



Law Council
OF AUSTRALIA

Family Law Amendment (Information Sharing) Bill 2023

Senate Legal and Constitutional Affairs Legislation Committee

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About the Law Council of Australia

The Law Council of Australia represents the legal profession at the national level, speaks on behalf of its Constituent Bodies on federal, national and international issues, and promotes the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933, and represents its Constituent Bodies: 16 Australian State and Territory law societies and bar associations, and Law Firms Australia. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Law Society of the Australian Capital Territory
- New South Wales Bar Association
- Law Society of New South Wales
- Northern Territory Bar Association
- Law Society Northern Territory
- Bar Association of Queensland
- Queensland Law Society
- South Australian Bar Association
- Law Society of South Australia
- Tasmanian Bar
- Law Society of Tasmania
- The Victorian Bar Incorporated
- Law Institute of Victoria
- Western Australian Bar Association
- Law Society of Western Australia
- Law Firms Australia

Through this representation, the Law Council acts on behalf of more than 90,000 Australian lawyers.

The Law Council is governed by a Board of 23 Directors: one from each of the Constituent Bodies, and six elected Executive members. The Directors meet quarterly to set objectives, policy, and priorities for the Law Council. Between Directors' meetings, responsibility for the policies and governance of the Law Council is exercised by the Executive members, led by the President who normally serves a one-year term. The Board of Directors elects the Executive members.

The members of the Law Council Executive for 2023 are:

- Mr Luke Murphy, President
- Mr Greg McIntyre SC, President-elect
- Ms Juliana Warner, Treasurer
- Ms Elizabeth Carroll, Executive Member
- Ms Elizabeth Shearer, Executive Member
- Ms Tania Wolff, Executive Member

The Chief Executive Officer of the Law Council is Dr James Pople. The Secretariat serves the Law Council nationally and is based in Canberra.

The Law Council's website is www.lawcouncil.asn.au.

Acknowledgements

The Law Council thanks its Family Law Section for its guidance and input in the preparation of this submission, in addition to the following Constituent Bodies:

- Law Society Northern Territory
- The Law Institute of Victoria
- The Law Society of New South Wales
- The Law Society of South Australia

Introduction

1. The Law Council of Australia (**Law Council**) welcomes the opportunity to provide this submission to the Senate Legal and Constitutional Affairs Legislation Committee (**Committee**) to assist in its inquiry into the Family Law Amendment (Information Sharing) Bill 2023 (Cth) (**the Bill**).
2. The Bill, introduced on 29 March 2023, intends to give effect to key aspects of the *National Strategic Framework for Information Sharing between the Family Law and Family Violence and Child Protection Systems* (**National Framework**) by introducing new Subdivision DA into the *Family Law Act 1975* (Cth) (**the Act**). The Law Council acknowledges that the Bill was introduced with, and seeks to complement, the Family Law Amendment Bill 2023 (Cth), which is the subject of a separate, concurrent inquiry by the Committee.
3. To this end, the Law Council has consistently supported, in principle, the improved and uniform approach to information sharing between State and Territory policing, firearms and child protection bodies and the family law courts, comprising the Federal Circuit and Family Court of Australia (**FCFCOA**) and the Family Court of Western Australia (**FCWA**), together, the **family law courts**.¹ To this extent, the Law Council strongly supports the intent of the Bill to improve the process for information sharing between jurisdictions and enhance the capacity of the family law courts to properly assess the risk of family violence, abuse and neglect, and make decisions which prioritise safety.
4. The Law Council broadly supports the framework proposed in the Bill, as it provides an alternative to the current procedurally complex and time-consuming subpoena process in child-related proceedings, in addition to existing information sharing orders under section 69ZW of the Act (which the Bill seeks to repeal). The Law Council also understands that the court resources required to process subpoenas, together with the potential for interlocutory proceedings concerning the production, inspection and admissibility of subpoena material, can lead to increased costs and delays in family law proceedings.
5. In addition, the Law Council considers that court orders, such as those contemplated by the Bill, offer certain advantages compared to the current process of party-initiated subpoenas. For instance, they are more capable of addressing privacy-related concerns and associated risks, so long as they are of appropriate breadth. Relatedly, they allow for judicial oversight of the availability and extent of orders requiring the production of particulars, documents or information, which could be particularly appropriate in the family law context.
6. The Law Council notes, however, that key elements of the reform, as part of the National Framework, are to be prescribed in the *Family Law Regulations 1984* (Cth) (**the Regulations**). These include:
 - information sharing agencies to which the legislation applies (proposed section 67ZBC); and

¹ See Law Council of Australia, Information sharing between the family law and criminal justice and child protection systems (Submission, 27 November 2020) <<https://www.lawcouncil.asn.au/publicassets/2b77a2ad-4e34-eb11-9437-005056be13b5/3929%20-%20Family%20violence%20info%20sharing.pdf>>; Operationalising the National Strategic Framework for Information Sharing Between the Family Law and Family Violence and Child Protection Systems (Submission, 20 August 2021) <<https://www.lawcouncil.asn.au/publicassets/9f22bf1b-a70e-ec11-9440-005056be13b5/4072%20-%20Operationalising%20the%20National%20Strategic%20Framework%20for%20Information%20Sharing.pdf>>.

