Senate Legal and Constitutional Affairs Legislation Committee

Family Law Amendment Bill 2024

Attorney-General's Department

Hearing date: 18 October 2024

Hansard page: 53

Paul Scarr asked the following question:

Senator SCARR: Understood. I ask you to take on notice if you can provide some observations as to the protections or safeguards in the bill as proposed now against, potentially, perpetrators of family violence using access to those documents to inflict harm—
Mr Collett: Using it for systems abuse.
Senator SCARR: Yes, systems abuse—and they thereby inflict harm on the victims of that violence. Potentially, because of that use and potential instances of that use, this could lead to a perverse outcome where people don't actually get the counselling they need. I'm interested in you reflecting on the safeguards. If we pass this bill as it is, what would be the safeguards in the system against that sort of abuse of the system? Is it possible to take that on notice?
Ms Mills: We're happy to take that on notice.

The response to the question is as follows:

Stakeholders in the family violence and health sector, as well as a number of Parliamentary inquiries and law reform processes, have consistently raised concerns about the disclosure of therapeutic treatment, where there is little evidentiary value, and that in practice:

- subpoenas can be used in family law proceedings to cause harm and perpetuate family violence, for example to subpoena another party's psychiatric or counselling records and to then use them to disadvantage, intimidate, humiliate, control and stigmatise that party[1]

- the disclosure of this evidence, and subsequent cross-examination on the contents of records of medical, psychiatric, psychological and counselling treatment, can compromise the effectiveness of treatment and party's willingness to engage with their treatment in future,[2] and

- disclosures can be weaponised by the other party during or following proceedings (for example, can later be used to undermine a parent-child relationship).[3]

[1] Radford, L. and Hester, M., Mothering Through Domestic Violence (Jessica Kingsley Publishers Ltd, 2006) 100; YWCA Vancouver Court-Related Abuse and Harassment: Leaving an Abuser can be Harder than Staying (2010) referred to in *Sense and Sensitivity: Family Law, Family Violence and Confidentiality*, Women's Legal Services NSW, May 2016, p. 24.
[2] Australian Law Reform Commission, 'Family Law for the Future: An Inquiry into the Family Law System – Final Report', March 2019, Page 336-337.
[3] Sydney Morning Herald (August 8, 2014) 'Psychiatric patients' records being aired in court'. Available at www.smh.com.au/nsw/psychiatric-patients-records-being-aired-in-court-20140805- 100q9h.html (accessed 23 October 2024) referred to in the Royal Australian and New Zealand College of Psychiatrists Position Statement 89 Patient-psychiatrist confidentiality: the issue of subpoenas, p.2.

The protected confidences measure represents the first time there will be a clear statutory framework for a victim of family violence to ask the court to consider and take into account the harm they will experience from the production, inspection, copying and adducing of evidence of protected confidences, and make directions to exclude that evidence.

Presently, a party to a family law proceeding is able to seek disclosure of evidence of protected confidences, most frequently, through the subpoena process. There are some limitations to this – including that a self-represented litigant must seek leave of the court for a subpoena and address the relevance of the subpoena as part of this process. In addition, there are specific rules and procedures in place to ensure that parties have an opportunity to inspect subpoenaed medical records, and decide whether they will make an objection.[4]

In general, these records will be allowed to be inspected unless an objection is successfully raised. The existing common law grounds for objecting are narrow and include that the information sought is irrelevant, too broad, or privileged. These grounds are useful in instances where a party is seeking to misuse court procedures to gain access to sensitive information that clearly has no probative value. However, these existing grounds do not allow the courts to consider harm to the confider, in circumstances where the evidence has some probative value.

Under the proposed provisions, a court will be required to determine, overall, whether the likely harm to a protected confider or a child outweighs the value of the evidence in proceedings. In making this decision, a court also has a positive obligation to consider the availability of alternative sources of this evidence, the probative value and importance of the evidence, as well as the means available to the court to limit the harm to the protected confider or the child.

If the grounds for a direction are met, then the court will be able to direct that a protected document is not produced, copied or inspected, or that protected confidences evidence is not given in court proceedings.

[4] *Federal Circuit and Family Court of Australia Rules 2021*, Rule 6.38.

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Paul Scarr asked the following question:

Senator SCARR: We've received submissions about the potential quarantining of compensation awards for acts of family violence from the property settlement provisions. You were here for the discussion I had with the Law Council of Australia about how it would seem, from my perspective, perverse that someone who's perpetrated family violence against a partner could share in the compensation paid to their partner for that family violence which they perpetrated. What was the consideration of the department around there not being a specific carve-out? Is the intention that it's covered under the 'just and equitable' grounds? Is there any reason why we couldn't have a specific carve-out given the attention on that issue from some major stakeholders?
Ms Mills: I would agree with the Law Council's assessment that it could be captured already within the 'just and equitable' framework, so you could consider that. The case law bears out that, where that's occurring, it's unlikely that it would be given to the other party or adjusted in that manner. I think we could give consideration to including it in the future, but really the consideration was that we think that's covered and it would be an unusual circumstance where that would arise.
Senator SCARR: The corollary of that is that perhaps it could be included, because we expected it to be effectively dealt with on the 'just and equitable' side. Is there any downside in including it? Again, you could take it on notice.
Ms Mills: We would need to take the opportunity to see potential downsides and whether it fetters—
Senator SCARR: Could you take that on notice. I'm alive to the fettering argument, but it does seem as if it's something which has attracted some substantial attention, so I would be interested in your further reflections on that.

