Law Council
OF AUSTRALIA

# Information sharing between the family law and criminal justice and child protection systems

## Commonwealth 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.

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- Mr Greg McIntyre SC, Executive Member
- Ms Caroline Counsel, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

# Acknowledgement

The Law Council acknowledges the work of its Family Law Section in the preparation of this submission.

The Law Council is also grateful for the contribution of the following Constituent Bodies:

- Law Institute of Victoria;
- Law Society of New South Wales; and
- Bar Association of Queensland

# Executive Summary

1. The Law Council of Australia (**Law Council**) welcomes the opportunity to respond to the Attorney General's Department (**AGD**) reform project which is aimed at improving information sharing between the Federal Circuit Court and Family Court of Australia (**the family law courts**), State and Territory courts, and welfare agencies of the States and Territories.

2. A consistent and uniform approach to the sharing of appropriate information for the safety of families across these systems has been the focus of a number of inquiries and projects by the family law courts, State and Federal authorities and State and Federal Governments for some time. The Law Council considers that the National Framework for Information Sharing between the Family Law and Family Violence and Child Protection Systems (**National Framework**) will be an important tool to co-ordinate ongoing input and consultation on this very significant aspect of the lives of so many families.

3. As such, the Law Council continues to support measures that will improve interaction and information sharing between the family law courts and other agencies as a means of enhancing the capacity of the family law courts to properly assess the risk of family violence.

4. Crucially, the success of these initiatives will depend upon adequate and sustained resourcing of both Federal and State/Territory agencies. The vulnerability around such is a significant factor which informs the viability of these initiatives. Insufficient resourcing of these services renders them ineffective, thereby increasing risk for some people.

5. In relation to the proposed National Framework, the Law Council's analysis has had regard to the extent and limitations of current information sharing arrangements. These must logically be understood before an attempt can be made for their improvement. Further, there is a need to give greater consideration to the scope and type of information to be shared under any future arrangements.

6. With regards to co-location, the Law Council is of the view that the currently piloted co-location model assists in promptly providing information which is critical to the courts' capacity to understand context and assess risk. It is crucial that the learnings from the pilot be carried forward into consideration of how this program should continue or change beyond its scheduled ending of 30 June 2022, and that the necessary funding continue to be dedicated to future delivery of the program.

7. The Law Council also strongly supports the aims and rationale of improved risk screening processes and welcomes initiatives aimed at improving outcomes for people experiencing family violence. Comprehensive, early risk assessment and tailored support throughout the litigation process is critical in supporting families impacted by family violence.

8. Finally, the Law Council supports the proposed scoping of a technological solution to facilitate information sharing between the family law courts and the State and Territory criminal justice and child protection systems. It is anticipated this will be a significant undertaking which will require cooperation across jurisdictions and stakeholder groups. It is of course also essential that the protocols governing the accessing and releasing of information from the database be harmonised across jurisdictions.

# Background and context

9. It is understood that the AGD has been working with the family law courts to progress a number of reform projects aimed at improving information sharing for family safety. These include the co-location pilot, a risk screening process (**the Lighthouse Project**), and the National Framework, together with State and Territory Attorneys-General.

10. The proposals are designed to encourage and facilitate the two-way exchange of information between the family law courts exercising federal family law jurisdiction on the one hand, and the State and Territory courts and government agencies responsible for responding to and managing family safety risk on the other.

11. The Law Council has had regard to the briefing paper provided by the AGD which details the National Framework, the co-location pilot, and the Lighthouse Project. This submission is made in response to the issues raised in that document.

## Past reports

12. Consideration of these issues is not novel. More than a decade ago, the National Justice Chief Executive Officers' Group approved a project plan for developing initiatives to enhance collaboration between State and Territory child welfare authorities on the one hand, and the federal family law system on the other.[1]

13. Under the umbrella of this body of work, the Australian Government in 2012 commissioned a review by Professor Richard Chisolm AM on information sharing in family law and child protection. Professor Chisolm produced two reports which made recommendations to pass legislation that encourages information sharing, and amend those which hinder it: in 2013, *Information-Sharing in Family Law & Child Protection – Enhancing Collaboration* and, in 2014, *The Sharing of Experts' Reports between the Child Protection System and the Family Law System*.[2]