- information sharing agencies on the handling, storing, accessing and sharing of information (proposed section 67ZBI).
7. Consequently, while the Explanatory Memorandum provides some indication as to the likely contents of the accompanying regulations,² without concurrent access to the draft regulations in their entirety, it is not possible for the Law Council to:
- comprehensively assess the efficacy of Bill and the National Framework, upon implementation, more broadly;
 - determine precisely who the information sharing agencies will be; and
 - ascertain whether adequate guidance will be provided to the courts and State and Territory agencies to support the practical operation of the proposed information sharing scheme.
8. While the Law Council considers that the Bill be passed—subject to the queries and recommendations outlined in this submission—it wishes to emphasise to the Committee that visibility of the supporting regulations will be critical in assessing whether the proposed reforms are likely to achieve their intended purpose. The Law Council cautions against the Government seeking to make these regulations—noting they are expected to be disallowable under the *Legislation Act 2003* (Cth)—without appropriately consulting the Law Council and other key stakeholders as to their contents, to ensure they are appropriately aligned with the Bill and do not produce unintended consequences.
9. Finally, as a membership-based peak body, the Law Council has an obligation to consult with its Constituent Bodies, Sections and expert committees on matters of policy. While acknowledging that the reporting date of 14 June 2023 is outside of the Committee’s control, the resulting time constraints to provide submissions to the Committee have significantly limited the Law Council’s ability to engage with the Bill, its Explanatory Memorandum, and the views of its membership, in the course of preparing this submission. This has meant that the Law Council has not been in a position to consider, and address, every provision of the Bill in detail. Accordingly, to the extent this submission addresses specific provisions of the Bill, the Law Council’s views should be considered preliminary.
10. The Law Council makes the following recommendations:
- Consideration should be given to including State and Territory corrective services and education departments as ‘information sharing agencies’ in the Regulations.
 - The word ‘neglect’ should be defined in the Bill. Alternatively, given that the definition of ‘abuse’ in section 4 of the Act includes ‘serious neglect’, the word ‘neglect’ could be removed from the Bill.
 - Proposed subsections 67ZBD(4) and 67ZBE(4) should:
 - include additional examples; and/or
 - clarify that the list of examples is non-exhaustive and that the family law courts have discretion over what particulars, documents and information to request.
 - To support timely responses, proposed sections 67ZBD and 67ZBE should include a power for the court to set timeframes for compliance with an order.

² Explanatory Memorandum, Family Law Amendment (Information Sharing) Bill 2023, 10, 16.

- Additional examples or guidance should be provided in the Bill or the Explanatory Memorandum in relation to what constitutes the ‘public interest’ in subparagraph 67ZBF(3)(c)(iv).
- An agency that does not provide the court with particulars, information or a document should be required to simultaneously provide written reasons when informing the court under subsection 67ZBF(2).
- Consideration should be given to redrafting subsection 67ZBG(2) to make an agency’s advice to the court about any risks of disclosure mandatory, not discretionary.
- Consideration should be given to providing for further reviews of Subdivision DA, eg, after 24 months and five years.
- Processes must be introduced to provide parties with the opportunity to make submissions in relation to orders proposed to be made under sections 67ZBD and 67ZBE and admissibility under section 67ZBH.
- Procedural guidance must be developed at the national level to complement the Bill, if passed, to assist both judicial officers when seeking to issue an order and information sharing agencies upon receipt of an order.
- Consideration should be given to establishing accountability measures for agencies upon receipt of an order.

Analysis of proposed Subdivision DA of the Family Law Act

Meaning of ‘information sharing agency’ (67ZBC)

11. Proposed section 67ZBC provides that an ‘information sharing agency’ is an agency, or a part of an agency, or a part of a Commonwealth agency that provides services on behalf of a State or Territory, prescribed in the Regulations. The Explanatory Memorandum specifies that the types of organisations to be prescribed would include those that:³
 - have investigative power, or responsibility for the prevention of family violence, child abuse and neglect matters; or
 - hold information which is directly relevant to the assessment and mitigation of family violence, neglect or abuse risk for a child concerned in proceedings, or a party to proceedings.
12. The Explanatory Memorandum further provides that:

These organisations would include State and Territory child protection, policing and firearms authorities. For the avoidance of doubt, State and Territory courts will not be prescribed as information sharing agencies by the Regulations.

The scope of agencies, or parts of agencies, contemplated to be captured as information sharing agencies under new section 67ZBC is substantively similar to those agencies captured as prescribed agencies by current section 60CI(4).⁴

³ Ibid 16.

⁴ Ibid 16-17.

