Law Council
OF AUSTRALIA

Operationalising the National Strategic Framework for Information Sharing Between the Family Law and Family Violence and Child Protection Systems

Attorney-General's Department

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote 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 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

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

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

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 the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

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- Ms Caroline Counsel, Executive Member

The Chief Executive Officer of the Law Council is Mr Michael Tidball. The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council of Australia acknowledges that this submission has been primarily prepared by its Family Law Section.

The Family Law Section is the largest of the Law Council's specialist Sections. Since its inception in 1985, the Family Law Section has developed a strong reputation as a source for innovative, constructive and informed advice in all areas of family law reform and policy development. With a national membership of more than 2,400 it is committed to furthering the interests and objectives of family law for the benefit of the community.

The current members of the Family Law Section Executive are:

- Di Simpson (Chair)
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- Greg Howe
- Michael Kearney SC
- Trevor McKenna
- Aditi Srinivas
- Sydney Williams QC

Law Council Constituent Bodies

The Law Council is grateful to the following Constituent Bodies for their assistance with the preparation of this submission:

- Queensland Law Society;
- Law Society of New South Wales;
- Law Institute of Victoria;
- Law Society of Western Australia;
- South Australian Bar Association; and
- Law Society of the Australian Capital Territory.

Introduction

1. The Law Council of Australia (**Law Council**) appreciates the opportunity to make a submission to the Attorney-General's Department's (**AGD**) Consultation Paper, *Operationalising the National Strategic Framework for Information Sharing Between the Family Law and Family Violence and Child Protection Systems* (**Consultation Paper**).

2. In principle, the Law Council supports processes that facilitate the awareness within the Federal Circuit Court and Family Court of Australia (**the Family Courts**) (including in their new merged form as at 1 September 2021) of family violence risk, for the purposes of protecting vulnerable parties through case management and determining the substantive legal issues. Currently, courts may be required to make decisions, particularly on an interim basis, without access to all the information necessary to make safe and fully informed decisions. The prompt and comprehensive exchange of information between relevant courts and authorities under the proposed National Strategic Framework for Information Sharing between the Family Law and Family Violence and Child Protection Systems (**National Framework**) is likely to contribute to better outcomes for vulnerable parties and children.

3. The Law Council agrees with the assessment in the Consultation Paper that the use of subpoenas to inform the courts about family violence can be cumbersome. This is particularly true for self-represented litigants. Subpoenas also do not necessarily produce documents that are relevant and appropriate. However, it is noted that processes should not exclude or unduly limit the capacity of a litigant to issue a subpoena, particularly in the context of a matter proceeding to trial.

4. While the implementation of the National Framework may help to address the issues identified in the Consultation Paper, the benefits of reform must be balanced with the risk of exposing parties to further violence if private or sensitive information is inadvertently brought to light or made available to the parties as a result of the reforms. In this regard, the National Framework must adequately balance privacy concerns and protect sensitive information. The Law Council also highlights the necessity for appropriate resourcing and training of the relevant courts and agencies if the reforms are to succeed.

5. It is unclear how the existing Notice of Risk document (whatever final form it will take when new forms are released upon the commencement of the Federal Circuit Court and Family Court of Australia) will fit with the processes contemplated in the Consultation Paper. As is addressed further below, in the Federal Circuit Court of Australia, the Notice of Risk document is currently provided to relevant welfare agencies and if they hold records, that information is provided to the court (and then to the parties) in short form/summary report. That process is often then the foundation for the making of an order under section 69ZW of the *Family Law Act 1975* (Cth) (**the FLA**) by the court.

6. The Law Council looks forward to providing further feedback to the AGD when a detailed proposal and/or draft legislation is available.

Information sharing from state and territory bodies to the family law courts

7. The Law Council supports the recommendation by the Australian Law Reform Commission (**ALRC**) in 2019 that the Australian Government work with the state and territory governments to develop and implement a national information sharing

framework to guide the sharing of information about the safety and wellbeing of families and children between family law, family violence and child protection systems.[1] Accordingly, the Law Council agrees in principle with the proposal that the National Framework include information sharing from state and territory bodies to the Family Courts.