The response to the question is as follows:

In property settlement proceedings, the court can only make an order altering interests in property if it is satisfied it would be just and equitable to do so (subsections 79(2) and 90SM(2) of the *Family Law Act 1975* (Family Law Act)). The Family Law Amendment Bill 2024 (Bill) would codify the existing process developed by the courts for determining a property division, including that the court must be satisfied that the final terms of the proposed property settlement order itself is just and equitable. The 'just and equitable requirement' is an overarching consideration relevant to the whole property decision-making process.

Generally, an award of compensation where one party has compensated the other would be disregarded by the courts[1]. This is because typically, it would not be just and equitable for this

[1] For example, *Coad & Coad* [2011] FamCA 622, *Marsh & Marsh* (1993) 17 FamLR 289.

to be considered as part of the property pool to be divided (as part of the court's identification of the property of the parties - the first step in the decision-making process), or as a financial resource available to the victim-survivor that could ground an adjustment in favour of the other party (as part of the court's assessment of the future needs of the parties - the third step in the decision-making process).

This Bill does not seek to disturb the key feature of the property decision-making framework in the Family Law Act, which affords judicial officers a broad discretion to ensure just and equitable outcomes that account for the particular circumstances of the families that come before them.

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Paul Scarr asked the following question:

Senator SCARR: ..In relation to children contact services, there's been a bit of a discussion during the course of the day as to whether or not the accreditation should be at an organisational level or at an individual employee or sole trader level. Has there been any final assessment made in that regard? Do we wait for the regulations? What's the current position?
Mr Collett: There's obviously consideration. This issue goes back to inquiries over a number of years now. But, to the heart of your question: that needs to involve consultation with the sector and the broader space.
Senator SCARR: Understood. A small point on that space: I saw that there are provisions dealing with partnerships and provisions dealing with trusts in terms of making sure partners and trustees are covered, but there was nothing I could see dealing with the obligation on directors in the event that a body corporate company is providing the service. Could you take that on notice and see if directors are covered? I would have thought they should be?
Mr Collett: My expectation is they would be, but we're happy to get you some advice.

The response to the question is as follows:

Directors and body corporates are considered to have legal standing as persons under Australian law, meaning they have the capacity to bear responsibility and incur liabilities. As such, references to 'persons' in the Bill would capture both natural persons (individuals) and incorporated business structures (body corporates). In contrast, trusts and partnerships are not legal persons and cannot directly bear liabilities. Therefore, the Bill includes provisions to clearly identify accountable individuals (e.g. trustees or partners) within these non-legal entities.

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Paul Scarr asked the following question:

Senator SCARR: There have been a number of submissions made in relation to issues such as the ability of courts to give interim orders with respect to—I'll call them companion animals—companion animals and also in relation to the ultimate orders that can be made by the court and the need for some flexibility with respect to the orders. At the moment, as I read the legislation, the choice is binary between ordering that the companion animal become the property of one of the two parties and ordering that it be sold. Is that something the department's considering in terms of those submissions?
Ms Mills: It is. Firstly, in terms of the interim orders, I'll just confirm that it's intended that, consistent with the current approach to other types of property, the courts would have the power to make interim orders about the family pet before the final proceedings are finally determined.
Senator SCARR: Is that therefore a drafting issue?
Ms Mills: We can have a look at whether there might be a need to clarify—
Senator SCARR: The fact that we're actually getting—if the Law Council of Australia raises the issue, it does raise the question as to whether or not the drafting could be made clearer.
Ms Mills: Yes, we will have a look at that. In terms of the options with the pets, the challenge that we have there is that the courts can only make orders about parties that are joined to proceedings. So it might be outside of the Commonwealth's legislative power for them to order that a party surrender or place an animal in the care of another person or organisation that is not joined to proceedings. That's the challenge in terms of the drafting there. Certainly, you could look at joining an individual to proceedings. That might be a complex way to go about it. It's also open to the court to make no order about the pet or companion animal. But were an order to be made that the pet cannot go to either party, beyond that, then they could look at what they do practically outside of the courts to give effect to that.
Senator SCARR: So what happens if the court orders a pet be sold and it can't be sold? Do you go back to court?
Ms Mills: If you were looking at rehoming options, I guess—
Senator SCARR: You're saying the particular barrier is the concern about giving the court the jurisdiction to make an order which involves a third party which is not a party to the proceeding. That's the particular concern?
Ms Mills: That's right.
Senator SCARR: Okay.
Mr Collett: I think the answer to your specific question is: if you couldn't implement a court order, you'd have to go back to the court and explain that, in that particular scenario.
Senator SCARR: But then the court's still left with that binary choice, so you're potentially just getting into a loop.
Mr Collett: Yes, although I think in practice these sorts of issues have an emotional aspect where the parties want them resolved.