13. The agencies currently deemed ‘prescribed State or Territory agencies’, for the purposes of current subsection 60CI(4) of the Act, are listed in Schedule 9 of the Regulations.⁵ These agencies include the Australian Federal Police and State and Territory departments with responsibility for child welfare, such as the Queensland Department of Child Safety, Youth and Women, the New South Wales Department of Family and Community Services, the South Australian Department for Child Protection and the Tasmanian Department of Communities.
14. The Law Council considers that the effectiveness of the National Framework will depend on bodies being prescribed as ‘information sharing agencies’, to the extent that they hold information relevant to the assessment and mitigation of family violence, neglect or abuse risk for a child. This information may include criminal and corrections history, domestic violence records, records of other violent offences, parole orders and bail conditions, and material tendered at sentencing hearings. Other types of information could also be shared, including information from police about driving records, which would establish whether offences relating to driving under the influence of alcohol and/or drugs have been recorded, and material tendered at sentencing hearings, given that sentencing remarks alone may not provide all relevant detail and context.
15. In light of the above, the Law Council suggests that consideration be given to broadening the scope of agencies that are captured in the Bill under new section 67ZBC to include State and Territory agencies with responsibility for corrective services, to capture any gaps in criminal history, as such information can be highly relevant to the assessment of risk. Such information includes, but is not limited to, a person’s time—and any programs completed—in prison, discipline issues, parole and probation conditions (and breaches) and information from the parole board, including if parole was revoked. Moreover, information and documents concerning criminal and corrections history provide valuable insight into not only family violence and risk within the particular family unit, but also into perpetrator tactics—including systems abuse, denial and minimisation—and patterns of behaviour, rather than individual incidents of violence.
16. The Law Council also recommends that consideration be given to including State and Territory agencies with responsibility for education, subject to adequate resourcing and funding. State and Territory education departments are important sources of evidence directly relevant to the assessment of risk, particularly in relation to neglect, as the repositories of school attendance records and other documentation relating to the child’s welfare.
17. It does not appear from the Explanatory Memorandum that State and Territory health departments, or hospitals, are intended to be ‘information sharing agencies’ for the purpose of new section 67ZBC, given that they are not presently listed within Schedule 9 of the Regulations.

⁵ *Family Law Regulations 1984* (Cth) reg 12CD, sch 9.

18. If this inference is correct, the Law Council agrees with this approach on balance, given it has received concerns from its Constituent Bodies relating to a person's sensitive therapeutic records (ie, medical or counselling records) being placed into evidence without the proper opportunity for that person to object, or make submissions, as to what, if any, parts of the record are relevant to the proceeding. Nonetheless, any provisions which contemplate the disclosure of a person's sensitive medical information must be carefully considered to ensure parties are not able to 'weaponise' that information within the context of family law proceedings and individuals are not discouraged from seeking necessary medical support.

Recommendation

- **Consideration should be given to including State and Territory corrective services and education departments as 'information sharing agencies' in the Regulations.**

Orders (67ZBD and 67ZBE)

19. Proposed section 67ZBD introduces an order requiring the provision of particulars of documents or information held by prescribed information sharing agencies, which relate to family violence, child abuse or neglect risk in child-related proceedings. The Explanatory Memorandum provides that particulars may include a 'summary, short description or outline',⁶ but clarifies that 'the way in which an information sharing agency provides this information is open to their discretion'.⁷
20. Proposed section 67ZBE introduces an order requiring the production of documents or information held by prescribed information sharing agencies, which relate to family violence, child abuse or neglect risk in child-related proceedings. This section is constructed similarly to proposed section 67ZBD, except that it relates to the production and provision of the documents or information themselves, rather than particulars.⁸
21. The Law Council supports, in principle, the introduction of these two categories of orders. It especially sees benefit in the availability of an order for particulars under section 67ZBD, as the production of particulars may enable the family law courts to make expedited decisions, or decisions ensuring greater protection for victim-survivors and vulnerable parties at the early stages of a matter. It would also be a useful means of narrowing the scope of information and documents that an agency may produce and will better enable targeted information and documents to be sought by the family law courts and provided by agencies.
22. Nonetheless, the Law Council has several concerns regarding sections 67ZBD and 67ZBE, as outlined below.

Neglect

23. The word 'neglect' appears in subsections 67ZBD(2) and 67ZBE(2) as a matter where the court may make an order relating to it, but this word is not defined in the Act, nor does the Bill propose to introduce a definition. In this regard, the Explanatory Memorandum states:

⁶ Explanatory Memorandum, Family Law Amendment (Information Sharing) Bill 2023, 17.

⁷ Ibid.

⁸ Ibid 20.

*'Neglect' is not defined in the Act. However, this Bill adopts the position of the explanatory memorandum to the Family Law Amendment (Shared Parental Responsibility) Act 2006, which inserted the term. Consistent with this, the term 'neglect' within the Act should be applied by reference to its meaning or understanding in accordance with State and Territory child protection legislation. Further, it is intended to be limited to situations where a lack of reasonable care is likely to cause unnecessary suffering or injury to the health of the child.*⁹

24. The Law Council acknowledges the approach outlined in the Explanatory Memorandum and also appreciates that there may be some practical benefit in leaving the term open in the legislation, in accordance with its ordinary meaning, so as to not restrict the types of conduct that are captured within that definition, particularly as society's understanding evolves in relation to what constitutes 'neglect'.
25. However, given that 'neglect' is a broad and potentially subjective term, the Law Council considers it would be preferable for the Bill to specify the nature or degree of neglect contemplated as the basis for orders under proposed sections 67ZBD and 67ZBE. Providing a definition in the legislation would likely assist the family law courts when issuing the orders, as well as the agencies, upon receipt of that order.
26. The Law Council's Family Law Section and Constituent Bodies have raised concerns that, in the absence of a clear definition of 'neglect' in the Bill, it would be a matter for the State or Territory agency to interpret that term. This may lead to inconsistency and uncertainty in its application, particularly given that State and Territory agencies may have different matrixes for determining if neglect is occurring (or could occur).¹⁰
27. A consistent definition of neglect may also be useful as a means of guiding self-represented litigants, solicitors, advocates and judicial officers. In this respect, the Law Council considers that section 24 of the *Children's Guardian Act 2019* (NSW) may be a helpful template for the inclusion of a definition of 'neglect' under section 4 of the Act.
28. If the Government is not minded to define the term 'neglect' in the Bill, an alternative option may be to rely on the definition of 'abuse, in relation to a child' in section 4 of the Act, which includes 'serious neglect', and remove all references to 'neglect' in the Bill, to ensure consistency is maintained across jurisdictions and agencies.