8. The Law Council considers that the agencies in the first tranche proposed in the Consultation Paper, including police, child protection and state and territory courts,[2] are likely to hold information most relevant to family law proceedings. With respect to the inclusion of additional agencies in the National Framework, the Law Council notes that the resourcing implications for non-government organisations (**NGOs**) are likely to be significant. At present, NGOs may receive resourcing when information is sought via subpoena. Without additional resources under the proposed framework, their capacity to provide timely information to the court is likely to be limited. The Law Council therefore supports consultation with applicable NGOs in considering whether these agencies should be included under the National Framework.

9. In addition to funding, clear guidelines will need to be developed in respect of costs should NGOs be included in the Framework. The mode of information sharing should also be carefully considered, to ensure it is practicable to facilitate the timely sharing of information and materials.

10. It is noted that the current system in Western Australia (**WA**) offers evidence of the benefits of the proposals set out in the Consultation Paper. In WA, similar protocols to those proposed in the Consultation Paper already exist between the Department of Communities, the WA Police and the state-run Family Court of Western Australia (**FCWA**) such that the FCWA has before it relevant information about children and their families at an earlier stage than do the Family Courts in other jurisdictions. This means that victim-survivors are not required to repeat their stories and/or wait for subpoenas to issue.

Information to be shared

11. There are clear benefits to the National Framework from the perspective of ensuring the child's best interests in family law proceedings. While decision making at an interim stage is by necessity an abridged process, the court will be in a better position to discharge its responsibility to children and to victims of family violence if more relevant information is available at an early juncture in the proceedings.

12. For parties who deny they have engaged in family violence or other concerning conduct (including conduct which has otherwise placed children at risk) having relevant information from third party agencies available at the time the court considers the contested applications enhances procedural fairness.

Types of information

13. The Law Council agrees with the proposed power to expand the scope of section 69ZW of the FLA from its current child protection focus to capture relevant family safety information held by other state and territory entitles involved in the family violence system. This will ensure the court has more comprehensive information early and at less expense to parties. It will also assist self-represented parties who may

[1] See, ALRC, *Family Law for the Future – An Inquiry into the Family Law System* (Final Report, April 2019 report) Rec. 2.
[2] See, 3.

have difficulty navigating the various systems and who are least likely to request the relevant information via subpoena.

14. The Law Council agrees that the types of information to be shared, as listed in the Consultation Paper,[3] should include orders made under state and territory child protection legislation.

15. The Law Council also supports recommendation 3 of the ALRC Report, being for the Australian Government to work with the state and territory governments to consider expanding the information sharing platform as part of the National Domestic Violence Order (**DVO**) Scheme to include such orders.[4] This is subject to privacy concerns being addressed and sensitive information being redacted. The Law Council also considers that to assist the court in its assessment of risk, the information covered by this section of the National Framework should include applications for DVOs and any response(s) filed.

16. Information to be shared by police could include driving records, which would establish whether drink driving and driving under the influence of drugs offences have been recorded.[5] The Law Council also supports the inclusion of material tendered at sentencing hearings, given that sentencing remarks alone may not always provide the detail and context necessary in the circumstances.

17. Further, information sharing from relevant state-based government departments tasked with child and family welfare may also be highly effective when assessing risk to a child, however such information sharing should be implemented carefully as documents may contain interview records with parents, relatives and children and may include admissions of family violence or criticism against a party. The Law Council is advised of situations where parties become aware of negative comments made by a relative or admissions of family violence made by a child through reading family services interview records, in circumstances that could foreseeably lead to retaliation against the relative or child. Consistent with the existing practice that the identity of those who make reports or notifications to child welfare agencies must not be revealed to those who access those records, equivalent protections should be implemented to shield the identity of those making these ancillary reports. In such instances, the relevant department should redact sensitive information, which may pose a risk to either party or other witnesses. The necessity for further training and resourcing in response to this recommendation is also essential.