14. As to developments in more recent years, the final report of the Parliamentary inquiry into a better family law system to support and protect those affected by family violence was released in December 2017 (**Better Family Law System Report**). That report contained recommendations about improving information sharing between the family law courts and the State and Territory welfare systems, to better protect families.[3]

15. In its response to the Better Family Law System Report, the Government noted that it was 'working with states and territories to improve information sharing between systems and jurisdictions through a Council of Attorneys-General (**CAG**) family violence working group of justice officials', and that this may include considering measures like a child safety service.[4]

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[1] See, Professor Richard Chisholm AM, 'The Sharing of Experts' Reports between the Child Protection System and the Family Law System' (Final Report, March 2014) at 47-48.
[2] See, Professor Richard Chisholm AM, 'Information-Sharing in Family Law & Child Protection – Enhancing Collaboration' (Final Report, March 2013) at 1; Chisholm, 'The Sharing of Experts' Reports' at 49.
[3] House of Representatives Standing Committee on Social Policy and Legal Affairs, 'A better family law system to support and protect those affected by family violence' *Parliament of the Commonwealth of Australia* (Final Report, December 2017), Recommendations 6 and 21.
[4] Australian Government, 'Australian Government response to the House of Representatives Standing Committee on Social Policy and Legal Affairs report: A better family law system to support and protect those affected by family violence' (Report, September 2018) at 8, 15.

16. More recently, in March 2019, the Australian Law Reform Commission (**ALRC**) released its final report for the Family Law Inquiry (**the ALRC Report**).[5] The Law Council provided responses to the Issues Paper and Discussion Paper released by the ALRC in preparing its Report, and refers the AGD to its submissions (as contained in those responses) on the matters currently under consideration.[6]

17. The ALRC Report made 60 recommendations on a range of topics, including those opened for consideration in the briefing paper.[7] The ALRC also recognised that this issue was the focus of significant work by the CAG Family Violence Working Group, and noted an expectation that work would continue.[8]

18. When the ALRC Report was published, the Attorney-General noted the Government's commitment to considering and developing individual responses to the issues raised in the recommendations, and that it had already started to do so.[9] To date, the outcomes of that consideration have not been published in a formal response.

19. In addition to the Better Family Law System and ALRC Reports, two further Parliamentary inquiries about family law and family violence were also commenced in September 2019 and June 2020 respectively.[10]

20. The first of these ongoing inquiries, the Joint Select Committee Inquiry into Australia's Family Law System (**Joint Select Inquiry**), included in its Terms of Reference the issue of information sharing between the family law system and State and Territory child protection systems, and family and domestic violence jurisdictions.[11]

21. In the recent interim report for the Joint Select Inquiry, the issue of information sharing was directly addressed. The findings in the Better Family Law System and ALRC Reports were noted, and the interim report referred directly to the Government's initiative to develop an information sharing regime through the CAG as a 'current reform' in the area.[12]

22. The second of these inquiries, the House Standing Committee on Social Policy and Legal Affairs inquiry into family, domestic and sexual violence, is likely to report on similar issues. This is because one of its Terms of Reference addresses: '[t]he level and impact of coordination, accountability for, and access to services and policy responses across the Commonwealth, State and Territory governments, local governments, non-government and community organisations, and business.'[13]

23. Finally, in its Interim Report '*Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems*', the Family Law Council noted there were

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[5] Australian Law Reform Commission, Family Law for the Future: An Inquiry into the Family Law System (ALRC Report 135, March 2019).
[6] See, Law Council of Australia, 'Submission to the ALRC Review of the Family Law System – Issues Paper 48' (7 May 2018) at response to Question 33; and Law Council of Australia, 'Submission to the Review of the Family Law System: Discussion Paper' (16 November 2018) at responses to Proposals 5-10, 11-1 – 11-5.
[7] See, ibid at Recommendations 2 and 3; paragraphs 4.129 – 4.171.
[8] Ibid, paragraph 4.144.
[9] Attorney-General for Australia and Minister for Industrial Relations, 'Australian Law Reform Commission Review of the Family Law System' (Media Release, 10 April 2019)
[10] The ongoing Joint Select Committee Inquiry into Australia's Family Law System, appointed on 19 September 2019; House Standing Committee on Social Policy and Legal Affairs inquiry into family, domestic and sexual violence, adopted on 4 June 2020.
[11] See, Joint Select Committee on Australia's Family Law System, 'Improvements in family law proceedings' (Interim Report, October 2020) at xv.
[12] Ibid at 160-163.
[13] The House Standing Committee on Social Policy and Legal Affairs, 'Inquiry into family, domestic and sexual violence', Terms of reference (c).