Recommendations

- **The word 'neglect' should be defined in the Bill.**
- **Alternatively, given that the definition of 'abuse' in section 4 of the Act includes 'serious neglect', the word 'neglect' could be removed from the Bill.**

⁹ Ibid 16.

¹⁰ See, eg., National Council on Crime and Delinquency, Queensland Child Protection Guide 2.1 (March 2019) <<https://www.cyjma.qld.gov.au/resources/dcsyw/about-us/partners/government/child-protection-procedures-manual.pdf>>.

Suspicion

29. Paragraphs 67ZBD(2)(a) and 67ZBE(2)(a) refers to 'abuse, neglect or family violence ... to which the court suspects the child has been subjected or exposed'. This drafting appears to require the court to have made an assessment of risk, which is then communicated to the information sharing agency through the issuing of an order.
30. This apparent requirement is problematic as, in practice, the family law courts will generally not be in a position to 'suspect' a matter prior to receiving the information which would be the subject of an order under the Bill. It is more likely that a party to the proceedings will have made a complaint, or raised an allegation, of family violence, child abuse or neglect. The Law Council considers that it is not appropriate for a court to provide a positive indication of suspicions it purportedly holds to a third-party agency, prior to the determination of the matter.

'To the extent that it may affect a child to whom the proceedings relate'

31. In its current form, the Bill enables the family law courts to make orders requiring an agency to produce material relating to matters including (emphasis added):
 - 'family violence to which a party to the proceedings has been exposed, or in which a party to the proceedings has engaged, *to the extent it may affect a child to whom the proceedings relate*' (paragraphs 67ZBD(2)(b) and 67ZBE(2)(b)); and
 - 'any risk or potential risk of a party to the proceedings being subjected to, or engaging in, family violence, *to the extent any such family violence may affect a child to whom the proceedings relate*' (paragraphs 67ZBD(2)(d) and 67ZBE(2)(d)).
32. The Law Council appreciates that the above provisions seek to reflect the overarching consideration of the best interests of children in family law proceedings, and that proposed Subdivision DA specifically concerns child-related proceedings. However, the Law Council seeks clarification as to who in the agency is authorised to decide the extent to which material that relates to family violence may affect a child..
33. Further, although the family law courts and legal practitioners are likely to be familiar with making nuanced assessments about what matters concerning family violence may affect a child 'to whom the proceedings relate', agencies may be less so, particularly as they may lack visibility over the full circumstances of the matter.
34. It may therefore be difficult for the family law courts to formulate orders to which agencies can respond in a meaningful and consistent way, even with the benefit of further guidance provided through the Regulations or other supporting materials. In this regard, the Law Council suggests monitoring the operation of these provisions. It welcomes the fact that proposed section 67ZBI provides for a review of the operation of Subdivision DA to be arranged within 12 months of its commencement.

Examples

35. Subsections 67ZBD(4) and 67ZBE(4) provide examples of the types of documents and information that may be included in order, specifically:
 - notifications to the agency of suspected abuse of a child to whom the proceedings relate; and
 - notifications to the agency of suspected abuse, by a party to the proceedings, of any other kind.

36. The Law Council appreciates that these examples seek to provide an indication to information sharing agencies of the types of orders the family law courts could be expected to make and the types of particulars, documents or information which are required to be provided.¹¹
37. However, the Bill only provides the above two examples in each case, which may be of limited use to agencies. There is also a risk that providing examples in the legislation, rather than in the Regulations or other guidance materials, may be construed as implying a limited discretion to make information sharing orders.

Recommendation

- **Proposed subsections 67ZBD(4) and 67ZBE(4) should:**
 - **include additional examples; and/or**
 - **clarify that the list of examples is non-exhaustive and that the family law courts have discretion over what particulars, documents and information to request.**

Producing particulars or documents on an agency's own initiative

38. Paragraph 67ZBD(5)(a) provides for an agency to produce, on its own initiative, documents, in which the particulars were sought by an order under section 67ZBD.
39. The Law Council has received feedback that the ability for an agency to produce documents pursuant to paragraph 67ZBD(5)(a) appears to effectively negate the distinction between the processes contemplated by sections 67ZBD and 67ZBE, respectively.
40. The production of documents on an agency's own initiative under paragraph 67ZBD(5)(a) may force the court or parties to deal with such documents—or the information disclosed—in circumstances where this may otherwise not have occurred until later in proceedings, giving rise to concerns regarding case management and procedural fairness.
41. In addition, under subsection 67ZBD(6), if an agency has produced documents or gives information or particulars on its own initiative, the agency is required to give consideration to:
 - the redaction of the document, if the document contains protected material; or
 - not providing the information or particulars to the extent that the information is, or the particulars would reveal, protected material.