18. At all times, it is critical that information proposed to be accessible under the National Framework is deemed relevant, and there is an ongoing need for measures to protect the privacy of litigants and ensure all information is limited to precise information that will assist the court with its enquiry. The introduction of methods to redact documents

[3] See, 3-4.

[4] See, ALRC Report at Recommendation 3. See also, Law Council of Australia, 'Submission to the Commonwealth Attorney-General's Department – National Framework for Information Sharing between the Family Law and Family Violence and Child Protection Systems' (27 November 2020) <https://www.lawcouncil.asn.au/publicassets/2b77a2ad-4e34-eb11-9437-005056be13b5/3929%20-%20Family%20violence%20info%20sharing.pdf> 17-18; Law Council of Australia, 'Submission to the Senate Legal and Constitutional Affairs Legislation Committee – Family Law Amendment (Federal Family Violence Orders) Bill 2021' (25 June 2021) <https://www.lawcouncil.asn.au/publicassets/a6c111b6-cbe5-eb11-943e-005056be13b5/4027%20-%20Family%20Law%20Amendment%20%20Federal%20Family%20Violence%20Orders%20%20Bill%202021.pdf> 22-23.

[5] It is noted that while the relevant police agency may hold some driving records, there may also be a need to request this type of information from the applicable department of transport.

where the information is not directly relevant to the matter at hand would help alleviate these concerns.

19. However, these measures would come with their own risk as to who makes the decision about what is relevant and what recourse a party would have if relevant information was not in fact produced to the requesting court. This process also assumes that requests for categories of documents and information may sensibly be made, assuming a foundation of accepted or 'usual' documents and categories of documents is held by the providing agency. It may be necessary for the providing agency to also produce a list of all categories of documents held by them, to ensure the requesting court may better assess what further information, if any, may be required.

Process for deciding which information should be shared

20. The Law Council agrees with the proposed power to make a 'short form' order under an amended section 69ZW of the FLA. However, there is some uncertainty as to the process through which this would occur. The Law Council makes the following comments with respect to possible scenarios for how 'short form' orders are intended to be made:

    (a) It may be intended that this process occur at a court event, with the parties present. This would mean an additional step in the information gathering process is being contemplated. If at a later court event, another order (a more expansive order for production of documents and information) is then made, additional costs are likely to be incurred – by the court, in having to make additional requests and creating another court event in which to do so (or expanding the time needed in a concurrent court event), and by the parties, who will need to review two groups of documents, instruct their lawyers and attend two court events.

    (b) It may be intended that the short form order be made in Chambers or *ex parte*. This would create additional challenges from a procedural fairness perspective. Submission may need to be made about the nature of the material sought under the short form order and the relevance or otherwise of that material, and any risks associated with its production.

    (c) It may be intended that at a preliminary stage, prior to the first court event, the court assesses the evidence then filed and determines that a short form order should be made to an agency, directing the production of certain information, to be received by the court, prior to the first court event. This process is akin to the production, to the court, of a short report from relevant agencies, in response to the Notice of Risk filed at the commencement of parenting cases. This has been a successful initiative. The Consultation Paper does not address the role of Notices of Risk and the responses of agencies after receipt of those notices. There is some risk that a new process is being contemplated, in the Consultation Paper, which is very similar to that which applies presently, when welfare agencies receive a Notice of Risk from the courts.

21. There is value in requesting and accessing identified and relevant information in a timely manner so that it can inform decision making from the early stages of proceedings, as inefficiencies in current information sharing processes may leave vulnerable parties at greater risk of family violence or child abuse.