Senator SCARR: I'm just trying to get my head around the practicalities. What would happen, for example, if the court made an order that the pet becomes the property of party A? Presumably party A could then immediately surrender the pet to an animal refuge. Would that be right, or would that be contempt of court?
Mr Collett: In the context of a final order, it would be a final settlement. It would then be the property of party A, and then party A—
Senator SCARR: And they can do whatever they want.
Mr Collett: In the same way, if the court ordered a house to party A, they're then free to sell it afterwards or do what they wish to do with it.
Senator SCARR: Can I ask you to take it on notice? Again, if self-acting litigants aren't going to appreciate, as I would have thought, the intricacies of the court having to join third parties before an order is made—given all the submissions we've received from organisations with quite a bit of expertise in this area, one wonders whether or not you, acting as a self-representing litigant yourself, reading the provision would be left bemused as to what to do in practice.
Mr Collett: Just so I'm clear, the intent behind your question is: how do you ensure clarity for that self represented litigant; how do you make this as straightforward as possible?

The response to the question is as follows:

The companion animal amendments have been drafted to operate within the existing property decision-making framework in Parts VIII and VIIIAB of the *Family Law Act 1975* (Family Law Act). Subsections 79(1) and 90SM(1) of the Family Law Act provide the power for the family law courts to alter interests in property. The framework provides significant guidance to the family law courts, while allowing judicial officers to apply broad discretion in making orders that account for the particular circumstances of the parties, to ultimately provide for a just and equitable outcome.

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Paul Scarr asked the following question:

Senator SCARR: A number of submissions, in this space, called for simplification of the considerations and made the observation, which you've heard, that the number of considerations with respect to best-interest factors in relation to child custody are fewer in number than the number in relation to pets and asked whether or not there can be some sort of rationalisation of the number of considerations. Can I ask you to take on notice—I won't ask for your views now—the suggestions from Lucy's Project, I think it was called, potentially with respect to rationalisation of the interests or considerations that need to be made? In particular, concerns were raised with respect to the relevance of who's paid, in the past, for the maintenance of the pet and how that may lead to unintended consequences, if that's considered. The provisions with respect to wastage, are they simply meant to reflect the existing jurisprudence and to codify that?

The response to the question is as follows:

The department understands that Lucy's Project recommends simplifying the list of factors the court must consider in proceedings for orders dealing with a companion animal to only include consideration of family violence, animal cruelty, and attachments to animals.

In circumstances where there are no allegations of family violence or animal cruelty, the additional factors are likely to be highly relevant and may be determinative in making an order for ownership where both parties are equally attached to the companion animal.

The Explanatory Memorandum explains (paragraphs [102] and [191]) that the family law courts are not obligated to consider every factor in each case, only relevant factors. The list of factors is intended to provide guidance for the courts and family law users on what factors may be relevant to determining ownership of a companion animal.

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Paul Scarr asked the following question:

Senator SCARR: On that issue of initial review, one area of concern that the Law Council of Australia raises is the operation of the family violence and cross-examination of parties scheme. Recommendation 2 of their submission refers to the need to have 'a further review of the operation of section 102NA of the Family Law Act'. Does the department have any views with respect to the need to review how that scheme's working at the moment?
Mr Collett: I'd say we do and we need to continue to monitor that scheme. That scheme is not a static body of work that can be simply set and left. It's used across the country. There are differing demands in differing jurisdictions, for a whole range of reasons. We have continued to mature the oversight and monitoring practices for that scheme in the years it's been in existence. It's supported nearly 5,000 cases now, since its inception, so there's a growing body of understanding not just for us at the government level but with the LACs. We've put in place a scheme coordinator now, which sits inside the South Australian Legal Aid Commission, to provide an ongoing holistic view and an ongoing reporting mechanism to us so that there is an ongoing review mechanism. That's not to say it shouldn't be considered as part of broader statutory reviews—that would be a logical thing to do—but we have to continue to monitor that scheme. It's not something we can set and forget.
Senator SCARR: I'll ask you to take a few things on notice now so the chair can share the call. The first is in relation to that proposal, recommendation, of whether or not the department has any concerns, with respect to adding a review of the operation of that section to the review that's in the bill, as it stands at the moment, whether or not there are any issues with that given the current processes underway. In answering that question you might provide some detail with respect to what's happening at the moment, as you outlined.
Mr Collett: Certainly.
Senator SCARR: I'd appreciate that. I won't go through the technical drafting recommendations the Law Council of Australia has made. They made reasonable sense to me. But I'd like to give you, the department, an opportunity to respond to recommendations 3 and 4 of the Law Council of Australia's submission and also recommendations 6 to 10 of their submission and their particular drafting suggestions. Also, is there any particular comment you'd like to make in relation to some of the recommendations made by the Women's Legal Service in its submission? I think we covered off on the Fitzroy Legal Service issue—

The response to the question is as follows:

<u>Law Council of Australia recommendations</u>

Recommendation 2 – funding of family violence and cross-examination scheme

The LCA recommends that a further review of the operation of section 102NA of the Family Law Act should be conducted to support the ongoing viability of the Family Violence and Cross Examination of Parties Scheme (Scheme).