Similarly, subsections 67ZBE(5) and (6) impose obligations to redact, or not provide, documents or information which may reveal protected material under a section 67ZBE order.

42. Notwithstanding the provisions of proposed section 67ZBF relating to the disclosure of protected material, the Law Council seeks clarification as to whether the same considerations apply to documents produced at the request of the court pursuant to subsections 67ZBD(1) and 67ZBE(1).

¹¹ Explanatory Memorandum, Family Law Amendment (Information Sharing) Bill 2023, 19.

43. As drafted, these provisions appear to create an unnecessary distinction regarding the provision of protected material depending on whether documents have been requested by the court or provided on an agency's own initiative.

Timeliness

44. The Law Council recognises that the effectiveness of information sharing arrangements will depend on information sharing agencies responding to court-initiated orders in a timely manner. The Explanatory Memorandum to the Bill similarly acknowledges the importance of timeliness by referring to the need for 'timely access to information',¹² 'timely production of particular, documents and information'¹³ and 'timely and effective sharing of ... information'.¹⁴
45. The Law Council is aware of concerns within the profession regarding the delays in obtaining material under current section 69ZW of the Act. In some instances, receipt of section 69ZW documents has taken between four and six months to be provided. The Bill does not appear to enable the court to set timeframes for compliance with an order under new sections 67ZBD or 67ZBE. This shortcoming will impede the effectiveness of the proposed information sharing regime, given it is predicated on the timely sharing of information for the family law courts to identify and respond to risk.
46. The Law Council recommends that a power for the court to set timeframes for compliance with an order be included in proposed sections 67ZBD and 67ZBE, subject to appropriate resourcing and accountability measures to promote and support agencies' compliance.

Recommendation

- **To support timely responses, proposed sections 67ZBD and 67ZBE should include a power for the court to set timeframes for compliance with an order.**

Disclosure of protected material (69ZBF)

47. Proposed section 67ZBF provides that in response to an order made under new sections 67ZBD or 67ZBE, an agency is not required—but is nonetheless permitted—to give the court information that would reveal or contain 'protected material', as defined in subsection 67ZBF(3) to include:
- information that is the subject of legal professional privilege;
 - information that discloses, or would enable a person to ascertain, the identity of a person who communicated information to the agency in confidence; or
 - information where its disclosure would:
 - endanger a person's life or present an unreasonable risk of harm to a person;
 - prejudice legal proceedings (including proceedings in a tribunal and a coronial inquiry, investigation and inquest);
 - contravene a court order or law that would restrict the publication of other disclosure of information in connection with legal proceedings; or

¹² Ibid 2.

¹³ Ibid 11.

¹⁴ Ibid 27.

- be contrary to the public interest.

48. The Law Council appreciates that these exclusions seek to strike a balance between the protection of sensitive and confidential information with the identification, assessment and management of risk.¹⁵ Nonetheless, it has several concerns with these exclusions and the discretion to apply them, and seeks further clarification of the process following an objection by an agency. This includes:
- whether, and at what stage, this objection will be conveyed to the parties; and
 - whether the parties or the court will be entitled to dispute the agency's assessment and, if so, how.

Discretion to apply an exclusion

49. It appears from the Bill that the agency has discretion to not comply with an order if it considers that an exclusion applies. Specifically, the agency is not required to comply if it considers that protected material will be disclosed, as set out in new subsection 67ZBF(3), although, under subsection 67ZBF(2), it must inform the court of the same, including which type of protected material, in its opinion, applies to the particulars, document or information sought.

50. According to the Explanatory Memorandum, the intention of these provisions is to:

*ensure the court is aware of the existence of further material, which in the opinion of the information sharing agency is protected material. The court can then engage with the information sharing agency directly about whether this information is critical for the purposes of decision-making, and if so, what additional protections, safeguards and practices can be applied to support its safe provision to the court.*¹⁶

51. While no further detail has been provided regarding the process of engagement between the court and agencies mentioned above, it is likely to be both time and resource intensive and may give rise to an inefficient 'back-and-forth' dialogue between the court and agency. In addition, if the determination of a dispute regarding the agency's assessment would necessitate a hearing, the Law Council is concerned that could mirror the current subpoena process. This would likely result in an equivalent drain on court resources, increasing the potential for delays and costs for parties, against the stated objective of the Bill.

52. The Law Council also considers that section 67ZBF, as currently drafted, may cause difficulties for agencies when determining whether there are grounds for exception:

- **New paragraph 67ZBF(3)(a):** Determining the question of whether the information is the subject of legal professional privilege would generally require specialist legal expertise, which may not be readily available.
- **New subparagraph 67ZBF(3)(c)(i):** It may be difficult for an agency to assess whether the disclosure of material would endanger a person's life or present an unreasonable risk of harm if that agency has limited knowledge of the surrounding factual circumstances and nuances of the particular case.

¹⁵ Ibid 20.

¹⁶ Ibid 23.