22. The Law Council considers that the proposed framework may assist to improve upon the current procedurally complex and time-consuming process, which frequently

includes the requirement for parties to specifically subpoena whole categories of documents. It is, however, noted, that the right of parties to assess and take steps to obtain the evidence which is needed to advance their case or to rebut allegations made remains fundamental and the right to issue subpoenas must remain.

23. It is also appropriate that the making of an order under section 69ZW should be discretionary[6] and parties should be afforded an opportunity to address the utility and scope of such orders and to whom they might be directed. It may be that the question of the issue of subpoenas to welfare or other state/territory agencies may be deferred until receipt and review of the court ordered documents, allowing more specific and focussed subpoenas to issue in due course.

24. Where the court considers it does require more information to assess family violence or other risk, the Law Council considers that the 'short form' process as proposed may be an appropriate initial step in doing so (subject to the matters addressed above). Any order should identify all the information relevant to risk while minimising the capture of irrelevant information. The courts' power should be defined so that a 'short form' order will elicit a wide range of documents, and the breadth of the order in each case is informed by the circumstances of the case. For example, in some matters it may be relevant to inspect records of police attendances or complaints or charges of family violence, while in others it may be sufficient to obtain recorded convictions or prior court orders. The nuance contemplated in this submission makes clear the necessity for parties and their advisors to be engaged in the process of consideration of what is to be included and sought in the order made by the court.

25. The Law Council notes that the possibility that parties may only issue subpoenas to welfare agencies and/or the police (and other groups of agencies) with leave, as raised in the Consultation Paper,[7] gives rise to concerns about a significant limitation on the right of individuals to assess how they propose to conduct their case, and should be considered with caution. There is a risk that shifting to the court the primary responsibility for the identification and procurement of relevant evidence from welfare and related agencies could impose a significant burden on the courts. The process of seeking leave may also create an additional burden for self-represented litigants and creates an additional step in the process, with attendant resource costs for parties and the court.

Making information available to the parties

26. While the Law Council supports the sharing of information regarding complaints and child protection processes, it will be necessary to provide training to those who may be required to share information on relevant privacy principles and on identifying the various types of information that can be shared in light of family violence and other risk. Governments should collaborate with the relevant state and territory agencies on implementing models that have proven successful. An example of one such model is the 'Safe and Together Model', which aims to assist child welfare professionals to use language in their documents which focuses on the risk to children posed by perpetrators rather than victim-survivors.[8]

27. Judicial officers must also continue to be equipped with the skill and expertise and training necessary to properly understand the nuances of a particular matter, including the dynamics of relationships involving family violence and the presentation of victim-

[6] See, Consultation Paper at 2.
[7] Ibid.
[8] See T De Simone and S Heward-Belle, "Evidencing better child protection practice: why representations of domestic violence matter" *Current Issues in Criminal Justice* 32(4):1-17.

survivors in these circumstances (and sensitivity as to how third parties may respond to and report these matters). Ongoing education on family violence is essential in this regard, and the Law Council supports the provision of ongoing training and capacity-building for all users of the National Framework, as proposed in the Consultation Paper.[9]

28. Further, for registries impacted by public health restrictions as a result of the COVID-19 pandemic, and for self-represented litigants who are unable to physically access a registry where particular material is stored, a tension exists between ensuring procedural fairness on the one hand and ensuring that the litigant does not gain access to material that may be improperly used (for example, through dissemination in breach of section 121 of the FLA) on the other. It is likely that the ability to access documents in a digital format is going to be necessary for some time into the future. The Law Council acknowledges that building appropriate safeguards around the release of sensitive information in this context will pose a challenge for the courts.

29. Possible resolutions to this ongoing tension include strengthening penalties for breaching section 121 of the FLA, and strengthening the Family Courts' procedures and capacity to enforce the provision. Another possibility is to require self-represented litigants to provide an undertaking prior to gaining access to the applicable documents. However, the consequences of breach of that undertaking would need to be fully explained to that party, with careful consideration given as to how that would occur and by whom.

