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4 October 2024

Committee Secretary

Senate Legal and Constitutional Affairs Legislation Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By email only: legcon.sen@aph.gov.au

Dear Committee Secretary,

Re: Family Law Amendment Bill 2024: Protected Confidences

The Law Institute of Victoria (**LIV**) is Victoria's peak body for lawyers and those who work with them in the legal sector, representing over 20,200 members. The LIV has a long history of contributing to, shaping, and developing effective state and federal legislation.

The LIV writes in response to the Senate Legal and Constitutional Affairs Legislation Committee's (the **Committee**) Inquiry on the Family Law Amendment Bill 2024 (Cth) (the **Bill**). This submission provides the LIV's views on Part 5 of Schedule 3 of the Bill, entitled 'Protecting sensitive information'.

The LIV is a constituent body of the Law Council of Australia (**LCA**), such that it generally supports the recommendations of the LCA. The LIV has provided a separate submission to the LCA on the Bill, particularly regarding the issues of property reforms, and case management and procedure. However, the LIV wishes to provide further input to the Committee in relation to the issue of protected confidences. This submission is informed by members of the LIV's Health Law Committee and Family Law Section, which consists of legal practitioners with health law expertise working in the health sector.

General comments

The LIV strongly supports the aim of the Bill, as outlined by the Attorney-General in his Second Reading Speech, 'to prevent records and other evidence generated from a child or party's engagement with health and specialist domestic and family violence services from being viewed by the other party or used as evidence, where the harm in doing so outweighs the need for the evidence'.¹ Similarly, the LIV agrees that '[p]roviding a safeguard against unnecessary access to this sensitive information is critical to reducing harm to families and children, and to ensuring that people can feel safe to engage with therapeutic and support services'.²

¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 22 August 2024, 9 (Mark Dreyfus, Attorney-General).

² *Ibid.*



However, the LIV submits that the Bill is at risk of failing to achieve its intended aims due to drafting flaws in the proposed section 102BA because the current drafting protects some, but not all, of a person's sensitive information. The LIV submits that minor, common sense amendments to section 102BA (as detailed below) are essential to remedying this significant concern, and by extension, reducing harm to families and children in this context.

For completeness, the LIV notes that it has undertaken significant advocacy work regarding the issue of protected confidences. Amongst other recommendations, the LIV has previously recommended against the proposal to place the onus on confiders and confidants to make an application in relation to protected confidences information.³ The LIV maintains its position that the onus should be placed on the party seeking to obtain and adduce sensitive information, rather than on the party seeking to object to the evidence. However, given the advanced stage of the Bill, the LIV will confine the scope of this letter to focus solely on the definition of 'protected confidence' in section 102BA.

Definition of 'protected confidence'

The LIV is concerned that the definition of 'protected confidence' as currently drafted in the proposed section 102BA of the Bill would not protect sensitive information such as:

- a record of a communication that was not made 'in the course of a relationship ... to provide a health service', such as when information about a person is given to a health or specialist domestic and family violence service by a third party who is not providing or receiving the service — for example, a family member or police officer; or
- a record of a communication that is not a 'communication made by one person to another person', such as a medical report created for clinical management purposes at a time when the person lacks the capacity or is practically unable to communicate.

Illustrative scenario

A person's medical records contain sensitive information that can cause significant, irretrievable trauma if disclosed. As recently stated by the Attorney-General, 'seeking to have sensitive information disclosed and adduced in family law proceedings is also a method that can be employed by perpetrators to exploit legal systems to continue their abuse of an ex-partner'.⁴ LIV members with significant expertise in health law matters report having experienced many situations in their practice where a perpetrator of family violence has successfully sought access to a victim survivor's entire medical history using current legal processes.

³ Letter from the Law Institute of Victoria to the Senate Legal and Constitutional Affairs Legislation Committee, 30 June 2023, 4.

⁴ Commonwealth, *Parliamentary Debates*, House of Representatives, 22 August 2024, 9 (Mark Dreyfus, Attorney-General).



By way of an illustration, a common scenario is where a victim survivor who has experienced family violence is admitted to hospital with diminished cognitive capacity. As part of usual clinical practice, the hospital collects information about the victim survivor from third parties, such as family members and police officers, and prepares a medical report about the victim survivor while the person is unable to communicate. In family court proceedings, a person can easily obtain a subpoena for another party's medical records.⁵ The records, however, might have little or no relevance to the family law proceedings. In this scenario, the proposed provisions in the Bill would not protect the victim survivor for the following reasons:

1. the information collected from the third parties is not a 'communication made by one person to another person in the course of a relationship in which one of the persons (the confidant) is acting in a professional capacity to provide a professional service ... to the other person (the protected confider)'. As such, it would not meet the requirement in section 102BA to be a 'protected confidence'; and
2. the medical report was made for clinical management purposes and is not 'a communication made by one person to another person', such that it would not meet the requirement in section 102BA to be a 'protected confidence'.

The LIV submits that all sensitive information in a person's medical or family violence records needs to be protected by the Bill if it is to be capable of achieving its intended purpose, and affording the degree of protection promised to victim-survivors — protection they should be entitled to expect. As a related concern, the LIV submits that if the definition of 'protected confidence' protects only some, but not all, sensitive information, the task of reviewing a person's entire medical records to determine whether each particular document meets the definition will be time-consuming and costly for courts.

Proposed amendments

To ensure that the Bill achieves its aim of preventing sensitive health and family violence information from being inappropriately accessed, the LIV submits that the definition of 'protected confidence' should be amended in a manner which would address its existing drafting flaws. For example, section 102BA could be amended as follows:

⁵ Australian Law Reform Commission, *Family Law for the Future: An Inquiry into the Family Law System* (Report, March 2019) 336 [10.149], 337 [10.153].



102BA Definition of protected confidence

A **protected confidence** is a communication made ~~by one person to another person~~:

- (a) in the course of ~~or in connection with~~ a relationship in which one ~~of the persons~~ (the **confidant**) is acting in a professional capacity to provide a professional service (see section 102BB) to ~~the~~ another person (the **protected confider**); and
- (b) in circumstances in which the confidant is under an obligation not to disclose communications made ~~to them by~~ in relation to the protected confider (whether the obligation is express or inferred from the nature of the relationship).

The proposed amendments outlined above would also better reflect the definition of 'protected confidence' outlined by the Australian Law Reform Commission:

a record of a sensitive therapeutic nature, such as a record generated when a person attends a medical, counselling or psychological service, and where the person providing the service ordinarily owes confidentiality to the person receiving the service.⁶

Ultimately, the LIV considers that the proposed minor, common sense amendments to section 102BA would extend the protective scope of Part 5 of Schedule 3 to the types of communications that it aims to protect, thereby addressing the current gaps in the Bill. The broadened definition would not only ensure that the protective aims of the Bill are met, but would also mitigate concerns of administratively burdening the courts.

Sincerely yours,

Donna Cooper
General Manager, Policy, Advocacy & Professional Standards

⁶ Australian Law Reform Commission, *Family Law for the Future: An Inquiry into the Family Law System* (Report, March 2019) 335 [10.146].