constitute a "significant risk" and what the accountable person should do to "reduce or remove the risk" of the potential offence and the applicable burden of proof.

Amendment of Criminal Code – Proposed section 229BC - Failure to report belief of child sexual offence committed in relation to child

New section 229BC creates a new criminal offence which is a misdemeanour punishable by three years imprisonment that applies to *an adult (i.e. a person 18 years or over)* where the following circumstances are met:

- the adult gains information that *causes them to believe on reasonable grounds, or ought reasonably to cause them to believe*, that a child sex offence is being or has been committed by another adult (the alleged offender);
- at the time at which the offence is believed or ought reasonably to be believed to have been committed against the child, the child is under 16 years or is 16 or 17 years of age with an impairment of the mind;
- in the absence of a 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 effect of the reasonable excuse provision in the new section 229BC (Failure to report belief of child sexual offence committed in relation to child) is to reverse the onus of proof to the defendant. This is inconsistent with a cornerstone principle of our legal system.

While the Society acknowledges the policy intent behind the offence, we have concerns about unintended consequences. QLS considers that the proposed offence is broader than the recommendation of the Royal Commission. It provides for mandatory reporting beyond the institutional context where "information" is gained which *causes* an adult *to believe on reasonable grounds, or ought reasonably to cause them to believe*, that a child sex offence is being or has been committed by another adult.

This is an extremely broad provision and imposes obligations on every adult member of the community to understand the complexities of child sexual offences and whether any of the excuses in the Bill are applicable to the specific circumstances. In the absence of specific

disclosure by a child, it may be difficult for the ordinary member of the community to ascertain whether the information gained should raise suspicion. This creates a level of uncertainty in circumstances where there is a reversal of the onus of proof and a custodial sentence on conviction.

We note the offence proposed in the Consultation draft had a limited application to the institutional context. This application was sensible as staff and volunteers in that context would be provided proper training about recognising the signs of child sexual abuse, such training cannot be provided to the community at large, and the appropriate safeguards and steps to be taken when alerted to a potential issue.

There is a risk that the provision may be contrary to the policy intent of addressing and investigating child sexual abuse offences, by overburdening the police with reports and overshadow conduct or information which should otherwise be investigated.

Amendment of Criminal Code – Proposed section 229BC - Failure to report offence and religious confession privilege

The Bill includes amendments which make it clear that the failure to report offence applies to any information gained by an adult "during, or in connection with, a religious confession". QLS acknowledges the important policy intent behind this reform of protecting vulnerable members of our community.

The recommendations of the Royal Commission have been made as a result of a long and difficult inquiry with a view to ensuring the safety of children in institutional care. That policy objective is supported by the Society. QLS is aware that some of its members will support this reform, for the reasons outlined in the reports of the Royal Commission and due to the serious nature of the policy objective at hand. QLS has also received correspondence from members concerned this reform will not have any beneficial influence on achieving the over-riding policy objective of protecting vulnerable children, so as to justify the diminution of religious freedom.

From a legal perspective, some of the concerns raised in relation to this reform include:

1. Specifically identifying religious confession in this way raises concerns about freedom of religion. By seeking to remove the seal of the confession as a reasonable excuse for not reporting in the circumstances in proposed section 229BC, the legislation takes a step towards restricting the practice of a religion which includes the sacrament of confession. This is a concerning step to take as our community values the freedom of religion and such a reform creates a precedent for future incursions restricting the practice of a religion.
2. This provision is inconsistent with section 20 of the *Human Rights Act 2019* (**HRA**). The effect of section 229BC(3) of the Bill is:
    a. To contravene a person's freedom to demonstrate the person's religion or belief in worship, observance, practice and teaching (section 20(1)(b) of the HRA); and
    b. To coerce or restrain a person in a way that limits the person's freedom to have or adopt a religion or belief, in contravention of section 20(2) of the HRA.

3. Removing the privilege associated with religious confession will set a dangerous precedent which may be relied on, in the future, to remove or restrict legal professional privilege, also known as client legal privilege. Client legal privilege serves a critical role in our justice system, as it encourages frank and fearless exchange of information between a client and their legal representative to ensure that the client receives appropriate legal advice. Once reforms of this nature are accepted with respect to the religious confession privilege, then at a later date, this might be seen as justification to restrict or remove another previously unassailable privilege such as client legal privilege, which is a cornerstone legal principle.
4. Creating an offence of failing to report child abuse confessed to a priest during confession will not make a positive contribution to stopping child abuse but will only make confessions of child abuse more unlikely.
5. There is a question of equality of application of the law. The specific provisions in section 229BC(3) will only apply to members of the clergy and such discriminatory application must be justified as effectively achieving the over-riding policy objective of protecting vulnerable children. This justification is difficult to see for the reasons expressed. Questions have been raised whether the source of the issues identified by the Royal Commission are matters of a failure of ethical leadership in institutions rather than the practice of confession.
6. The obligation to report raises questions of hearsay evidence, as the member of the clergy can only repeat information delivered to them.

