

**RESPONSE TO VANESSA DEVERSON ON ‘CHILD ABUSE
AND NEGLECT: MANDATORY REPORTING AND THE
LEGAL PROFESSION’**

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This comment responds to Vanessa Deverson’s article titled ‘Child Abuse and Neglect: Mandatory Reporting and the Legal Profession’ and examines whether it is desirable for lawyers to be required to report child abuse and neglect that may be revealed by their clients. The comment begins by articulating the role of the legal profession, and explains how it differs from other professions. Part I explains that an obligation to report child abuse would fundamentally change the role of the legal profession in defending or asserting the rights, liberties and liabilities of their clients. Part II argues that even if mandatory reporting were to be brought in, it would be unlikely achieve its intended purpose because it would create suspicion towards the legal profession and undermine its role. The final Part discusses current South Australian draft legislation aimed at protecting children and argues that this may be a more appropriate route. The comment concludes that current Northern Territory reporting laws do not belong in a legal system that depends on clients having confidence in their lawyers.

CONTENTS

I	Introduction	130
II	The Role of the Legal Profession	131
III	Child Protection in South Australia and the Northern Territory	135
IV	Conclusion	138

I INTRODUCTION

When I was a law student, my ethics master, Professor Michael Detmold, instructed us on ethics through the prism of the role of the relevant participants in the administration of justice. The role of the lawyer was that of representation — advance and defence — of a client’s instructions within the boundaries of non-derogation from the administration of justice. It was not for

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the lawyer to judge a client but to be their confidential adviser and advocate. Allegiance to this goal ensured that rectitude would be maintained in the adversarial justice system, which relies on each participant fearlessly fulfilling their function. These lessons have always remained with me and instilled the sincerest duties of confidence and fidelity that distinguish the profession of law as one in which the community can have complete trust.

With that introduction, I commence by commending the author, Vanessa Deverson, for her scholarship and contribution to the issues surrounding child abuse and neglect. These are not only issues of current concern to the legal profession but are part of a national and international dialogue which seeks to examine and strengthen policy, procedure and law for the protection of children.

The author crisply frames the issue she addresses, which is to recommend legislative reform to require lawyers to report child abuse and neglect. The context of the author's recommendation is for lawyers to be mandatorily required to report against their own clients, hence giving rise to her consideration of privilege and confidentiality attaching to the lawyer-client relationship.

Ms Deverson accurately details current mandatory reporting laws in Australia in Part II of her article. She explains the application of common law doctrine on legal professional privilege and duties of confidentiality, as reflected in the rules of ethical and professional conduct, in explaining the current restrictions and limitations on lawyers self-reporting confidential information or issues they may learn from and with respect to their clients. The content of the article on which I will focus is that in Part IV, namely, whether it is necessary, and on a broader view, desirable, for lawyers to be required to report issues of child abuse and neglect against their clients.

II THE ROLE OF THE LEGAL PROFESSION

In this discussion, it is apposite to begin from the foundation of questioning whether it is appropriate for a lawyer to be required to report on any issue the lawyer may learn from confidential discussions or correspondence with clients. In every legal system—whether it be the common law adversarial system or the European inquisitorial civil law system; whether it be founded on the principles of client interest defined by codes of ethics and practice which guide lawyers in the United States or whether it be founded upon an overarching principle of adherence to the administration of justice as the bedrock principle

that guides Australian lawyers — there is enshrined a fundamental notion of justice. In developed, democratic justice systems that fundamental notion is captured by the familiar symbol of Lady Justice whose blindfold indefatigably evinces the equality of all persons before the law. In order to realise equality before the law, the justice system must steadfastly promote and adhere to tenets that allow those seeking justice to plainly, openly and frankly put their concerns, statements, propositions, grievances and allegations to a legal professional in whom they can have confidence of complete and on-going fidelity and trust. These principles are reflected in the rules, rights and privileges to which Ms Deverson refers and explains in Part III of her article.