A statutory review of the cross-examination provisions and Scheme was conducted in accordance with section 102NC of the *Family Law Act 1975* (the Family Law Act), with the final report delivered to the department in 2021. The review made 10 recommendations to address key issues identified throughout the review. The review found the Scheme had achieved encouraging results assisting victims to settle cases without the need for a contested court decision. The review stated that the primary focus of the department should be on ensuring that the Scheme has an adequate and reliable budget allocation, and refining the practical operation of the Scheme. This work is ongoing.

The Government accepted six recommendations, accepted in principle three recommendations, and noted one recommendation. The department is continuing to implement recommendations agreed by Government, through ongoing data collection and monitoring and analysis of demand and cost for associated Legal Aid Commission (LAC) activities; and the establishment of a Scheme coordination function, performed by the Legal Services Commission of South Australia.

Recommendation 3 – commencement

The LCA recommends that all amendments in the Bill should apply to every matter heard after a single commencement date. The majority of the measures, including the most significant changes, would commence 6 months after the Royal Assent. This is to enable the Federal Circuit and Family Court of Australia (FCFCOA) to prepare for the changes including to make updates to their rules, forms, practices and procedures, and website. This will also allow time for the department to disseminate information to assist practitioners and separated couples to understand the changes and how the new laws will apply. The delayed commencement of 6 months is consistent with the approach taken to the commencement of the *Family Law Amendment Act 2023*.

Recommendation 4 – definition of family violence

Subsection 4AB(2A) of the Bill provides a non-exhaustive list of examples of behaviour that may constitute economic or financial abuse, which includes the unreasonable denial of a family member's financial autonomy. The LCA recommends amending subparagraph 4AB(2A)(a)(iv) to explicitly include 'and consent' so the example would read: 'forcibly or without the family member's knowledge *and consent*, accumulating debt in the family member's name.'

It is implicit that if a debt is accumulated in a family member's name without their knowledge, it was done without their consent. The inclusion of 'forcibly' at the beginning of the subparagraph is intended to capture the circumstance where a debt was accumulated without the consent of the person, yet the person may have had knowledge of this.

The LCA also recommends that paragraph 4AB(2A)(d) be amended to clarify that the example only relates to circumstances where there is a dowry. The example was intentionally drafted to capture a broad range of conduct which may constitute economic or financial abuse, so as to include, but not be limited to, things done in connection with a practice of dowry. Narrowing the interpretation would risk excluding concerning behaviour from the definition.

Recommendations 5 – companion animals

While the department was not asked to respond to this recommendation, we have addressed the three specific issues raised by the LCA in its submission at pp. 17-20.

Interim orders

The LCA queries whether the court would be permitted to make interim orders in relation to companion animals. It is intended that, consistent with the FCFCOA's existing jurisprudence relating to other types of property, the court would be empowered to make interim orders about a companion animal.

Operation of proposed paragraphs 79(7)(g) and 90SM(7)(g)

The LCA queries whether paragraphs 79(7)(g) and 90SM(7)(g) of the Bill would work against a family violence victim-survivor who is the financially weaker party, in a claim for ownership of the pet.

As the Explanatory Memorandum explains (paragraphs [102] and [191]), the family law courts will holistically assess relevant matters when determining orders for ownership of the companion animal. Judicial officers will be afforded broad discretion to consider and balance relevant matters. This is consistent with the long-standing approach elsewhere in the property decision-making framework, for example, when the court assesses the parties' future needs (which are now proposed as current and future circumstances in subsections 79(5) and 90SM(5) of the Bill).

Increased complexity, length and delay

The LCA submits the proposed companion animal amendments will likely exacerbate conflict and extend property proceedings. This risk must be balanced against the benefits of providing a specific framework in the Family Law Act for determining ownership of the family pet following separation. These amendments acknowledge the high rates of pet ownership in Australia, with research indicating that approximately 69% of Australian households include pets. They recognise that bonds between humans and animals are common and emotionally significant[1]. Importantly, these amendments also seek to support victim-survivors of family violence to retain their pet where they may not otherwise be able to do so under the current framework. They respond to research highlighting the intersections between family violence and animal abuse, and that violence against family animals can be a barrier to victim-survivors leaving a violent relationship[2].

