

Panel Discussion

## Subpoenas & Warrants

Greater Brisbane  
Family Law Pathways Network



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## Panellists

- ❖ Senior Registrar Chris Spink, Family Court of Australia
- ❖ Accredited Family Law Specialist, Stephen Page, Page Provan Family & Fertility Lawyers
- ❖ Solicitor, Julie Sarkozi, Women's Legal Service Queensland (Counselling Notes Protect)
- ❖ Manager, Right to Information and Subpoena, Teresa Stewart-Hunter, Department of Child Safety, Youth & Women
- ❖ Team Leader, Subpoena Team, Right to Privacy & Information, LaTanya Lemuelu, Queensland Police Service
- ❖ Manager Practice, Governance, and Research, Dr April O'Mara, Centacare Family & Relationship Services

## Why keep notes?

- ❖ Practitioners are encouraged to consider the purpose of note keeping within the context other role.
- ❖ Avoid making notes of options or judgments - document what can be seen and heard.
- ❖ Non-governmental organisations providing services to families, such as Centacare, UnitingCare and Relationships Australia, have comprehensive policies and induction training for staff to ensure that the purpose of notes are to make accurate assessments to meet client needs and provide quality service. It is common practice for clients to have a numeric reference within an organisation so that identifying material such as names and addresses are not held with sensitive, intimate information.

## Who can see notes?

- ❖ There are many circumstances where notes may be accessed and viewed or become evidence.
- ❖ There are circumstances where notes may be protected.
- ❖ When keeping notes, one should be aware of the possibility that notes may be seen by third parties.
- ❖ Depending on the jurisdiction (civil, criminal, State, Federal), different legal protections and permissions will apply.

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## Who can see notes in Family Law Matters?

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- ❖ Generally speaking, parties may rely on material that is relevant to resolving their dispute.
- ❖ Medical, hospital, counselling and other records may be subpoenaed for court cases and used as evidence.
- ❖ When material has been subpoenaed by the parties or an Independent Children's Lawyer, the court must determine whether the material:
  - ❖ can be accessed by the parties or their representatives; and
  - ❖ whether the material is admissible in the proceedings.
- ❖ At the early stage of proceedings, when the issues are not yet clear, it is common for access to be granted for the basis that there is apparent relevance, unless objections are raised and it is necessary for a judge to view the material first and determine the relevance and weight.
- ❖ Beyond a lack of relevance, Senior Registrar Chris Spink, and Accredited Family Law Specialist, Stephen Page, addressed some of the exceptions to the use of subpoenaed material as evidence in family law matters.

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## Who can see notes in Family Law Matters?

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### Family Counselling

- ❖ Under Section 10D of the Family Law Act, evidence cannot be given in any court or tribunal of what people say in the course of family counselling by a family counsellor - including professionals to whom the parties have been referred.
- ❖ Caution must be exercised in ascertaining whether the confidentiality provisions relating to family counselling applies - that is, whether the notes relate to family counselling activity by a family counsellor.
- ❖ A list of family counselling organisations is issued by the Attorney-General's Department and can be found [here](#).

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## Who can see notes in Family Law Matters?

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### Family Counselling continued ...

- ❖ Determining when the process of helping starts and stops might however be difficult in some cases.
- ❖ Intake or assessment processes may not be covered under the confidentiality provisions. Things said before or after the context of family counselling may not be confidential.
- ❖ Agencies may be able to clarify what is and is not family counselling. Organisations may wish to clarify explicitly whether activities are considered to be family counselling.
- ❖ The exception to the confidentiality provisions is where there is an admission by an adult or disclosure by a child indicating that a child has been abused or is at risk of abuse - including severe neglect (s4) or exposure to domestic violence (s4AB).

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## Who can see notes in Family Law Matters?

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### Family Dispute Resolution

- ❖ Under Section 10H of the Family Law Act, communications made as part of Family Dispute Resolution are also protected.
- ❖ As with family counselling, intakes, screenings and assessments prior to Family Dispute Resolution most likely will not be protected

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## Counselling Notes Protect Queensland

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- ❖ Recent Queensland Legislation protects the counselling records of victims of sexual assault or alleged sexual assault from being used in some courts.
- ❖ The proceedings covered by the legislation are criminal and civil court proceedings commenced on or after 1 December 2017, including domestic violence court proceedings.
- ❖ The Counselling Notes Protect service provides free legal advice and representation to individuals covered by the legislation.
- ❖ Counselling is considered broadly, including when a counsellor (which may include a doctor) listens, gives support, provides help or encouragement, advises, gives therapy or treatment, including group therapy.
- ❖ Counselling records will be protected from being available during a court case or from being subpoenaed for a court case.