30. Whether information elicited through a section 69ZW order is made available to the parties should, in the Law Council's view, be at the court's discretion. The primary consideration should be the safety of the parties and their families; it is essential that information which could pose a risk of harm to a party or a child is not inappropriately shared with perpetrators. In some cases, the nature and extent of the risk of family violence may be such that sharing certain information could increase risk. In other circumstances, the risk may be lower and allowing access to the information may help the parties to progress to resolution. These are matters which would require consideration and the opportunity for submission in many instances, requiring another court event to occur. The alternative would be application of a carefully considered default position, which a party could then address if they wished to deviate from it.

31. Clear protocols should also be in place around the parties' access to, and use of, the information produced, and these should be aligned with the court's risk management procedures for the protection of victim-survivors. Where the 'short form' process indicates that there are records of interest, the parties should be notified and given the opportunity to make submissions in relation to a possible section 69ZW order. This will ensure that any other factors or information which were not identified by the 'short form' process, but which the parties are aware of, can be brought to the court's attention. It will also give parties an opportunity to address the scope of an order and provide input on which information should be shared with the court and the parties, so as to minimise the risk to victim-survivors.

32. The court should make orders allowing a brief 'window' for the other party to inspect the applicable material first, to ensure that there is no identifying information that may place an alleged victim-survivor at risk (for example, to confirm their residential address is not included in the material, and if it is, bringing this to the attention of the court prior to the other party gaining access to the information so it can be redacted). As a general rule, any irrelevant documents provided under the National Framework should also be redacted. For example, if interim or final family law orders are provided

[9] See, Consultation Paper at 8.

that relate to both parenting and property matters, the part of the orders relating to property should be redacted.

Retaining ability to use subpoenas

33. Subject to the reservations outlined above, the Law Council expresses qualified support for the AGD's proposed shift away from the need for parties to issue subpoenas to obtain relevant information at first instance, as currently occurs.[10] However, it will be important to ensure that subpoenas can still be issued by parties in appropriate circumstances.

34. The Law Council notes, on this subject, the limitations to the scope of the powers under section 69ZW of the FLA, which permits the making of a relevant order in relation to documents pertaining to a child 'to whom the proceedings relate'. This does not permit production of information about a child to whom the proceedings may not directly relate – for example, a stepchild, child of a previous relationship or adult child – to assist the court in its assessment of risk. This is a clear category of case in which the issue of subpoenas will be essential to ensure information about such children can be sought where relevant.

Importance of cooperation

35. The Law Council notes that to overcome significant legal, institutional and resource barriers to the adoption of the proposed National Framework, there will need to be extensive cooperation between all levels of government, as well as the family, state and territory courts and the various Commonwealth, state and territory police agencies. It will be essential for cooperation between these stakeholders to be fostered and cemented, if the National Framework is to succeed.

36. There are known challenges inherent in creating a system which seeks to transpose reports and processes from a forum which does not apply the rules of evidence to a forum which (generally) does. Evidence which may offer an acceptable foundation for action in the former forum may be found wanting in the latter. For instance, the opinion provided by a child protection case worker may be sufficient evidentiary foundation for action by that welfare agency, in the interests of protecting a child. However, evidence of that opinion in the family law forum will not carry the same weight. In some welfare agencies, the decision by a party to decline to co-operate with the agency may be seen as evidence of culpability but no such inference could properly be drawn in the family law courts. The AGD will need to ensure that stakeholders are aware of these jurisdictional differences and the additional challenges of assessing these differences for self-represented parties.

37. It will also be important for the Family Courts to have a thorough understanding of the types of records held by the state or territory agencies and of their likely relevance to each matter.

Resourcing requirements

38. It is imperative that reforms under the National Framework be accompanied by appropriate funding and resourcing increases for both the Family Courts and state and territory agencies, in consultation with the funding recipients.