Use of the term 'companion animal' (as raised by Senator Scarr)

Senator Scarr queried the use of the term companion animal rather than pet for the purposes of the legislation. The Bill would insert a definition of 'companion animal' into section 4 of the Family Law Act, to support the proposed framework for making orders about companion animals. The term 'companion animal' is consistent with similar legislation, for example, the *Companion Animals Act 1998* (NSW), the *Family Law Act* [SBC 2011]. It is also consistent with language used by the Australian Government elsewhere, for example, by the Department of Agriculture, Fisheries and Forestry: Exporting companion animals and other live animals - DAFF (agriculture.gov.au). If the Bill becomes law, educational materials will be prepared to explain in plain English which animals could be within the new definition to assist family law system users understand how they might apply to their particular circumstances.

[1] Australian Institute of Family Studies (April 2024), *Violence against family animals in the context of intimate partner violence*, p. 3.
[2] Ibid, pp. 10-11.

Recommendation 6 – less adversarial approach

Recommendation 6 of the LCA's submission relates to the application of the less adversarial approach to property or other non-child-related proceedings. The LCA recommends limiting the automatic operation of the less adversarial approach to proceedings "to the extent that they are proceedings under Part VII."

The Bill provides for this. Where there are both children's and non-children's matters, the less adversarial approach would apply automatically to the child-related-proceedings (paragraph 102ND(2)(a)). The less adversarial approach would only apply to the other proceedings between the parties, if the parties consent or if the court orders it (subparagraphs 102ND(2)(b)(i) and (ii)).

The LCA recommends that the less adversarial approach apply to particular issues within a proceeding, rather than the whole proceeding. The policy intent of the Bill as drafted is to give the court discretion to apply the less adversarial approach to proceedings where that would be appropriate based on the circumstances of the case. This approach has been supported by other stakeholders, including WLSA and Relationships Australia.

Additionally, the LCA proposes that the Bill apply a set of criteria to guide the court's determination of whether to apply the less adversarial approach, including that the less adversarial approach only applies if the circumstances are exceptional, and following consideration of matters such as the importance and probative value of the evidence, and the nature of the subject matter. In determining whether to apply the less adversarial approach, the court will be guided by the relevant principles in section 102NE.

Other drafting issues raised about the less adversarial approach

The LCA raises concerns that subsection 102ND(2) is unclear about whether it applies to two separate proceedings or one proceeding only. This subsection clarifies how the less adversarial approach can be applied to proceedings by type (whether the proceeding is child-related or non-child related only, or both), rather than focusing on whether proceedings are filed as a single event or as multiple related proceedings. The drafting replicates the existing language in Division 12A of the Family Law Act.

The LCA raises concerns about the use of the word 'form' in subsection 102NE(7). This drafting replicates the existing language in Division 12A of the Family Law Act.

The LCA proposes redrafting paragraph 102NH(1)(h) in relation to the reference to counselling and alternative dispute resolution, and which matters these apply to. The drafting does not provide that family dispute resolution cannot be used in child-related proceedings, but rather that family counselling is only relevant to child-related proceedings. The drafting replicates the existing language in Division 12A of the Family Law Act.

The LCA raises concerns about the use of the phrase 'to deal with' in paragraphs 102NH(1)(i) and (j). This drafting replicates the existing language in Division 12A of the Family Law Act and the phrase is also used elsewhere in the Act as a reference to the range of actions a court may take in relation to a matter.

The LCA proposes removing the word 'remaining' from paragraph 102NN(1)(b). This drafting is also consistent with existing language in Division 12A of the Family Law Act.

Recommendation 7 – duty of disclosure

The LCA recommends amendments to clarify that respondents in contravention and contempt applications should provide documents that are not relevant to that application. The intention of the Bill is that the duty of disclosure would not apply to respondents specifically in the context of contravention or contempt applications only.

The LCA also recommends that the Bill identify what a party should do if they do not have a document to disclose in their possession, but that would be a relevant financial document for the purposes of the duty to disclose. The Rules of Court provide information about what a party is to do in such a circumstance.

Recommendations 8 and 9 – family law arbitration

Costs and injunctions

The LCA recommends that costs and injunctions should be matters capable of family law arbitration (Recommendation 8). The Bill is intended to enable costs and injunctions to be dealt with as part of family law arbitration.

Appeals

The LCA recommends that the Bill include a new measure to amend section 13J of the Family Law Act, which provides for the court to review an arbitration award, to provide consistency with the scope of the appellate jurisdiction and powers (Recommendation 9). Such amendments would require close consultation with other key stakeholders, including the family law courts, to consider any potential unintended consequences.

Recommendation 10 – costs

The LCA recommends that the provisions in Part 1 of Schedule 4, relating to costs orders, should be redrafted, including to omit or amend subsections 114UB(5), (8) and (9).