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## Counselling Notes Protect Queensland

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- ❖ Counselling notes are not protected by this legislation prior or any proceedings being commenced. For example, where police are investigating a matter.
- ❖ The practical effect of this new law will be that any counselling notes may become “protected counselling communications” and be protected by an absolute privilege at a committal hearing or Bail application.
- ❖ If a party is seeking a record in a proceeding for a trial, sentencing and/or domestic violence order matter, “protected counselling communications” has qualified privilege and material can only be provided by leave of the Court.
- ❖ Contact Julie Sarkozi at [Women’s Legal Service](#) or [Legal Aid Queensland](#) for further advice, support and legal representation for clients.

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## Subpoenas to Queensland Police

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- ❖ A team of 8 members of the Queensland Police Service delegated to accept service on behalf of the Commissioner are tasked with responding to more than 3000 subpoenas each year of which more than 70% arise from family law matters
- ❖ A decentralised system comprising 19 regions, 55 districts and 340 police establishments means there are challenges in meeting this demand.
- ❖ Lawyers and parties can facilitate the production of subpoenaed documents by:
  - ❖ Providing the name, date of birth and address of people named in a subpoena - copies will need to be served on all interested parties;
  - ❖ Making it clear how individuals listed in a subpoena are related to the matter;
  - ❖ Avoiding broad, generic descriptions; and
  - ❖ Where possible, giving specific information about dates and locations of particular incidents concerning the individuals named in the subpoena.

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## Subpoenas to Department of Child Safety

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- ❖ The team at the Department of Child Safety, Youth & Women face similar challenges with respect to volume of subpoenas that the team must respond to.
- ❖ The Department will seek to narrow the scope to material held on the Integrated Child Management System (ICMS).
- ❖ [Section 186 of the Child Protection Act](#) protects “notifiers of harm” from being identified and states that evidence of the identity of the notifier or from which the identity of the notifier could be deduced must not be given in a proceeding before a court without leave of the court.
- ❖ The court would only grant leave if satisfied that the evidence is of critical importance in the proceeding and there is compelling reason in the public interest for the disclosure or if the notifier agrees.

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## Subpoenas to Department of Child Safety

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- ♦ The legislation extends the confidentiality obligations to other organisations, departments and professionals who become aware of the identity of a notifier, preventing them from disclosing the identity of the notifier except in specific, prescribed circumstances.
- ♦ Where a person uses or discloses information or documentation which relives the identity of a notifier, the penalty is up to 2 years imprisonment and/or a substantial fine.
- ♦ Section 191 of the Act lists the discretionary factors that may be relied upon by the Department in refusing to disclose particular documents or information. These include the risk to safety or psychological health of a person or where it is a record of confidential therapeutic counselling and the person to whom it relates does not consent to its disclosure.
- ♦ Recent additions to the Child Protection Act were also noted:
  - ♦ Section 188C - Chief executive may give information about third parties;
  - ♦ Section 188D - Chief executive may give information about deceased child; and
  - ♦ Section 188E - Chief executive must give police commissioner information about deceased child.

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## Responding to a warrant: practical suggestions

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- ♦ If Police attend with a warrant, read the warrant and ensure that the information is correct.
- ♦ Do not allow removal of material not covered by the warrant. For example, if the warrant does not cover mobile phones, these should not be removed.
- ♦ Observe and/or record the removal of material by police.
- ♦ It is recommended that you telephone a solicitor for legal advice.
- ♦ When responding to a subpoena, check your legal obligations. Do you have a legal right or obligation to object to the subpoena?
- ♦ If unsure, seek legal advice.

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## Responding to a subpoena: practical suggestions

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- ♦ If providing material under subpoena, ensure that information that may identify a notifier under the Child Protection Act is redacted. Again, seek legal advice if there is any uncertainty.
- ♦ Costs and expenses incurred in complying with a subpoena may be sought from the party issuing the subpoena.
- ♦ If there is an objection to the subpoena, you may make an application to the Court to have the subpoena set aside in whole or in part. Reasons for objecting may include irrelevance, privilege or the terms of the subpoena being too broad.
- ♦ Unless the subpoena specifically requires the production of the original documents or things, copies may be provided.
- ♦ If unsure, seek legal advice.