- **New subparagraphs 67ZBF(3)(c)(ii) and (iii):** Without access to specialist legal expertise or guidance, in addition to an understanding of the context of the matter, an agency may not have the capability to ascertain whether the disclosure of any relevant information would prejudice legal proceedings or contravene a court order or law that would restrict its publication or disclosure.
 - **New subparagraph 67ZBF(3)(c)(iv):** ‘Contrary to the public interest’ is a broad, ambiguous term and the non-exhaustive list of narrow examples in the Explanatory Memorandum (‘where disclosure would prejudice an active police investigation, or reveal confidential police methodology’)¹⁷ does not provide much clarity, particularly in connection with how the various relevant interests are to be balanced, and by whom.
53. In light of the above ambiguities, it is foreseeable that agencies may apply the proposed exceptions incorrectly or inappropriately. Clear guidance and advice for agencies on how to apply the proposed exclusions when considering orders will be critically important to the success of the scheme.
54. For example, in relation to the ‘public interest’ exclusion, the Bill, Regulations, Explanatory Memorandum or other guidance materials should provide advice as to how to balance the public interest in reducing the risk of family violence, child abuse and neglect with the competing interest in preserving confidential, sensitive information, and who is to undertake this balancing exercise. The Law Council also queries what information is to be shared when an objection is taken to sharing the information, and what the anticipated processes will be, if any, for that information to then be shared with the parties.
55. In the absence of such guidance, engagement by agencies in relation to orders made under new sections 67ZBD and 67ZBE may be unhelpful to progressing the family law proceedings and may exacerbate risks to the parties or their families.
56. If an agency appears to be unduly or erroneously relying on exclusions, it is unclear how this would be challenged or adequately scrutinised. Consideration should be given to requiring agencies to provide written reasons to justify why the information in question should not be disclosed. This should be done at the time that the agency informs the court it possesses potentially relevant protected material under subsection 67ZBF(2).
57. Requiring an agency to provide written justification in the first instance will likely enhance the effectiveness and timeliness of the court’s subsequent engagement with that agency. Again, however, it will be important for the agency to be able to rely upon adequate guidance in this respect.

¹⁷ Ibid 23.

Recommendations

- **Additional examples or guidance should be provided in the Bill or the Explanatory Memorandum in relation to what constitutes the ‘public interest’ in subparagraph 67ZBF(3)(c)(iv).**
- **An agency that does not provide the court with particulars, information or a document should be required to simultaneously provide written reasons when informing the court under subsection 67ZBF(2).**

Advice to court about risk of disclosure (67ZBG)

58. The Law Council welcomes the inclusion in the Bill of section 67ZBG which allows agencies to advise the court, when disclosing particulars, documents or information, about any risks that the agency contends that the court should consider, including any risk to:
- a party to the proceedings;
 - a child to whom the proceedings relate;
 - a person who communicated information to the agency in confidence; or
 - any other person.
59. The Law Council is of the view that this provision is likely to minimise the risk of retaliation by parties and provide further protection against the misuse of sensitive information obtained in family law matters. However, the process of safely sharing that information with parties, especially a vulnerable party, will need to be made clear.
60. In light of this, consideration could be given to redrafting subsection 67ZBG(2) in order to impose an obligation—instead of a discretion—on the agency to inform the court of its contentions in relation to relevant risks of disclosure.

Recommendation

- **Consideration should be given to redrafting subsection 67ZBG(2) to make an agency’s advice to the court about any risks of disclosure mandatory, not discretionary.**

Admission into evidence (67ZBH)

61. The Law Council considers that the obligation under proposed section 67ZBH for the court to ‘admit into evidence any particulars, documents or information provided under an order’ may be problematic, recognising that the probative value of admitting the evidence may not outweigh the risk to the child or party and the need to ensure procedural fairness. In addition, an opportunity to be heard on the admission of the evidence must be given to parties before this occurs. These considerations are set out further in the ‘general comments’ section below.
62. In addition, the Law Council seeks clarification regarding the point in the proceedings—and the process by which—the consent of the notifier would be obtained, pursuant to paragraph 67ZBH(3)(a). Further, in relation to paragraph 67ZBH(3)(b), a person may be a ‘party’ to a proceeding at one point in time, but not at another. This may, or may not, coincide with the making of the orders in the Bill, and the drafting of section 67ZBH should have regard to this reality.

Information sharing safeguards (67ZBI)

63. As is the case for any information sharing legislation, it is important that the Bill appropriately balances information sharing imperatives and privacy concerns, and that it mitigates any risk to individuals that may flow from the sharing of potentially sensitive information. In this respect, the Law Council agrees with the contention in the Explanatory Memorandum that:

*information concerning family violence and child abuse risk is inherently sensitive and can pose a safety risk to parties when mismanaged or inappropriately shared.*¹⁸

64. Proposed subsection 67ZBI(1) provides that an information sharing agency must, when providing particulars, documents or information under an order made under sections 67ZBD or 67ZBE, have regard to the matters prescribed by the Regulations. Similarly, proposed subsection 67ZBI(2) provides that the court must have regard to the information sharing safeguards when using particulars, documents or information provided by an information sharing agency under such orders. Subsection 67ZBI(3) clarifies that 'use' includes handle, store and access.
65. The Explanatory Memorandum provides a list of the expected types of information sharing safeguards to be prescribed through the Regulations.¹⁹ Based on the information provided, the Law Council considers these safeguards would be generally sufficient to ensure information and documents are being shared, collected, used, disclosed and stored in an appropriate manner, which is extremely important. However, the Law Council reiterates that without visibility of the Regulations as proposed, it is not possible to form an informed view as to the effectiveness of these information sharing safeguards.
66. Moreover, the effectiveness of the information sharing safeguards will depend on agencies having the necessary resourcing, expertise, training and guidance material, preferably at a national level, to position them to assess orders and respond appropriately and in a timely fashion.
67. This will be particularly important, given that proposed sections 67ZBD, 67ZBE and 67ZBF confer an absolute discretion on agencies, subject to matters prescribed in the Regulations, to determine what material is relevant, and whether they will provide the material at all, regardless of whether it falls within the definition of 'protected material'.