Omit proposed subsection 114UB(5)

Whilst subsection 114UB(4) would state that a party to the proceedings may make an application for costs 'at any stage during the proceedings', subsection 114UB(5) states that a court may make a costs order for either the whole of the proceedings, or any issues ordered to be tried separately. In addition, subsection 114UB(2) sets out the court's general powers to make cost orders it considers just. It is not intended that section 114UB(5) should, in practice, limit the application of the court's powers to award costs under subsections 114UB(2) or 114UB(4).

Clarify the interaction between subsections 114UB(3) and (8)

Subsection 114UB(3) sets out the general considerations that a court must take into account when making cost orders. Subsection 114UB(8) sets out that a court may make a costs order in favour of, or against, a party to proceedings regardless of the degree to which the party has been successful. It is intended that subsection 114UB(8) will operate subject to subsection 114UB(3) in practice.

Omit proposed subsection 114UB(9) from the Bill, or, alternatively, include statutory examples to enhance clarity and limit the potential for misinterpretation

The ALRC recommended that the Family Law Act should be amended to explicitly clarify the potential for cost orders to be made against non-parties, as a deterrent to non-parties whose

conduct has the potential to increase the costs incurred by parties (Recommendation 36). Subsection 114UB(9) sets out the court's broad powers to make cost orders in relation to non-parties. This reflects that while these powers are used sparingly in practice, case law has found that the categories of matters in which they could be applied are not closed.

Women's Legal Services Australia recommendations

Wastage

The Bill identifies 'the effect of any material wastage, caused intentionally or recklessly…of property or financial resources' as a factor within the list of current and future circumstances that the courts may consider when making property division orders. WLSA recommends the Bill be amended to include examples to clarify the meaning of wastage.

The Explanatory Memorandum includes examples of wastage such as excessive gambling and allowing a third person to live rent free in a property with the intention of depriving the other party of rental income. Subject to passage of the amendments, information will be prepared for practitioners and separated couples about the new laws, to clearly explain the intention of this factor.

WLSA recommends the Bill clarify that any consideration of wastage does not limit the court's ability to consider other approaches to dealing with wastage in property settlement proceedings, such as 'add backs'. The court already has broad discretion to make orders which account for wasted property or finances to be added back into the property pool and to be considered as property (funds) already received by the wasteful party. It is not the policy intent of these reforms to codify this discretion.

WLSA recommends amending the Bill to include wastage as a factor within the list of considerations in relation to contributions. The Bill's approach to codifying wastage was informed by stakeholder feedback received through the Exposure Draft process, including from the LCA.[3] The feedback highlighted that if wastage is considered as part of the court's consideration of contributions, it would be accounted for as a 'negative contribution.' Established case law provides there are no concepts of negative contributions in family law and the Bill does not intend to alter this.[4]

Children's Contact Services accreditation

WLSA recommends further consultation in developing the proposed accreditation rules for Children's Contact Services (CCS). The Bill will establish a power for the government to regulate the sector, and the final model for accreditation and drafting of the regulations themselves will be the subject of further consultation. Ongoing consultation is planned to support the development of robust, workable regulations that support an increase in safety and quality of CCS.

WLSA also recommends increased funding for CCS, particularly in rural, regional and remote communities. Funding for CCS is a matter for government. The Family Relationship Services Program (FRSP), under which current CCS funding is available to grant recipients, was recently reviewed. Future CCS funding will be considered in the context of government's consideration of the report from that review.

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[3] See [168]-[173], Law Council of Australia Submission, *Exposure Draft: Family Law Amendment Bill (No. 2) 2023* (available at: https://www.aph.gov.au/DocumentStore.ashx?id=60e46a68-2c1b-471c-997c-2a1eb1f0619f&subId=767860).

[4] For example, *Antmann v Antmann* (1980) Fam LR 560, *Keskin v Keskin and Anor* [2019] FamCAFC 236.

Protected confidences

Definition of protected confidences

WLSA recommends that the definition of protected confidence should be widened to confirm that not only the counselling records, for example file notes, associated with counselling are considered protected counselling records, but also any other document produced because of that professional relationship, for example, correspondence or a medical certificate.

The court's direction-making powers in sections 102BC and 102BD are not limited to documents or evidence recording a protected confidence. A court may also make directions in relation to evidence '*relating to*' a protected confidence.

The Explanatory Memorandum at paragraph 581 makes it clear that the phrase *'relating to'* protected confidences ensures that records containing the observations and opinions of the confidant, or summary information, may be subject to a protected confidences direction.

Definition of professional service

WLSA recommends that the definition of professional service should be expanded to include all counselling services in relation to sexual assault or family and domestic violence and this should not only be limited to the interpretation of a 'specialist service'.

The Bill provides a broad definition of 'health service'. In particular, a 'health service', under the Privacy Act, has already been established to cover a range of health and allied health services that treat both physical and psychological health issues, as well as disability services. The Explanatory Memorandum at paragraph 578 also makes clear that counselling services are intended to be within scope of this definition.

The use of a broad definition, rather than a categorical list of services, acknowledges that there are a broad range of professional therapeutic relationships, in both the health and disability context, in which harm could occur to a confider if evidence of confidential communications within that relationship were released.