indications that the co-location of child protection department practitioners in the family courts brought benefits in the speed of transferring information, an improved interface between the two systems and enhanced understanding of how each other's system operated.[14] The co-location of police and child protection authorities in family law court registries goes some way to ensuring that information about risk is shared, and in a timely manner. It is submitted that legal practitioners, and particularly Independent Children's Lawyers, report real benefits in their presence and the assistance they can provide.

24. In its Final Report, the Family Law Council noted a protocol known as the Personal History Pilot, which enabled the NSW Department of Families and Community Services (**FaCS**) (as it then was) to provide information about children held by FaCS to be shared with the Federal Circuit Court for the purpose of considering orders under s 69ZW of the *Family Law Act 1975* (Cth) (**Family Law Act**). The information, which included the child's personal information and any relevant reports or assessments, could be transferred within two days in urgent cases.[15]

# National Framework: Areas for further consideration

25. The Law Council raises below several issues in addition to those contained in the AGD briefing note, in order to fully appreciate the scope and feasibility of the National Framework.

## Existing information sharing arrangements

26. The first area for further consideration relates to the extent and limitations of current information sharing arrangements. These must logically be understood before an attempt can be made for their improvement. The briefing note states that the National Framework is not intended to intersect with or detract from current information sharing arrangements already in place at State and Territory level. It should be recognised that some jurisdictions have significantly more information sharing arrangements than others (such as Western Australia, Victoria and South Australia).

### Notices of Risk and suspicion of abuse/ill treatment

27. Most jurisdictions already have information sharing arrangements which provide the family law courts with some level of information held by child welfare agencies or police about families. This is predicated upon the determination of whether there is risk to children and their carers, based upon consideration of a 'Notice of child abuse, family violence or risk' (**Notice of Risk**) when filed in a particular matter.

28. A Notice of Risk must be filed with any initiating application or response regarding a parenting order, or the making of new allegations of child abuse or family violence in parenting proceedings, in the family law courts (including where proceedings are being transferred from another court).[16] The issuing of a Notice of Risk in parenting matters in family law proceedings is a trigger for the family law courts to notify relevant welfare agencies.[17]

29. In the experience of the Law Council's Family Law Section, it is common for child welfare agencies to respond to a Notice of Risk with information. That information may prompt

[14] Family Law Council, '*Interim Report on Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems*' (30 June 2015), 2.
[15] Law Council of Australia, '*Final Report on Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems* (June 2016), 64.
[16] See, *Family Law Act 1975* (Cth) at ss 67Z and 67ZBA; *Federal Circuit Rules 2001* (Cth) at Part 22A.
[17] See, *Federal Circuit Rules 2001* (Cth) at Note 2, r 22A.02(2).

the recipient court, either on application or on its own motion, to make a section 69ZW Order ('Evidence relating to child abuse or family violence') to the child welfare agency and/or police to provide a report to the court. A section 69ZW Order must be considered by a court where a Notice of Risk has been filed, and can also be used to obtain information from relevant welfare agencies and police.[18]

30. The parties (including an Independent Children's Lawyer) may also issue a subpoena for the production of documents and direct it to the person they choose.[19] However, some family law court registries have issued Practice Directions requiring parties to obtain the leave of the Court to issue subpoenas to a child welfare agency.[20] This reflects an understanding of the pressures being experienced by those agencies to meet the demand for information requests, alongside the need to produce documents in response to Notices of Risk and s69ZW Orders, and is intended to counter the real risk of duplication.