39. The proposed reforms for sharing information from state and territory bodies with the Family Courts may have significant resourcing implications. The ability of state and

[10] Ibid, 2.

territory agencies to comply promptly with a 'short form' order or a section 69ZW order will be crucial to the efficacy of the reform, particularly as the need to assess risk will often be urgent.

40. There may also be resourcing implications for the Family Courts in managing and/or reviewing documents produced in response to a section 69ZW order. In the experience of members of the Law Council's Constituent Bodies, thousands of pages of documents and records can be produced in matters with extensive involvement by child-protection authorities and/or police.

Self-represented litigants

41. As noted above, the Law Council supports the use of judicial discretion to prevent litigants utilising the information sharing framework for the purposes of 'fishing', breaching the other party's privacy unnecessarily or causing undue stress, based on unfounded allegations.

42. Perpetrators of family violence may be able to perpetrate further family violence on victim-survivors through baseless allegations, which would result in orders for document release in other jurisdictions. Additionally, victim-survivors must be supported in identifying their options for information sharing which would support a more appropriate and equitable outcome. Independent Children's Lawyers and judges play an important part in monitoring these issues, and it is essential that the court is empowered to make the final determination on exclusions and safeguards, while parties maintain the ability to raise objections.

43. As many litigants in family law matters are self-represented, the National Framework should provide for considerable and targeted education to ensure parties are aware of their rights to access information and to restrict that access. The Law Council would welcome further consultation in the development of new Practice Directions or guidelines for litigants.

Possible extension of an amended section 69ZW to property proceedings

44. The Law Council acknowledges that victim-survivors of family or domestic violence are more likely to settle property matters on unfavourable terms when compared with parties who have not been subjected to family violence. As such, the Law Council considers that family safety information sharing may be important in cases relating to 'financial matters'. As defined at section 4 of the FLA, these include matters with respect to the property of either or both parties, or to the maintenance of one of the parties or their children (amongst other things).

45. Under the law as it presently stands, family safety information may be relevant in the following instances, for example:

- in a property settlement case where it is alleged a course of conduct in the form of family violence had a significant adverse impact upon a party's contributions (making them more arduous); and/or
- to support an application for spousal maintenance.

46. The Law Council supports in principle the extension of an amended section 69ZW to property proceedings in tandem with the recommended amendments to the property division provisions of the FLA. This proposal would support implementation of the

Law Council's suggestions as previously made to the AGD with respect to the consideration of family violence in property matters in family law.[11]

47. On this issue, the Queensland Law Society has noted that extending family safety information sharing to the consideration of financial matters would allow safety factors to be considered in managing them and would facilitate the taking of additional safety measures, such as referrals of vulnerable parties to support services. As noted in the Consultation Paper, it would also address the risk of a party accepting a smaller portion of assets than they are entitled to because they fear retaliation or forgoing their entitlements entirely in order to prioritise their immediate safety. However, absent detailed information as to the proposed law reform in this area, the Law Council's Family Law Section considers it is difficult to comment upon the possible expansion of section 69ZW to property/financial proceedings.

48. The extent to which family safety information will be relevant in property and financial cases is not known when the extent and content of reform about these matters remains unknown. It is known that family violence is commonly alleged in cases before the Family Courts.[12] What proportion of financial cases may also be the subject of (relevant) family violence or other risk/abuse allegation is not known as we do not know threshold requirements for the inclusion of relevant family violence and other abuse considerations. The Law Council notes, however, that it is reasonable to expect that there will be significant resourcing implications in prioritising and managing property matters where family violence has been identified and in providing vulnerable parties with any additional support they need. The Australian Government should increase funding appropriately to reflect this.

Co-location

49. The Law Council notes its support of the continuation of the ongoing pilot co-location initiative currently being implemented by the Australian Government as part of the fourth manifestation of its National Plan to Reduce Violence against Women and their Children, in conjunction with the National Framework.[13] Though it is unclear whether the National Framework and the co-location initiative are intended to be interrelated, they both aim to address the currently fragmented system and the way that they interact should be further considered when developing the National Framework.