This proposal raises a number of genuinely held concerns, particularly with respect to competing rights and precedent value.

QLS notes that the "Fact Sheet – Institutional child sexual abuse offences: failure to report and failure to protect" indicates that the Council of Attorneys-General (CAG), on 28 June 2019, agreed to establish a working group to consider the Royal Commission's recommendations relating to confessional privilege, with the working group to report back to CAG. We understand that this report was delivered in late September 2019.[1] QLS recommends that no final decision be made on this proposal until CAG has considered this report and conducted further public consultation on the findings in the report.

Amendment of Criminal Code – Unintended consequences of sections 229BB and 229BC - Clarification required – legal practitioners employed or engaged by the institution

QLS is concerned that the wide application of the proposed reporting obligations in proposed section 229BC will extend to a legal practitioner representing an institution.

[1] Australian Government Annual Progress Report 2019 – Implementation of recommendations from the Final Report of the Royal Commission into Institutional Responses to Child Sexual Abuse (page 88) – accessed 7 January 2020 at https://www.childabuseroyalcommissionresponse.gov.au/sites/default/files/2019-12/annual_progress_report_2019.pdf

This paragraph would apply to an in-house lawyer or a legal practitioner in a firm or a community legal centre who is approached by an institution seeking advice as to, for example, its obligations under sections 229BB and 229BC.

This wide drafting has the potential effect of over-riding client legal privilege so that the legal practitioner may be exposed to potential penalties in sections 229BB and 229BC.

QLS recommends that this section be clarified to exclude legal practitioners employed or engaged by the institution, in circumstances where the information and knowledge referred to in sections 229BB(1)(a) and 229BC(1)(a) is provided to the legal practitioner in the context of the relevant institution seeking legal advice. In these circumstances, the reporting obligation would then properly fall on the adult who is the client, not the adult who is the legal practitioner.

Under the Australian Solicitors Conduct Rules (**ASCR**), legal practitioners are generally subject to obligations of confidentiality with respect to confidential client information, but legal practitioners may disclose confidential client information if:

- the solicitor discloses the information for the sole purpose of avoiding the probable commission of a serious criminal offence; or
- the solicitor discloses the information for the purpose of preventing imminent serious physical harm to the client or to another person (Rule 9.2).

Clarifying this section to exclude legal practitioners as proposed above will not jeopardise the safety of children currently in the care of an institution as legal practitioners are permitted to disclose information of the kind contemplated in sections 229BB and 229BC if a child is presently in danger.

However, QLS is concerned that without this clarification, legal practitioners will unintentionally be caught by these offence provisions where advice is sought in relation to historical offences (section 229BC) or the "significant risk that another adult (the alleged offender) will commit a child sexual offence" (section 229BB).

The ASCR also imposes clear ethical obligations on a solicitor whose client confesses guilt to a solicitor but maintains a plea of not guilty. In these circumstances, a solicitor cannot mislead the court by setting up an affirmative case inconsistent with the confession and must not continue to represent the client if the client insists on giving evidence denying guilt or requires the making of a statement asserting the client's innocence (Rule 20.2).

These ethical obligations ensure that solicitors act appropriately within the criminal justice system and provide further support for excluding legal practitioners from this proposed offence.

The definition of "associated" in section 229BB(3) suggests that the section is not intended to extend to legal practitioners and the policy intent of the section will be achieved even if legal practitioners are excluded.

Whilst we note that the Explanatory Notes at page 7 states that the "offences do not override any other privilege, including the privilege against self-incrimination or legal professional privilege", we submit that further certainty in the Bill is required.