31. Subpoenas directed to State and Territory police are also commonly issued in family law proceedings.

32. As to the substance of information provided, there is variation across the States and Territories as to what information is produced to the family law courts in response to the various calls for it. Ordinarily, however, the relevant agency provides information it collects and generates in the form of its choosing. Typically, in the case of a Notice of Risk, information may be provided in the form of a summary of notifications, antecedents, and domestic violence history. More comprehensive documents are generally provided in response to a subpoena.

33. This information or these business records typically provide a summary or snapshot of a family's interaction with child protection and law enforcement authorities. This snapshot may be directly relevant to assessing harm or risk of harm or family violence to the children and parties the subject of family law proceedings.

34. Importantly, Notices of Risk and section 69ZW Orders are not directed to State or Territory courts. Rather, the family law courts must rely upon parties to alert them to relevant proceedings and orders made in those courts.

35. Other mechanisms for information sharing include that a person (including a member of a family court) must notify relevant welfare agencies where they have reasonable grounds, in the course of performing duties or functions, for suspecting actual or risk of abuse or ill treatment.[21] In addition, a party seeking a parenting order must also file a copy of any family violence order affecting the child or a member of the child's family.[22]

## File sharing between courts

36. The *Family Law Rules 2004* (Cth) (**the Rules**) already provide for the sharing of documents between the family law courts and a State or Territory court, when requested by a party seeking to produce a document in court.[23]

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[18] See, s 67ZBB(4).
[19] Ibid, r 15.17.
[20] See, for example, Family Court of Western Australia, 'Practice Direction No. 1 of 2014' (13 March 2014); Federal Circuit Court of Australia, 'Information Notice Subpoenas and the Department of Health and Human Services Victoria' (1 January 2018); In Victoria, the Northern Territory and Western Australia, requests for the issue of a subpoena to a child welfare agency will only be granted with leave of the court and only where there is a legitimate forensic purpose in seeking more information.
[21] See, *Family Law Act 1975* (Cth) at s 67ZA.
[22] See, *Federal Circuit Rules 2001* (Cth) at Part 22A.
[23] See, r 15.34.

37. Under the Rules, a Registrar of the relevant family law court can formally request the Registrar of another court to produce the document in question.[24] Typically, the parties then review the relevant file and make a decision about how information on that file may be provided to the family law court – it is not automatic that documents filed in one court, will be relevant to or available in the other court. Matters of such procedural complexity are unlikely to be understood by self-represented parties.

## Scope and type of information to be shared

38. In the family law courts, as stated previously, much information can already be made available (via subpoena etc), however information sharing should result in more timely access to important information (like the status of child welfare investigations), and better informing risk assessments.

39. Risk may be assessed more promptly, rather than having to wait weeks for subpoenaed material to be returned. This is particularly critical for matters that have been listed urgently (such as Recovery Orders or where a parent is refusing to facilitate time and limited third party information is available, or where the respondent has not had time to file their response and where a party or parties are not represented).

40. On the importance and implications of identifying the precise scope of information to be shared, the Law Council repeats comments made in its submission to the ALRC on the *Review of the Family Law System – Issues Paper 48*:

> *331. There needs to be an identification of the information sought to be shared – as different processes and requirements will attend different forms of information.*
>
> *332. The sharing of information as to convictions, and of the entry of protection orders, is one that ought to occur and there ought be a ready commitment to a process by which this can be effected.*
>
> *333. The sharing of information as to complaints, and child protection processes, is one that should also occur but there needs to a greater awareness of the context in which such information is gathered and a greater scrutiny of and safeguards applied to its use once shared.*
>
> *334. In that context, guidance can be obtained from the model adopted by the Family Court of Western Australia which is not beset by the challenges otherwise posed by the federal system and the unavailability of a 'one-family, one-court' system throughout Australia.*
>
> *335. The LCA also supports the recommendations of the Family Law Council and Victorian Royal Commission as set out at paragraphs 249 and 250 of the Issues Paper. It is to be noted, however, that the LCA endorses the concerns set out at paragraph 252. To the two matters listed at paragraph 252 we add a third, namely the challenges created when intending to forge a new system where reports and processes in one forum (which do not apply the rules of evidence) are to be transposed to a forum where there is greater adherence to those rules – that which is an acceptable foundation for action in one place may be found wanting in another. By way of example, in the family law courts the bare opinion and summaries of a child protection case*

[24] Ibid, r 15.34.