50. Under the pilot co-location initiative, child safety authorities and police are co-located at Family Court registries. Police or child safety authorities are able to provide summaries of information in relation to a particular matter direct to the court. While these summaries may be less detailed than material produced under subpoena, the Law Council considers that there is significant advantage to receiving information which is critical to the courts' capacity to understand context and assess risk in a timely manner, particularly in urgent matters.

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[11] See, Law Council of Australia, 'Submission to the Commonwealth Attorney-General's Department on a new decision-making framework for property matters in family law' (21 July 2021) <https://www.lawcouncil.asn.au/publicassets/17898bf2-a8ea-eb11-943e-005056be13b5/4047%20-%20Decision-making%20framework%20for%20property%20matters.pdf> 16-17.

[12] See, Australasian Institute of Judicial Administration, National Domestic and Family Violence Bench Book (2018) 10.1.7.

[13] For more background and discussion of the benefits of the co-location pilot, see, Law Council of Australia, 'Submission to the Commonwealth Attorney-General's Department on Information sharing between the family law and criminal justice and child protection systems' (27 November 2020) <https://www.lawcouncil.asn.au/publicassets/2b77a2ad-4e34-eb11-9437-005056be13b5/3929%20-%20Family%20violence%20info%20sharing.pdf> 16.

51. Members of the Law Council's Constituent Bodies have generally reported a positive experience with the co-location initiative. They note that uptake has been impacted by the COVID-19 pandemic, which has seen significant changes to court processes with practitioners often appearing virtually and with much reduced physical access to courts. The Law Council therefore recommends that the Australian Government consult with state-based child welfare authorities and police in considering the future of the co-location initiative and its interaction with the National Framework.

Information sharing from the family law courts to state and territory bodies

52. The Law Council agrees that the types of information to be shared, as listed in the Consultation Paper,[14] should include Family Court orders. However, the Law Council holds concerns with respect to sharing information from the Family Courts with state and territory bodies (some of which have been described above).

53. Particularly, there is a risk that sharing a report prepared by an expert for the purpose of family law proceedings may inadvertently disclose sensitive information which could be prejudicial to a party or their family. These expert reports commonly contain expert opinions about health or historical circumstances which, unlike the findings in a judgment, are not the product of tested evidence. To manage this risk, and in the absence of judicial oversight, clear protocols should be developed about the extent to which such information is shared and about the manner in which these reports may be used by the recipient agency.

54. Notice must also be given to the report author about the release of the report, and they ought to be invited to express any view about it. Alternatively, protocols should be developed and included in the court's rules with respect to the provision of expert reports such that experts are made aware at the first instance that the report may be provided to a third agency/other court in the future. There is some prospect that experts may decline to prepare reports for use in one court if they hold concerns about how that report may be used in the future, in another place.

55. As to additional forms of Family Court information which could be useful to share with relevant state and territory agencies, the Law Council suggests considering the sharing of Child Dispute Conference Memorandums. These documents are often prepared early in a family law matter, sometimes prior to any hearing, and typically refer to issues of family violence or risk of harm to children where this is indicated on initial interview of the parties. Similarly, the Notice of Risk document, as described above, provides each party's summary of relevant risk considerations and actions taken by them in response to those events (e.g. notification to welfare agencies and police).

Risks, exceptions and operational safeguards

56. The Law Council agrees with the proposal for a presumption in favour of information sharing with limited exceptions and safeguards, as outlined in the Consultation Paper. It also supports the operational safeguards proposed, including sending and receiving information in a manner which limits its disclosure, with an accompanying clear caveat about the purposes of the transfer and redaction of identifying or sensitive information.

57. The Law Council also supports the implementation of an exclusion with respect to provision to the Family Courts by state and territory agencies of information which might be prejudicial to an ongoing investigation, an exclusion which the Law Council

[14] See, Consultation Paper at 3-4.

understands is currently exercised under the co-location model. Although this exclusion means the courts may not be given access to recent issues relevant to the safety of a party or their children, it may in some cases be necessary to protect the integrity of an investigation. The limitation should explicitly only apply where to share the information would mean that the investigation is compromised.

