

27 February 2023

APS Response to Attorney-General's Department Consultation on the Family Law Amendment Bill 2023

The Australian Psychological Society (APS) provided the following responses to the Attorney General's Department consultation on the Exposure Draft of the Family Law Amendment Bill 2023.

The Department's Consultation Paper contained 43 questions in relation to the Exposure Draft Bill. The APS responded only to questions which were relevant to psychologists' work within the family law system.

The APS would like to acknowledge and sincerely thank the members who so kindly contributed their time, knowledge, experience, and evidence-based research to this submission.

Schedule 1: Amendments to the framework for making parenting orders

Redraft of objects

Question 1. Do you have any feedback on the two objects included in the proposed redraft?

The APS supports the two objects included in the proposed redraft of s 60B.

Best interests factors

Question 3. Do you have any feedback on the wording of the factors, including whether any particular wording could have adverse or unintended consequences?

The APS supports the wording of the factors in proposed section 60CC. We particularly welcome the recognition of 'the developmental, psychological and emotional needs of the child' and the capacity of proposed carers to provide for these needs. The inclusion of these factors is consistent with our previous submissions.

Removal of equal shared parental responsibility and specific time provisions

Question 7. Do you have any comments on the removal of obligations on legal practitioners, family dispute resolution practitioners, family counsellors or family consultants to encourage parents to consider particular time arrangements? Will this amendment have any other consequences and/or significantly impact your work?

The APS supports the removal of equal shared parental responsibility and specific time provisions. As the Act currently stands, psychologists working with clients involved in family law proceedings constantly need to explain the operation of these provisions and to correct common misunderstandings. Removing these provisions should free psychologists to use their time more effectively with their clients. However, there will need to be considerable education and support to affected professionals ahead of the commencement of these amendments to undo these deep-seated and widely held, erroneous assumptions and beliefs.

Schedule 3: Definition of 'member of the family' and 'relative'

Question 17. Do you have any feedback on the wording of the definitions of 'relative' and 'member of the family' or the approach to implementing ALRC recommendation 9?

The APS supports the proposed changes in Schedule 3, which are consistent with our previous submissions.

Question 19. In section 2 of the Bill, it is proposed that these amendments commence the day after the Bill receives Royal Assent, in contrast to most of the other changes which would not commence for 6 months. Given the benefit to children of widening consideration of family violence this is appropriate – do you agree?

Yes.

Schedule 4: Independent Children's Lawyers

Requirement to meet with the child

Question 21. Do you agree that the proposed requirement in subsection 68LA(5A) that an ICL must meet with a child and provide the child with an opportunity to express a view, and the exceptions in subsections 68LA(5B) and (5C), achieves the objectives of providing certainty of an ICL's role in engaging with children, while retaining ICL discretion in appropriate circumstances?

The APS supports these proposed requirements but recommends that the Bill explicitly affirm the ability for an ICL to be supported by a Family Consultant or other psychologist involved when meeting with a child. The APS also recommends that the Bill require that ICL have due regard to the psychological wellbeing of the child when arranging a meeting, and to conduct the meeting in a way which is trauma-informed, culturally safe and attentive to the developmental needs and current wellbeing of the child.

Schedule 5: Case management and procedure

Harmful proceedings orders

Question 30. Do you have any views about whether the introduction of harmful proceedings orders, which is intended to protect vulnerable parties from vexatious litigants, would cause adverse consequences for a vulnerable party? If yes, do you have any suggestions on how this could be mitigated?

The APS supports the proposed introduction of harmful proceedings orders as one mechanism to limit systems abuse. However, the difference between 'psychological harm' and 'major mental distress' in section 102QAC(1)(a) and (b) is unclear. These are not terms which have a standard meaning within the fields of psychology and mental health. If the intent is to ensure that both shorter-term impact ('major mental distress') and longer-term impact ('psychological harm') are considered forms of harm, this should be made clear in the plain wording of the provision.

Overarching purpose of the family law practice and procedure provisions

Question 31. Do you have any feedback on the proposed wording of the expanded overarching purpose of family law practice and procedure?

The APS supports the proposed wording of the expanded overarching purpose of family law practice and procedure.

Schedule 6: Protecting sensitive information

Express power to exclude evidence of protected confidences

Question 32. Do you have any views on the proposed approach that would require a party to seek leave of a court to adduce evidence of a protected confidence?