Subpoenas (67ZBK)

68. Proposed section 67ZBK provides where an order for documents or information under new section 67ZBE has been made, permission of the court must be obtained to issue a subpoena to that same information sharing agency. The Law Council notes that this requirement is in line with existing restrictions on subpoenas in the FCFCOA Rules.²⁰
69. However, it is unclear from the Bill if a party may apply for, or request the issuance of, a subpoena if such an order has been made under section 67ZBE, but the agency has objected to the production of the documents because an exception under subsection 67ZBF(3) applies. Clarification is sought on this point.

¹⁸ Explanatory Memorandum, Family Law Amendment (Information Sharing) Bill 2023, 25.

¹⁹ Ibid 25.

²⁰ *Federal Circuit and Family Court of Australia Rules 2021* (Cth) r 6.27.

70. The Law Council is also concerned that section 67ZBK as drafted suggests the issuing of subpoenas will be used as a 'safety net'. This is contrary to the stated objective of the Bill, as it would incur further costs for parties and cause delay, despite the same information having been previously sought by the court.
71. In addition, a self-represented litigant's capacity to prepare and file subpoenas that enable the production of relevant documents is likely to be limited due to lack of familiarity with legal process, language, cultural, economic and/or social barriers. It is therefore imperative that information and documents provided in response to an order under section 67ZBE are as comprehensive and relevant as possible.

Statutory review (67ZBL)

72. Proposed section 67ZBL provides that a review of the operation of Subdivision DA be arranged within 12 months of its commencement. The Law Council welcomes this measure, should the Bill be passed, to ensure that the information sharing scheme is operating as intended, while appropriately safeguarding sensitive information.
73. The Law Council suggests that further reviews, perhaps after 24 months and five years, would be beneficial in assessing whether the objectives of the National Framework are being achieved.

Recommendation

- **Consideration should be given to providing for further reviews of Subdivision DA, eg, after 24 months and five years.**

General comments

Independent Children's Lawyers

74. Integral to the support of the family law courts in the information sharing and evidence-gathering process in parenting proceedings is the proactive role of the Independent Children's Lawyer (ICL).
75. The Family Law Amendment Bill 2023 (Cth) proposes to mandate that an ICL meet with a child over five years of age unless exceptional circumstances exist. Despite this mandatory proposal,²¹ grants to legal assistance providers for the funding of ICL appointments remain limited and practitioners acting as ICLs are not appropriately remunerated for their expertise, time and travel. This is a significant disincentive to undertake ICL work.²²
76. Given the importance of ICLs in providing support throughout the information sharing process in parenting proceedings, the Law Council strongly recommends significantly more funding and resources be provided to ensure experienced practitioners undertake ICL work.

²¹ Family Law Amendment Bill 2023 (Cth) sch 4, pt 1, cl 2.

²² Law Council of Australia, Exposure Draft – Family Law Amendment Bill 2023 (Submission, 16 March 2023) <<https://lawcouncil.asn.au/publicassets/3a066bba-a9c3-ed11-947a-005056be13b5/2023%2003%2016%20-%20S%20-%20Family%20Law%20Amendment%20Bill%202023.pdf>> 27-28.

Procedural fairness and the proper administration of justice

77. The Law Council appreciates the need for an appropriate framework to address child protection and family violence matters. It is however also of the utmost importance that any legislative framework supports the fundamental rights of parties engaged in court proceedings and allows for procedural fairness as an aspect of the proper administration of justice.
78. In accordance with these principles, the Law Council submits each party to the proceedings should have the opportunity to object to: an order under proposed sections 67ZBD and 67ZBE; the admission of evidence under section 67ZBH at various points during the matter (ie, before an order is made and before information is admitted into evidence), and to the terms of the order (ie, to whom the documents are released).
79. It is difficult to assess the extent to which the proposed framework addresses considerations of procedural fairness, given that the detail on certain aspects of the process (eg, the process to be followed when an agency seeks to rely on an exclusion) is not available. In this context, the Law Council reiterates the need for further clarity in respect of the procedural aspects of the Bill and the supporting regulations.
80. The proper administration of justice requires a person to be heard on which parts of their sensitive information should (or should not) be made available to the parties in a proceeding and entered into evidence. Otherwise, the family law courts would be placed in the improper position of determining what information is relevant to a proceeding without input from parties who might object before the information is admitted. Relatedly, the possibility of the unfettered production of a person's medical record into evidence (assuming an information sharing agency under the Regulations would have access to such information) may discourage individuals from seeking necessary medical treatment where they are a party to a family law proceeding.
81. The Law Council suggests consideration be given to introducing processes within the proposed information sharing framework to afford parties the opportunity to object to the disclosure of information. An opportunity to make submissions in relation to orders and admissibility will ensure parties are enabled to address the scope of the order for documents, and which information should be shared. The Law Council is of the strong view that providing this opportunity is a necessary fundamental principle that must be given priority over the potential for further delay and increased costs associated with doing so.
82. Sections 67ZBD and 67ZBE together provide that information sharing agencies may be ordered to inform the court about, and provide any documents or information 'relating' to, the assessment of risk or potential risk of abuse, neglect or family violence. The breadth of the term 'relating' creates a risk that sensitive information, including medical records, may be captured, even where they hold no significant probative value as evidence. While the agencies ultimately captured within the Regulations would need to hold such information for this risk to emerge in practice, this nonetheless highlights the need to test and ensure the probative value of documents or information, particularly sensitive information, provided to the court.