58. It is anticipated that in providing self-represented litigants with an alternative to filing a subpoena as a means of informing the court of family violence risk, the proposed reforms would be beneficial. The formalities involved in issuing subpoenas, including the management of conduct money, can be time-consuming and difficult for a self-represented litigant to navigate.

59. However, as outlined at paragraph 31 above, the Law Council suggests that the parties be given an opportunity to make submissions as to the scope of the order, including with respect to the application of an exception to the presumption for information sharing. This would effectively preserve the existing ability for parties to object to production when a subpoena is issued and before the information is shared.

60. In some cases, the parties and, indeed, the court may be uncertain as to whether particular information or documents captured by an order will fall within the scope of one of the applicable exceptions. In those instances, determining the applicability of an exception would likely become an administrative decision falling to the relevant agency staff. The Law Council notes the importance of adequate additional resourcing and training of agency staff to be able to perform this task.

61. To allow for instances where an objection is successfully made in relation to a decision that an exception applies, a process will need to be created to ensure an opportunity for access to the material is preserved.

Information sharing with state and territory courts

62. In relation to enabling state and territory courts to access information from the Family Courts, the Law Council considers that there may be benefit in extending the information sharing framework to proceedings involving the same parties and their agents.

63. In support, the Law Institute of Victoria has provided the below case study to highlight the situations where further litigation is instigated by a party to perpetuate family violence after Family Court proceedings have concluded. In this instance, the husband commenced civil proceedings by use of a corporate entity in the state court, which then had to be defended by the wife at significant cost:

> *The husband and wife executed a Binding Financial Agreement ('BFA') which stipulated that in the event of marriage breakdown, the Husband could require the Wife to vacate any residence in respect of which the Husband, or companies and trusts under the Husband's control, held a legal or equitable interest or beneficial entitlement over. This included properties acquired after the BFA was executed. The Husband operated his business through a complex web of corporate entities, with a trust and corporate trustee established for each project.*
>
> *During the marriage, the Husband, Wife and children resided in properties being developed by the Husband and owned by trusts under his control. Prior to separation, the Wife lodged a caveat over the property ('the Apartment') in which she was residing with the Husband and their children. The Husband was excluded from the Apartment due to family*

and domestic violence. The husband served the Wife with a Notice to Vacate the Apartment, under the BFA, and initiated FamCA proceedings.

The Wife consented to remove the caveat and the Husband undertook not to deal with the Apartment, personally and as director of the corporate trustee. The proceedings resolved with the Wife vacating the Apartment and the Husband paying monies owed under the BFA. Final orders were made, with all applications dismissed and undertakings discharged.

Six months later, the Husband utilised his position as sole director and shareholder of the corporate trustee to bring an action in trespass against the Wife in the State Court. The plaintiff was the corporate entity, in place of the Husband. During the state Court proceedings, the Court did not allow into evidence relevant documents from the previous Family Court proceedings.

64. The Law Council notes that any proposed information sharing framework must consider the impact on established common law principles, such as the *Harman*[15] principle. The *Harman* principle is an obligation owed to the court which prohibits the use of documents or information produced under compulsion from being used for a collateral or ulterior purpose unrelated to the proceedings in which they were produced. In 2020, *Featon v Featon*[16] highlighted that leave is required from the court to rely on this information in another state court or for any purpose which is collateral to the proceedings, unless the material has been received into evidence and is therefore in the public domain. It is unclear whether the proposed framework is consistent with the established *Harman* principle and any proposed amendments ought to consider the impact on this implied undertaking.

[15] *Harman v Secretary of State for the Home Department* [1983] 1 AC 280.
[16] *Featon v Featon* [2020] FamCA 1061.