The APS welcomes the proposed approach requiring a party to seek leave to adduce evidence of a protected confidence. The provisions recognise the importance of confidentiality within a therapeutic relationship, including between psychologist and client.

Question 33. Does the proposed definition of a protected confidence accurately capture the confidential records and communications of concern, in line with the ALRC recommendation?

We recommend that proposed s 99(2)(b) be revised to clarify that a protected confidence arises in circumstances where there is a general or overarching obligation (rather than an absolute obligation, as potentially implied) not to disclose communications made to a professional by the protected confider. This is to ensure that the presence of specific circumstances where disclosure is required or permitted does not extinguish the protected confidentiality of communications between the confider and the professional. For example, a psychologist may be required to provide a report to the client's GP outlining the client's progress to fulfil Medicare requirements. This disclosure – or potential disclosure – should not prevent the client and psychologist's communications across the course of treatment from being characterised as a protected confidence.

Question 34. What are your views on the test for determining whether evidence of protected confidences should be admitted?

The proposed test in section 99 should be revised to create a rebuttable presumption against admission of evidence of protected confidences. As it currently stands in the Bill, section 99 merely requires the court to balance the public interest in admitting the evidence against the public interest in preventing harm. Given the critical importance of confidentiality in a therapeutic relationship, the test should be strengthened by requiring the party seeking for the evidence to be adduced to establish why the default position of confidentiality – as enshrined in professional codes of ethics and in the expectations of clients – should be displaced.

Question 35. Should a person be able to consent to the admission of evidence of a protected confidence relating to their own treatment?

A person should be able to consent to the admission of evidence of a protected confidence relating to their own treatment, but the Bill should contain explicit safeguards against coercion. In addition, proposed section 99(3)(b) should be revised so that the person's consent – not parental consent – is required for admission of evidence in relation to a 'mature minor'.

Schedule 8: Establishing regulatory schemes for family law professionals

Family Report Writers schemes

Question 41. Are the proposed matters for which regulations may be made sufficient and comprehensive to improve the competency and accountability of family report writers and the quality of the family reports they produce?

While we support initiatives to increase the quality of family reports and the competency and accountability of family report writers, the APS does not support the proposed regulatory scheme in Schedule 8 in its current form.

Psychologists are already subject to high levels of regulation and oversight, including from AHPRA. The introduction of another regulator for the monitoring and enforcement of standards risks creating unnecessary parallel – and potentially inconsistent – obligations on health practitioners. This may have the effect of disincentivising highly qualified professionals from becoming family report writers, ultimately to the detriment of parties to proceedings and affected children. One partial solution may be a legislative framework that prevents complaints from being handled by both the regulator and AHPRA.

The APS is concerned about the unfettered scope of offences and civil penalties which may be prescribed by regulation under this scheme. We strongly recommend that any proposed offences (e.g., intentionally making a false or misleading statement in a report) should be contained in the Bill following rigorous scrutiny and debate, not prescribed under regulation. We also recommend that the Bill provide parameters – following additional consultation – limiting the scope of matters for which civil penalties can be prescribed.

We are also concerned that the limited safeguards in the Bill exposes psychologists and other family report writers to vexatious or chilling complaints by parties. Beyond the operation of proposed paragraph 11K(2)(f), the Bill should, at the very least, set out an offence or civil penalty for the making of vexatious complaints against family report writers under this regulatory scheme.

We strongly object to the Bill allowing regulations to prescribe fees for family reports. As we have seen in other settings, the setting of fees for reports through legislation or regulation tends to lead to an inflexible, rigid approach which is rarely fair to report writers. Prescribed fees also tend to lag well behind fair and reasonable hourly rates charged by professionals for report writing. Prescribed fees are also contrary to the professional autonomy of family report writers and may have unintended effects on quality. Once again, over-regulation of report writers may have the adverse effect of driving away capable and qualified practitioners from participating in the scheme.

Commencement of the changes

Question 42. Is a six-month lead in time appropriate for these changes? Should they commence sooner?

A six-month lead-in time is appropriate if there is a sufficient education and awareness campaign to prepare all relevant stakeholders for the changes. This would include practical and financial support provided by the Government to professional peak bodies, including the APS, to help inform, train and prepare our members.

Question 43. Are the proposed application provisions appropriate for these changes?

The APS would recommend that the Bill contain a provision requiring the review and evaluation of these very significant changes within 2 years of commencement, to be conducted by an independent and multidisciplinary panel which includes psychologists.