Part III of the primary article begins with a sentiment which is perhaps at the heart of the tension that the author seeks to confront:

When a lawyer forms an opinion that the child is potentially being abused and neglected, they are morally obliged to take action to help the child. As citizens we all have a duty to protect the vulnerable.¹

Lawyers are citizens in their communities, societies and nations, as well as professionals in a discipline that is entrusted with the confidences of other citizens, the defence of their liberties and the enforcement of their rights. When discussing the lawyer's duty of confidentiality Ms Deverson refers to the work of Adrienne Lockie and related scholarship, which argues for the non-derogable importance of confidentiality in the lawyer-client relationship.² She then refers to the evolution of the doctor-patient relationship, suggesting that there were also concerns about placing mandatory reporting obligations on doctors because of the risk of interfering in the doctor-patient relationship, before pointing out that these problems have seemingly been overcome. She argues that any duty of confidentiality should be subordinate to the need for lawyers, as professional adults, to report suspicions of child abuse or neglect, on the justification that children who might be subjected to such treatment are vulnerable and unable to protect themselves. She concludes that the situation of the doctor-patient relationship is analogous and applicable to the suggested development of a lawyer-client relationship.

There is merit in this argument that the vulnerability and limitations of children demand that their rights and protection be preferred to the interests of persons, usually adults of sound mind, who are better positioned and able to guard themselves from harm. However, the analogy between the doctor-patient

¹ Vanessa Deverson, 'Child Abuse and Neglect: Mandatory Reporting and the Legal Profession' (2016) 2 *University of South Australia Student Law Review* 102.

² *Ibid* 111–2.

relationship and the lawyer-client relationship is, in my view, inappropriate. The fundamental purpose of the medical profession is to ensure the health of their clients. In that respect, the medical profession is charged with investigating matters that may adversely affect mental or physical health, such as suspicions concerned with abuse and neglect. The purpose of the legal profession is to advise on and, if necessitated by dispute, defend or assert the rights, liberties and liabilities of their clients. The purpose of the legal profession is to be the confidential advisor to clients. The role of a lawyer in the administration of justice is not to judge the client. The long established principles of confidentiality in both the common law and, more recently, the laws and rules of professional conduct, reflect the role of the legal profession in the administration of justice as having no part of judging the conduct, character or actions of a client to anyone other than the client. To place on legal professionals an obligation to report to anyone, other than the client, matters learned or concerning the client would be to fundamentally and radically alter the purpose of the legal profession and the nature of their responsibility and obligations in a democratic system of justice.

A further concern I have is that the proposed reporting requirements on the legal profession and the paradigm shift in purpose that would result may, sadly, not achieve the aim of exposing cases of child abuse and neglect. If a positive obligation were placed on the legal profession to report suspicions about their clients to third parties, clients would be more reluctant, and even unwilling, to seek legal assistance or to be open and frank with their lawyer. This may arise from misinformation or misunderstanding as to the matters which were confidential as opposed to the matters which could be the subject of mandatory reporting. These distinctions may be difficult in practice even if seemingly clear in written form. Mandatory reporting for the legal profession would have a potential flow-on effect to the wider community to decrease public confidence and increase public concern about the nature and extent of conversations with lawyers which remain confidential in the lawyer-client relationship and those which did not. Rather than serving as useful method for detecting potential child abuse or neglect, mandatory reporting for lawyers may inhibit public confidence and trust in the legal profession and thereby reduce the instance of clients forthrightly communicating with lawyers. Forthright communications are critical to the lawyer being able to completely serve the interests of clients and advise them on all matters so that the client may be counselled as to appropriate courses of action.

At the outset of Part IV of the article, Ms Deverson touches on work by Freda Briggs in the family law jurisdiction. The points made, sadly, indicate seeming advice and tactics that may be employed in that jurisdiction that may

improperly take precedence over the best interests of the child. However, it should be emphasised that in cases where a client advises a lawyer of the suspected abuse or neglect of a child by a third party, there is no restriction on a lawyer from properly disclosing or evidencing such suspicions to the court or other appropriate authorities. Ms Deverson then goes on to make the following argument:

A lawyer's duty to their client should not outweigh our duty to protect children. The focus has to be on the protection of the vulnerable. We need to protect those who are unable to protect themselves.³

This is an argument based in morality with which one could not argue. The evolutionary impulse we all possess to protect the young of the species is inherent in our human nature. However, the concern in such a statement is that it places a lawyer in the position of weighing duties and responsibilities on bases such as utilitarianism and morality with respect to their clients. This derogates and detracts from the duty of the lawyer to serve, promote and defend the client's interests. While this may sometimes mean that the lawyer is placed in an invidious position with respect to their personal morality and values, the dedication of the legal profession to service of the client rather than judgment or adjudication of the client's rights compared to the rights of others ensures that the legal profession adheres to the fundamental *good* of providing an independent confidential advisor on legal rights and liabilities in the administration of justice. This role should not be diluted by asking the lawyer to intermix it with what may well be competing, contrary or separate interests to those of the client. That is not to diminish the need to protect children, in any way. Rather, it is to acknowledge that in a system of justice which seeks to provide robust measures for the protection of children, each individual and organ within that system must have a clear and defined role in which people can have certainty, confidence and reliance.