The specification of specialist sexual and family violence services separately in the provision is intended to ensure that the protection of these provisions is extended as fulsomely as possible to the activities conducted by those services. While many activities performed by these services (e.g. counselling) will also fall within the definition of 'health service', these services do not have to meet the criteria of 'health service' as defined in section 102BB(3) for the records held by them to be considered a 'protected confidence'. This recognises the highly sensitive nature of the records held by these services, and the risks to a person's wellbeing and safety if this information is disclosed.

Further, the legislation makes provision for the extent of 'professional services' to be clarified over time by regulation. For example, in circumstances where there is repeated litigation regarding whether a certain service type is in scope, it may be useful for a definitive regulation to be made.

Positive obligation on court to raise the protected confidence provision with confider

WLSA recommends that the provisions should include a positive obligation on the court to raise the protected confidence provisions with the confider.

It is not clear how a court would meet a mandatory requirement to raise the opportunity for a

protected confidences application, when applications can be made in relation to disclosure and subpoena processes that occur prior to a court date.

If the Bill becomes law, educational material for parties will be prepared to ensure appropriate awareness of this measure. There is a compulsory brochure[5] sent to all parties whose records are subpoenaed which would be updated to ensure that all recipients of subpoenas receive information about the existence of the protected confidences provisions (currently the brochure only flags common law grounds to object).

Consent

WLSA recommends that the circumstances when a confider consents to the release of records should be expanded to:

a. include circumstances where the confider consents to part of a document being disclosed, and
b. set out that the confider has had the opportunity to seek legal advice.

The intent of this provision is to allow a person to consent to the admission of 'part' of a document. The process to verify consent will likely be determined in the Court Rules, or via a form developed by the court. If the Bill becomes law, educational material will be prepared on the protected confidences provisions to make clear that parties should consider obtaining legal advice.

[5] *Subpoena: Information for named person or other person (served with a subpoena or a copy of a subpoena)(prescribed brochure*) – fcfcoa.gov.au/fl/pubs/subpoena-named-person-served

Senate Legal and Constitutional Affairs Legislation Committee

Family Law Amendment Bill 2024

Attorney-General's Department

Hearing date: 18 October 2024

Hansard page: 58

Larissa Waters asked the following question:

Senator WATERS: Thank you. I hope that will satisfy the concerns of the Women's Legal Service; this was one of the four things they raised in relation to protected confidences. It sounds positive to me. You've referred to that issue being similar to how the states and territories approach it. On another matter, the Queensland Evidence Act currently says that the court should review a protected confidence prior to the applicant seeking to access the protected confidence, if you follow my drift. I'm wondering, given you've seen fit to have the wisdom of some states' and territories' approaches on other matters, if you would consider adopting Queensland Evidence Act section 14H, I think it is, which says the court can essentially vet protected confidence prior to an alleged perpetrator getting their hands on what could be quite damaging material.
Ms Mills: I might have to take that one on notice. There are mechanisms for the subpoenaed material to be considered by the courts. I will take that particular question on notice and come back to you accurately.
Senator WATERS: Thank you; I appreciate that. What are the mechanisms at the moment?
Ms Mills: The registrars within the courts may be able to inspect the material; I will clarify what their powers are in terms of that.

The response to the question is as follows:

Section 14H – Evidence Act 1977 (QLD)

Section 14H of the *Evidence Act 1977* (Qld), in combination with section 14G, creates a requirement for a person to seek leave for the subpoena of protected counselling information and sets out what a court will consider in deciding whether to grant that leave. This includes a power for the court to inspect the counselling notes before making a determination.

These provisions form part of the Queensland sexual assault counselling privilege, and as such, relate to protected counselling communications in the context of sexual assault offences. The protected confidences provision in the Family Law Amendment Bill 2024 (Bill) is intended to capture a broader range of professional therapeutic relationships that are important in the family law context.

An application for leave to subpoena protected confidence evidence (within the definition proposed by the Bill) would be a routine application, given the relevance of this information to the majority of family law proceedings. As advised to the Committee, this information is often important in making findings of fact underpinning the section 60CC best interests factors. In addition:

- this information is particularly critical in high-risk matters, where personal and sensitive information will be highly relevant to findings of drug use, alcohol use and a range of physical, psychological and other family violence, and
- information that would fall within the proposed definition of protected confidence often has significant relevance in financial disputes involving questions as to the health and capacity of parties to earn income, or where findings of family violence are to be made.

Adding a requirement for leave to subpoena protected confidences would have significant impacts on the courts' ability to efficiently dispose of matters, as well as time and costs for lawyers and parties, including:

- a court would be required to determine whether the evidence sought was a protected confidence in relation to each application for a subpoena, in addition to making a complex assessment regarding the merits of the application, and
- a court would need to consider the application even in circumstances where a protected confider would not object to its use in proceedings, and represented parties would bear the cost of their lawyers making applications in these circumstances.