83. Processes allowing parties the opportunity to object to the disclosure of information and to make submissions with respect to relevance or probative value would go some way to addressing the concerns raised above. However, challenges may still arise. For example, a vulnerable person may not be aware that they can object, may not have the resources to obtain legal representation, and may not have the emotional or psychological capacity to navigate the objection process. In this respect, the Law Institute of Victoria suggests that consideration should be given to establishing specific protections for medical records to ensure that this type of sensitive information is only admissible in appropriate circumstances.
84. The Law Council notes that Rule 6.36 of the Federal Circuit and Family Court of Australia (Family Law) Rules 2021 (**FCFCOA Rules**) stipulates that a person must only use a document produced in compliance with a subpoena for production for the purpose of the proceeding and must not otherwise disclose the contents of the document, or provide a copy to any other person, without consent. In the present context, the Law Council submits that the Regulations, or other guidance material, should require the court to consider further protections which would ensure that a party is not able to take advantage of sensitive information about another party to a proceeding in their general dealings with them. This is particularly important until the admissibility or relevance of the information is successfully proven, or where a party to a proceeding may be self-represented.
85. The Law Council also notes that any proposed information sharing framework must also consider its impact on established common law principles, such as the *Harman*²³ undertaking.

Recommendation

- **Processes must be introduced to provide parties with the opportunity to make submissions in relation to orders proposed to be made under sections 67ZBD and 67ZBE and admissibility under section 67ZBH.**

Guidance, resourcing and compliance

86. The efficacy of the proposed information-sharing arrangements will depend on the actual information and documents provided by information sharing agencies. They must be sufficient to enable an adequate assessment of risk by the family law courts, which the Law Council acknowledges must be balanced against the safeguards and exemptions under proposed sections 67ZBH and 67ZBI.
87. However, the Bill prescribes a complex process which may be challenging for agencies who receive an order. An agency's ability to engage with an order will involve:
- identifying relevant documents or information;
 - identifying whether any redactions and/or exclusions ought to be applied;
 - determining the appropriate response to the order; and
 - where relevant, drafting relevant and meaningful particulars.

²³ *Harman v Secretary of State for the Home Department* [1983] 1 AC 280.

88. This will require clear and concise orders by judicial officers to reduce the onus on information sharing agencies to determine the nature and scope of information and documents to be shared, not shared or redacted. To ensure consistency and certainty, clear guidelines and/or protocols should be developed between the information sharing agencies and the family law courts.
89. It will also be necessary to ensure that material produced is sufficiently free of acronyms and jargon to be meaningful to the court and the parties (where appropriate). This would have significant resourcing implications for agencies. There will also be resourcing and training implications in positioning the family law courts to process the material produced, in accordance with section 67ZBH.
90. The Law Council has received feedback that members of the legal profession have previously encountered issues with agencies extensively redacting documents, or interpreting orders differently to the court's intention (against the background of state legislation). This limits the scope of documents and information provided and renders the documents entirely unhelpful to the court in making findings as to risk to a child. This has been known to occur, even where the court has made very clear orders for specific documents and information.
91. Subsections 67ZBD(7) and 67ZBE(7) provide that State and Territory laws are not to apply, which may address the potential issue of information sharing agencies narrowly interpreting orders and providing information based on legislation in their respective jurisdiction. Nonetheless, there needs to be cooperation between state and territory agencies and the family law courts and a clear set of guidelines as to the nature and extent of information and documents to be provided.
92. As emphasised earlier in this submission, without an appreciation of the National Framework in its entirety, including the supporting Regulations, it is not possible for the Law Council to comment on whether agencies will have adequate guidance or resourcing to respond appropriately to orders under proposed sections 67ZBD and 67ZBE. The Law Council considers that unless guidance is developed at a national level, the onus will be on State and Territory governments, or on individual agencies, to develop, implement and maintain their own guidance. This will result in inconsistent approaches across agencies and jurisdictions. The Law Council therefore strongly recommends that to ensure uniformity of approach the necessary guidance be developed at the national level.
93. Finally, the Bill appears to provide little accountability for agencies once they receive an order. For instance, there are no clear consequences if an agency fails to comply with an order or fails to comply adequately and diligently (noting there are circumstances where an agency is not required to comply, as outlined above). In this respect, the orders under new sections 67ZBD or 67ZBE appear to be less effective than a subpoena, which will usually compel production. Consideration should therefore be given to introduce accountability measures for agencies upon receipt of an order.

Recommendations

- **Procedural guidance must be developed at the national level to complement the Bill, if passed, to assist both judicial officers when seeking to issue an order and information sharing agencies upon receipt of an order.**
- **Consideration should be given to establishing accountability measures for agencies upon receipt of an order.**