*worker is not of itself evidence of that expressed and to decline an interview with the department is not an admission of culpability.*[25]

41. The Law Council also caveated its support in relation to the type of information to be shared, in its response to Question 11-1 of the ALRC Discussion Paper. Question and response are set out below:

    *Question 11-1:*

    *What other information should be shared or sought about persons involved in family law proceedings? For example, should:*

    - *State and territory police be required to enquire about whether a person is currently involved in family law proceedings before they issue or renew a gun licence?*
    - *State and territory legislation require police to inform family courts if a person makes an application for a gun licence and they have disclosed they are involved in family law proceedings?*
    - *The Family Law Act 1975 (Cth) require family courts to notify police if a party to proceedings makes an allegation of current family violence?*
    - *The Family Law Act 1975 (Cth) give family law professionals discretion to notify police if they fear for a person's safety and should such professionals be provided with immunity against actions against them, including defamation, if they make such a notification?*

    *Comment:*

    *The LCA generally endorses the policy intent of these recommendations, but suggests that in relation to first three of these questions, significant legal, institutional and resource barriers exist such to make the adoption of such policies to be almost impossible without a great deal of cooperation between all levels of government, the courts and the various police agencies.*

    *In relation to the last question, the LCA suggests that family law professionals probably already have the discretion to breach their obligation of maintaining legal professional privilege if they reasonably believe that their client is about to commit a criminal offence (such as harming the other party). The ethical considerations may be more vexed when the lawyer believes their client might harm themselves. Any proposed legislative amendment would need to also provide immunity in the case that a family law professional does not make such a notification.*[26]

42. One key deficiency that Law Council notes is that State and Territory courts exercising family violence jurisdiction are not required to provide protection or family violence orders and applications to the family law courts. The Law Council strongly advocates for such a system and asks the AGD for its response, as well as details of how it would be imposed and resourced.

43. Further, expanding the scope of section 69ZW of the Family Law Act to include agencies such as corrections, youth justice and state courts, in addition to child safety authorities

[25] See, Law Council of Australia, 'Submission to the ALRC Review of the Family Law System – Issues Paper 48' (7 May 2018) at response to Question 33.
[26] See, Law Council of Australia, 'Submission to the ALRC Review of the Family Law System – Discussion Paper 48' (16 November 2018), 72.

and police, will ensure the court has more comprehensive information earlier and at less expense to parties. This will also assist self-represented parties who may have difficulty navigating the various systems and are least likely to request this information via subpoena.

## Access to information

44. It is noted that at this stage the AGD's proposal for a National Framework includes very little detail on matters such as what information would be collected and stored, who would have access and under what circumstances, how information would be used and shared, and aspects of data security and data sovereignty. Consideration of such details will be critical to determining the merits of the proposal.

45. Once documents are produced to a court, it is usual for that information to also be made available for inspection by the parties. That may have additional and possibly serious consequences, for example:

    - information being shared about third parties (eg, the new partner of a perpetrator) without their knowledge, placing them at risk; and
    - information being accidently provided with identifying information, for example names of schools or addresses of the victims.

46. Consideration should therefore be given to ensuring that information provided to the decision-makers is made available to the parties and their legal representatives in an appropriate form. It is important that in those cases, proper access to the evidence upon which decisions are made is available to the parties. However, personal contact details, including address and telephone numbers of at-risk family members, should be protected. It remains a priority to take steps to ensure the ongoing safety of individual family members. Information provided to duty lawyers and legal representatives, in a timely manner, will assist the provision of relevant and evidence-based advice to clients and submissions to courts.

47. Family consultants (working within the family law courts) will benefit from having updated information directly from child protection or police, rather than relying on parties to pursue and obtain subpoenaed information, which may be outdated by the time of interviews for the family report (noting that matters may take between 18 months to 3 years from the date of filing to the final hearing).