Criminal Code (Child Sexual Offences Reform) and Other Legislation Amendment Bill 2019

General comments

By way of general comment about the amendments in Part 5, Division 3 of the Consultation Bill, QLS notes:

- We query if there is a risk that the protection from liability from civil, criminal or administrative process in proposed section 229BC(5) will extend to a person who discloses information in good faith to the police, but which does not meet the requirements of subsection 1(a).
- The maximum penalties of 3 years imprisonment for section 229BC and 5 years imprisonment for section 229BB are quite significant for circumstances where a potential offender is a volunteer with an organisation, particularly in light of our concerns regarding the reversal of the onus of proof and the lower burden of proof discussed above. There may be many reasons for a person failing to report, including when it is unclear if the information obtained is based on rumour or unproven allegations. However, QLS acknowledges the policy intent behind these new offences.
- Given the consequences and risk of imprisonment, affected institutions will need guidance and education on the significant obligations proposed, particularly those which are small not for profits and charities run by volunteers. QLS asks that the Department make financial allocation for this education process about these new criminal offences, if passed as currently drafted.
- We note that the provisions contained in part 5, division 3 are to commence on a day to be fixed by proclamation. QLS recommends a significant transitional period to enable affected institutions to implement the necessary changes in their compliance policies and procedures.
- The new offence in section 229BC will apply to any information received on or after commencement, even if that information relates to abuse that occurred before commencement of the section (new section 751). The retrospective application of new criminal offences always creates uncertainty, particularly with respect to historical child sexual offences, and QLS would generally caution against this approach.

Amendment of *Evidence Act 1977* - Proposed new section 132BA - Delay in prosecuting offence

The effect of the proposed new section is to substantially alter the content of Longman[2] and Robinson[3] directions so that judges may not refer to 'dangerous to convict', 'unsafe' or 'scrutinise with great care'.

This change will, as drafted, affect all criminal proceeding with a jury and not only proceedings relating to child sexual offences. This is a significant shift in the legal landscape for jury trials.

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[2] *Longman v The Queen* (1989) 168 CLR 79 see https://www.courts.qld.gov.au/__data/assets/pdf_file/0006/86073/sd-bb-69-longman-direction.pdf.
[3] *Robinson v The Queen* (1999) 197 CLR 162 and see https://www.courts.qld.gov.au/__data/assets/pdf_file/0006/86064/sd-bb-63-witnesses-whose-evidence-may-require-a-special-warning.pdf.

The directions referred to have been developed over time through common law and applied and modified by judges in response to specific factual scenarios. The directions assist in avoiding miscarriages of justice and any interference with them must not be taken lightly. The attempts to clarify the meaning of directions risks creating unanticipated consequences via an extra layer of judicial interpretation of the new statutory provisions. QLS therefore does not support the proposed amendments.

QLS appreciates that the Royal Commission had a number of concerns about the Longman direction and its tendency to perpetuate myths about sexual assault rather than actual forensic disadvantage suffered by the accused as a result of delay. However, the proposed amendments go further than the recommendation of the Royal Commission. Rather than substantially changing the Longman direction, QLS submits that it is fairer for judges to issue directions to juries noting that there is no standard way in which victims behave, as was accepted by the Court of Appeal in *R v Davari*[4] and *R v Cotic*[5].

QLS is of the view that any proposed changes to the rules of evidence within the sphere contemplated by the Bill must be referred to the Queensland Law Reform Commission.

Amendment of *Evidence Act 1977* - Creation of an intermediary scheme

QLS supports the intention of the reforms but has concerns about the details. For example, the Explanatory Notes refer to the Intermediaries providing "practical strategies on how to best communicate with the witness and how to pose a question to get the most reliable evidence".

We request consultation on the Regulation to ensure the scheme pilot is appropriately implemented and balances the rights of the accused.

Amendment of *Penalties and Sentences Act 1992* – section 9 – Sentencing guidelines

Sentencing standards at time of sentence

Clause 53 provides that when sentencing offenders for historical child sexual offences, the court is to sentence offenders in accordance with sentencing standards at the time the sentence is imposed, rather than at the time of the offending.

QLS acknowledges this amendment is intended to reflect contemporary community attitudes towards this type of offending. However, the rule of law requires that laws are certain and are capable of being known in advance. Laws that create offences with retrospective application breach this cornerstone principle.

While we note the Royal Commission's recommendation to enact this reform, the presumption against retrospective effect is a central requirement for the rule of law. This reform is proposed in the context of significant changes in sentencing principles for these offences in recent times, including that the Act already imposes a requirement for a custodial sentence to be imposed, unless exceptional circumstances exist. QLS expresses concern that this reform will undermine the rule of law and may disadvantage those affected by the legislation.

[4] [2016] QCA 222.
[5] [2003] QCA 435.

Excluding good character

Clause 53 (5) seeks to exclude good character as a mitigating factor at sentence where that good character facilitated the child sexual offending.

QLS is concerned that for historical offences, this change risks undermining the relevance of rehabilitation as a sentencing principle. Further, where the legislature expressly stipulates what principles can and cannot be taken into account, it undermines judicial discretion; particularly where these offences are already dealt with in a special category.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via policy@qls.com.au or by phone on (07) 3842 5930.

Yours faithfully

[redacted]

Luke Murphy
President