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Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
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Submitted via email: legcon.sen@aph.gov.au

Dear Committee Secretary

APS response to the Inquiry into the Family Law Amendment Bill 2024

The Australian Psychological Society (APS) welcomes the invitation to provide a submission to the Senate Legal and Constitutional Affairs Legislation Committee's Inquiry into the Family Law Amendment Bill 2024 (the Bill). As the peak body for psychology in Australia, the APS advocates for policies that enhance the psychological wellbeing of individuals, families, and communities. APS members play a critical role in the family law system, providing expert evidence, reports and psychological support for parties, children and others affected by family law matters.

Protected Confidences

The APS supports the policy intention underpinning the Bill. In particular, we express support for the 'protected confidence' provisions in Schedule 3, Part 5 of the Bill, which would set up a framework for protecting information shared within a confidential therapeutic relationship, including between a psychologist and client. Given that psychologists work within a framework of confidentiality that is foundational to the therapeutic relationship,¹ the APS is pleased that these provisions have been reintroduced in this Bill following their unexplained omission from the Family Law Amendment Bill 2023 (as introduced).^{2,3}

The revised provisions in the Bill provide greater operational clarity compared with the draft provisions previously circulated in the Exposure Draft of the Family Law Amendment Bill 2023. They go some way towards recognising the sensitivity of a 'protected confidence' and the therapeutic context in which such confidences are shared. The recognition of these confidences is critical in maintaining the trust and safety necessary for effective psychological interventions.⁴

This is particularly the case in family law contexts where individuals may feel vulnerable or distressed due to deeply personal parts of their lives being exposed through systems of power. In family law

matters, psychologists often work with individuals who have experienced trauma, domestic and family violence, sexual abuse, and other forms of interpersonal conflict. It is critical that the legal framework acknowledges the unique needs and vulnerabilities of these individuals by providing robust protections for their confidential communications. Without adequate protection of confidential communications, clients may be reluctant to disclose sensitive information essential for their treatment.

Strengthening the Protection of Confidential Information

While the APS acknowledges the improvements made in this Bill, we remain concerned that the provisions still require the Court to make a direction regarding the admissibility or disclosure of a protected confidence. The discretion and uncertainty inherent in this requirement reduce the assurance that both psychologists (as confidants) and clients (as protected confiders) have in the protection of sensitive information. Despite the provisions in the Bill, clients who are aware that the disclosure of their private communications rests on a judicial direction may still feel unsafe in sharing important information, thereby jeopardising the therapeutic process and their psychological wellbeing.

The APS's view is that the sensitive and therapeutically critical nature of a 'protected confidence' warrants a stronger safeguard. Consistent with our previous submission, we recommend that the Bill introduce a presumption against the admission or disclosure of a protected confidence.^{2,3} A party seeking to rely on a protected confidence should require leave of the Court for the protected confidence to be disclosed or adduced.

This approach would place the burden on the party seeking to rely on the information to demonstrate why it is necessary, rather than placing the burden on the client and the professional to defend the confidentiality of the communication (if the Court does not make its own direction). Such a presumption would better align with the professional, ethical and therapeutic rationale for the confidentiality of therapeutic communications. Such a change would ensure that sensitive psychological information is only disclosed in exceptional circumstances, thereby preserving the integrity of the therapeutic relationship.

The Consultative Process

We express our disappointment that there has been no consultation with the APS regarding the development of these provisions, which directly affect psychologists and their clients. As the peak body for the profession of psychology in Australia, our involvement in such consultations is crucial to ensuring that the legal framework appropriately considers the perspectives and needs of both practitioners and their clients.

The APS calls for opportunities to work with the Government on the further development and implementation of the protected confidence provisions, consistent with the Australian Government's *Charter of Partnerships and Engagement*.⁵ The APS, and our members, are uniquely positioned to provide insights into how legislative changes impact both the practice of psychology and the wellbeing of clients. We seek to work with the Government to ensure that the final legislative framework provides comprehensive protection for therapeutic confidences while balancing the interests of justice.

Thank you again for the opportunity to provide a submission to the Inquiry into the Family Law Amendment Bill 2024. If any further information is required from the APS, I would be happy to be contacted through our National Office on (03) 8662 3300 or by email at:

z.burgess@psychology.org.au

Yours sincerely

Dr Zena Burgess, FAPS FAICD
Chief Executive Officer

References

1. Australian Psychological Society. (2018). *APS Code of Ethics*. <https://psychology.org.au/about-us/what-we-do/ethics-and-practice-standards/aps-code-of-ethics>
2. Australian Psychological Society. (2023). *Submission to the Senate Legal and Constitutional Affairs Committee on the Family Law Amendment Bill 2023*. <https://psychology.org.au/psychology/advocacy/submissions/professional-practice/2023/senate-committee-submission-on-the-family-law-amen>
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5. APS Reform. (2023). *Charter of Partnerships and Engagement*. Australian Government. <https://www.apsreform.gov.au/news/charter-partnerships-and-engagement>