48. In addition, the Bar Association of Queensland (**BAQ**) have suggested that traditional methods of information gathering for Court hearings may need to be considered. BAQ consider the current process of extensively redacting information from highly relevant subpoena material, when there is no other independent source of information as to alleged risk whether it be family violence or other forms of risk, does little to ensure that relevant information is provided to the Family Law Courts. When this is the only available method of accessing independent source material, the BAQ is of the view that redactions in their current form do little to ensure the decision-makers have access to information that can ensure the safety of family members are reflected in Court Orders.

## Input from sexual, domestic and family violence experts

49. It is submitted that any information sharing system should be developed with input from sexual, domestic and family violence experts with the agency and safety of victims/survivors prioritised. Any such system should also include the sharing of information relating to risk about the alleged perpetrator.

50. The Law Council supports the development of a national framework on information sharing to ensure that all relevant information can flow into the family law system in order to prevent unnecessary and unavoidable risks to children (and parties) and ensure good judicial decision making early in each matter.

51. It is noted that agencies such as Women's Legal Services Australia[27] have flagged that the development of an information sharing regime may present certain risks to victims/survivors of domestic and family violence. It is suggested that any design process should aim to ensure that such risks are minimised.

### Superannuation

52. The 2018 Women's Economic Security Statement included a government commitment to developing an electronic information sharing mechanism between the Australian Taxation Office (**ATO**) and the family law courts to allow superannuation assets to be identified quickly and more accurately.

53. At present, information gathering processes in relation to superannuation assets are often difficult and time-consuming. A mechanism which allows the ATO to provide this information directly to the courts will reduce difficulty and expense for parties and assist in producing just and equitable superannuation splitting outcomes. An information sharing mechanism of this nature is particularly important for women escaping violent relationships given superannuation commonly represents a significant asset for parties.

54. The Law Council understands the implementation of this scheme has been delayed and strongly recommends the scheme be funded and implemented as a priority.

## Concerns with current system

### Quality and admissibility of evidence

55. The Law Council notes the risk that information of the kind that may currently be shared, as set out above at paragraphs 27 to 37, may not necessarily establish an evidentiary foundation that harm has occurred, or the existence of a risk of harm. Rather, it may be evidence of a business record which details the interaction by that agency with a family.

56. Assessments set out in this information may be entirely untested and based on structured decision making and internal protocols and processes, screening or assessment tools relevant to the business of that organisation, which it employs to meet its threshold of intervention/involvement. It may include subjective assessments by particular workers who will not be called as witnesses in the family law proceedings, meaning that the basis for their statements or reports may never be tested.

57. The current process carries other issues too. Self-represented parties, for example, face understandable difficulties when attempting to organise the documents sought to be produced by them. This creates a risk that the court receives information which might be essential for the assessment of risk to children in that matter but may be lacking in relevance or cannot be used.

### Pressure on resources of agencies and police

58. As information is shared across state and territory agencies and jurisdictions and documents are sought using one or more of the possible procedures listed above, the

[27] Women's Legal Services Australia, *ALRC Review of the Family Law System: Response to Discussion Paper* (November 2018).

Law Council notes the risk of duplicating the information shared with the family law courts.

59. For example, information provided by police or a child welfare agency may be replicated in response to a Notice of Risk, which may in part duplicate information provided in response to a section 69ZW order – only to be followed by a party seeking the issue of a subpoena to such a body for the production of further documents. This raises the clear potential for welfare agencies and police bodies to expend surplus resources by providing the same information twice.

60. Further, increased filing rates have been widely reported, as has record increased demand for the services of the family law courts and reports of the increased incidence of family violence following the impacts of the COVID-19 pandemic.[28] These effects are likely to have resulted in upwards pressure on the services of welfare agencies and police. Sustained, appropriate resourcing by States and Territories to meet the demand under the current system will be essential and if the matters about which information is to be shared are to be expanded as a result of the National Framework; indeed, additional resourcing and training of key staff will be essential.

61. A further shortcoming with the current process is that ongoing production of documents is often required. A family's circumstances may be complex and may change regularly, leading to re-engagement with relevant agencies after a certain period of time. In such instances, an applicable agency will only provide relevant information if a further Notice of Risk is issued or a further section 69ZW order made. Self-evidently, if the parties and court are to access up-to-date information, they will need to be aware both of the fact that re-engagement has occurred, and that they will need to re-apply or issue a further order.