The author makes reference to Rules 9.2.4 and 9.2.5 of the *Australian Solicitors' Conduct Rules* as adopted in South Australia at 1 July 2015 which permit lawyers to make reports to third parties 'for the sole purpose of avoiding the probable commission of a serious criminal offence' or 'for the purpose of preventing imminent serious physical harm to the client or to another person'. This exception houses the recognition of the legal profession that acting to prevent probable commission of serious crimes or imminent serious physical harm should not amount to professional misconduct if a lawyer with such a purpose breaches obligations of confidentiality and makes reports to third

³ Ibid 114.

parties. In one sense, this provision substantially addresses the author's thesis by providing a mechanism through which a lawyer concerned by child abuse or neglect that amounts to probable serious crime or imminent serious physical harm can make report. The gravity in committing breaches of confidentiality is reflected in the need for probability and imminence in the advent of serious criminal offending or physical consequences. It should, however, be noted that the rules are not a directive to report such conduct, but permissive of reporting in that such a report will not amount to breach of the *Conduct Rules*. There is no regulatory or common law obligation on lawyers to breach confidentiality.

To impose mandatory requirements to breach confidentiality with respect to child protection may well give rise to what would be sensible arguments by analogy pertaining to why there are no other instances of conduct which should necessitate mandatory reporting by the legal profession. There are a myriad of offences or actions of which a legal practitioner may suspect their client, that may, like the need to protect children from harm, have a sound moral, ethical and utilitarian basis for disclosure by legal practitioners. However, for the reasons previously given, to do so would be to radically alter the purpose of the legal profession in ensuring that a society governed by laws is maintained by the confidence of each individual that they may have full, skilled and private access to advice on those laws.

The argument made for mandatory reporting of child abuse by the legal profession as a positive mandatory reporting obligation would be a paradigm shift in the relationship between lawyer and client and, more importantly, the purpose of the legal profession in serving citizens of a community administered by an open justice system. My view on this, however, does not remedy the substance of Ms Deverson's thesis. Her point validly remains: how do we ensure better and broader protection for children?

III CHILD PROTECTION IN SOUTH AUSTRALIA AND THE NORTHERN TERRITORY

The Child Protection Systems Royal Commission reported in August 2016. That report has resulted in draft legislation, namely, the Children and Young People (Oversight and Advocacy Bodies) Bill 2016,⁴ a primary purpose of which is to provide for the establishment of a Commissioner for Children and Young People.⁵ One critical function of that office will be for the

⁴ Children and Young People (Oversight and Advocacy Bodies) Bill 2016 (SA).

⁵ Ibid cl 7.

Commissioner to investigate systemic problems within child protection systems of children in state care.⁶ The original draft legislation was the subject of review and submission by the Law Society of South Australia due to concerns over the breadth of the investigatory powers that the Commissioner was to have under the proposed Act. The Society submitted that it was important that the Commissioner have power to investigate individual complaints of children and other individuals within child protection because individual complaints are often the root to uncovering systemic issues within the child protection system. The proposed Act builds on the *Children's Protection Act 1993* (SA), s 11, which deals with notification of abuse and neglect as it applies to persons as defined in s 11(2) of that Act. Those persons include:

- (a) a medical practitioner;
- (ab) a pharmacist;
- (b) a registered or enrolled nurse;
- (c) a dentist;
- (d) a psychologist;
- (e) a police officer;
- (f) a community corrections officer (an officer or employee of an administrative unit of the Public Service whose duties include the supervision of young or adult offenders in the community);
- (g) a social worker;
- (ga) a minister of religion;
- (gb) a person who is an employee of, or volunteer in, an organisation formed for religious or spiritual purposes;
- (h) a teacher in an educational institution (including a kindergarten);
- (i) an approved family day care provider;
- (j) any other person who is an employee of, or volunteer in, a government or non-government organisation that provides health, welfare, education, sporting or recreational, child care or residential services wholly or partly for children, being a person who—
 - (i) is engaged in the actual delivery of those services to children; or
 - (ii) holds a management position in the relevant organisation the duties of which include direct responsibility for, or

⁶ Ibid cls 14–17.

direct supervision of, the provision of those services to children.⁷

A noticeable absence from the list is the legal practitioner. In my view, for the reasons indicated herein, that is appropriate. The broad range of those who are placed under duties to report, evidences the concern of the law to provide multiple persons and points of contact for the reporting of suspicions of child abuse or neglect. The legal profession then takes on the critical role of considering, advancing, defending and determining those issues if they amount to matters beyond suspicion. If the legal profession is obliged to divide its purpose, the power of the profession to perform its vital role in our democracy is decreased.