Current process

There are some existing leave requirements for subpoenas, and processes in place to allow persons who have their medical records subpoenaed to inspect those records prior to making an objection.

Leave requirements for subpoenas

The Federal Circuit and Famly Court of Australia has different leave requirements for the issue of subpoenas, depending on whether they are issued by a self-represented litigant, a legal representative or an Independent Children's Lawyer. These include that a self-represented litigant must have approval from a registrar before a subpoena is issued. In contrast, if a party is legally represented, they may request the issue of up to 5 subpoenas for production for the hearing of an application for an interlocutory order without the permission of the court. An Independent Children's Lawyer may request the issue of any number of subpoenas for production for the hearing of an application for an interlocutory order without the permission of the court.

Where leave is required, an issuing party is required to provide the court with information regarding why permission should be granted (including the relevance of the information to proceedings).

Inspection of medical records

The procedure to allow the inspection of medical records (which is defined to include counselling records) is set out at Rule 6.38 of the Federal Circuit and Family Court of Australia Rules 2021. The Rule provides that person whose records have been produced may give notice to the court that they want to inspect those medical records in order to decide if they wish to object to their inspection. If they object to their records being inspected, they are allowed to file their notice of objection within seven days after the date for production in the subpoena. In this case, any party or interested person will not be permitted to inspect the medical records until the later of seven days after the date for production, or the hearing and determination of any objection.

Senate Legal and Constitutional Affairs Legislation Committee

Family Law Amendment Bill 2024

Attorney-General's Department

Hearing date: 18 October 2024

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Larissa Waters asked the following question:

Senator WATERS: Thank you; that's clear. The concern is that the person seeking to protect their confidence by objecting might not have legal advice or know that they have the right to object; I acknowledge you've said you'll make that nice and clear in your documents, but I still think there's quite a barrier to understanding legal jargon and the process for unrepresented litigants. Has the government considered any funding for community legal centres or legal aid or some body of lawyers who could give advice to people in that situation about objecting and the fact that it could be full or partial consent? I'm just concerned that people won't know what their rights are and therefore won't use them.
Mr Collett: Government considerations of legal assistance funding is at a broader level than that, Senator. I'd have to take the specifics on notice, but I don't believe that level of specificity would be involved through a legal assistance partnership type discussion. That would sit with states and territories and legal aid commissions. When it comes to education and awareness raising on the bill, there will be a whole range of activities that we will undertake, subject to the parliament passing the bill, as we did with the first tranche of reforms last year. With the benefit of last year's experience, we have a tried and tested arrangement of being able to move information through and across the sector and out into the community. When I appeared before you this time last year talking about the 2023 bill, we were confident in that process. On the other side of that, I've been really pleased with how much the sector responded to the efforts of the department and of the court in promulgating that sort of information, so we have tried and tested arrangements for pushing information out to the community.
Senator WATERS: Thank you. I believe in Queensland they did in fact tailor specific funding to address situations like this in sexual violence contexts, so it can be done. I still believe it should be done.
Mr Collett: And it may well be, Senator. I'll take that—
Senator WATERS: It's above your paygrade, so I'll take that up with the minister.
Mr Collett: Senator, if I can just clarify that. It's the responsibility of the Attorney-General around the final partnership. My point was where that level of decision-making sits, what the Commonwealth proscribes versus whether states manage it, that technicality doesn't sit within my responsibility, but I'm happy to take that on notice

The response to the question is as follows:

There is currently no funding specifically allocated for community legal centres or legal aid commissions to provide advice related to the protected confidences measure on commencement. Any specific additional funding for this purpose is a matter for Government.

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Larissa Waters asked the following question:

Senator WATERS: Okay. Well, hopefully you will be tasked with doing so at some point fairly soon. Senator Scarr touched on some of this. Lucy's Project, the organisation, was doing some great work in relation to keeping pets safe in families where violence has been the cause of separation. Their suggestion was, in essence, simply change the word 'sell' to 'rehome'. Senator Scarr put some lengthy questions to you, and I confess I got a bit lost on what the response was. Can we change the word 'sell' to 'rehome'?
Ms Mills: We can have a look at that option. It's not something I'd be able to comment on today. I am conscious that the challenge we have, which I raised with Senator Scarr, is around the court's ability to make orders to send pets anywhere in that it's not a party that's joined to proceedings, so their powers are—
Senator WATERS: Yes, but if you didn't specify where the rehoming was, surely you don't fall foul of that concern?
Ms Mills: We can have a look at that.

The response to the question is as follows:

The companion animal amendments have been drafted to operate within the existing property decision-making framework in Parts VIII and VIIIAB of the *Family Law Act 1975* (Family Law Act). Subsections 79(1) and 90SM(1) of the Family Law Act provide the power for the family law courts to alter interests in property. The framework provides significant guidance to the family law courts, while allowing judicial officers to apply broad discretion in making orders that account for the particular circumstances of the parties, to ultimately provide for a just and equitable outcome.