There are jurisdictions in Australia and overseas that have nonetheless seemingly extended reporting obligations to legal practitioners. Ms Deverson refers to these in Part IV. The legislation introduced in the Northern Territory, through the *Domestic and Family Violence Act 2007* and the *Care and Protection of Children Act 2007*, provides a comprehensive model of this type of legislation. Lawyers are included by non-exception rather than direct reference in a list such as that in the *Children's Protection Act 1993 (SA)* excerpted above. The Northern Territory Law Society considered the laws when they were introduced and a Guideline for NT practitioners was issued in November 2009. The Guideline extracts the relevant provisions and examines them. It concludes:

[I]t appears that client legal privilege is overridden by s 124A of the DFVA and s 26 of the CAPCA. Lawyers are unlikely to be able to rely on privilege as a reason for failing to make a report. When making a report, one is obliged to report the information which has led to the relevant belief. That this information might otherwise be privileged is unlikely to be accepted as a reason for withholding the information.

Practitioners should use caution and should advise their clients of the mandatory reporting requirements in appropriate situations.

Clearly, mandatory reporting that abrogates client legal privilege has the potential to damage the relationship between lawyer and client. Lawyers should keep this in mind and if possible, take steps to minimise damage to the lawyer client relationship, such as explaining to clients the obligations to report if a relevant belief is formed.

If a lawyer makes a report which involves a client (either a potential victim or potential perpetrator), two significant issues must be considered.

⁷ *Children's Protection Act 1993 (SA)* s 11(2).

Firstly, the practitioner must decide whether he or she must stop acting for the client. This will depend on the prospect of the lawyer being a witness in the case, and on whether the making of the report would place the practitioner in a position of conflict with his or her client's interests. A conflict will be most likely to arise if the client is the suspected perpetrator or if the client does not want the report to be made. The lawyer will also need to withdraw if it becomes apparent that he or she will be required to be a witness and give evidence in court about the circumstances leading to the making of the report, in accordance with Rule 13 of the Rules.

Secondly, the lawyer must only release otherwise privileged information and breach the confidentiality of the client to the extent required by the laws. Any lawyer making a report under either DFVA s 124A or CAPCA s 26 must include the information that is required by those sections but should otherwise take normal steps to preserve the client's legal privilege and the confidentiality of information obtained through the lawyer-client relationship.

It is also relevant to note that information given by a client to a legal practitioner will only be protected by client legal privilege if the information is confidential, and is provided to the lawyer for the dominant purpose of enabling the client to receive legal advice, or to be provided with legal services in relation to actual or anticipated proceedings. This means that subject to the context in which information is given, there may be no client legal privilege attaching to the information in any event.⁸

I do not consider such legislation to be consistent with a legal system that values, as it should, the interest in lawyers being the confidants of their clients and clients having certainty that their lawyers will fulfil this purpose. For the reasons I have articulated, this is due to the particular role that the legal profession has and the benefit to the community in that role being maintained and preserved against duties that may diminish confidence and understanding in the purpose that the legal profession serves.

IV CONCLUSION

The legal profession and governments across Australia are concerned with the need for improved and revised child protection strategies. It is difficult to overtly criticise reforms like those in the Northern Territory, which have the laudable objective of child protection at their core. So too, I offer praise to

⁸ Barbara Bradshaw, *Guideline for Legal Practitioners: Mandatory Reporting Laws*, Law Society Northern Territory (November 2009) Law Society Northern Territory, <www.lawsocietynt.asn.au/images/stories/Mandatory_Reporting_and_Privilege.Guidelines.pdf>. 7–8 [32]–[38].

Vanessa Deverson for the scholarly arguments advanced to extend reporting obligations to the legal profession. My view against the legal profession being mandatorily required to report on matters concerning clients was formed in my lessons at Law School and they have been proven sage by my time in practice. The legal profession provides an invaluable democratic service to the citizenry by offering them a counsel of confidence.