62. In light of the problems identified, the Law Council suggests that an audit is required to allow for a foundational assessment of what is presently working, where improvements need to be made, and whether any State or Territory has implemented a system that may be the preferred model for wider application.

63. Such an audit will be essential particularly to aid an understanding of resourcing needs (at State and Territory level and for Commonwealth funding). It is expected that resourcing needs will be especially acute in light of recent increased pressures upon State and Territory courts granting relevant protection/family violence orders, as a result of the COVID-19 pandemic and alluded to above.

64. The exchange of information between the state/territory and federal jurisdictions also requires not only collaboration and partnerships between agencies.

### Form and substance of information provided

65. As outlined at paragraphs 32 and 33 above, there is a concern that the form and type of information provided to the family law courts is not uniform as between agencies and jurisdictions. This ranges from chronological summaries and reports to self-selected,

[28] See, Law Council of Australia, 'Dire Federal Circuit Court backlogs prove family court merger a risk to families, judges' (Media Release, 23 October 2020). This outlines the Law Council's stark concerns that the FCC is simply unable to cope with its increasing workload, in light of the huge increase in the caseload of the Federal Circuit Court as revealed in its Annual Report of October 2020. See, also, Family Court of Australia, Annual Report 2019-20 (14 September 2020) at 17. This Report shows that the Family Court of Australia received a 7 per cent increase in Final Order Application filings from the previous reporting year, and 8.2 per cent and 7.5 per cent increases for applications in a case filed, and application for consent orders filed, respectively.

redacted copies of business records spanning several hundred pages, often with data prints which duplicate records of engagement.

66. This information is often of questionable practical and forensic utility in an evidence-based family law jurisdiction. Often, and particularly in relation to that provided by child welfare agencies, the information is not tested – for example, by reviewing relevant source documents and conducting cross examination – in the courts. Further, police material may include complaints and charges which have not necessarily led to conviction, as well as domestic and family violence applications which may be dismissed, discontinued or made by consent, without admissions.

67. Similarly, the views and reports of staff members of the relevant agencies that are expressed within the documents provided may be based on a range of information not known to the reader and without more, caution must be exercised in limiting the meaning and weight to be applied to statements apparently made by persons who (likely) will never be the subject of scrutiny in the primary proceedings.

68. The Law Council notes that information shared by child welfare agencies and police is agency specific and may or may not be created for forensic purposes. For example, a summary of notifications received by a child welfare agency setting out a chronology, reported child protection concerns and treatment of the notification by the agency, cannot and should not (without more) be treated as "proof" that there has been actual harm or risk of harm. Often these documents can run for a number of pages, but actual 'substantiations' that harm has occurred, or a risk of harm exists may be few or not recorded at all, despite the list of notifications.

69. Even leaving aside these evidentiary concerns, it is often necessary for legal practitioners to apply significant time and resources to sifting through documents, determining relevance and forensic utility. This poses a major challenge for self-represented parties. Further, where it can be located, relevant information is likely to fall at least partly under the category of hearsay, and so be prohibited from admission into evidence (except for the purpose allowed under section 69 of the *Evidence Act 1995* (Cth)).[29]

# Possible solutions

## Framework to standardise responses

70. As part of the National Framework, the Law Council encourages the AGD to formulate a mechanism which enables nationally standardised responses to Notices of Risk and section 69ZW orders.

71. This mechanism will require careful consideration. The probative value of information provided will depend upon consistency in the capture of source information, and in how that information is then assessed and expressed within any agreed protocol or framework. The differences between States and Territories will also need to be carefully assessed and accommodated for.

72. Engagement with stakeholders will be key to the success of this mechanism, by ensuring it generates what is actually required. So too will adequate resourcing, which will be needed to ensure the volume of requests can be met in a timely fashion and that there is a quality control on the content of the data being shared. Significant and ongoing training will be required.

[29] See, *Evidence Act 1995* (Cth) at s 59.

73. In creating this mechanism and more generally, the AGD must identify the various information collection and sharing responsibilities across Federal and State and Territory jurisdictions and their intersection with relevant privacy laws. This is expected to expose significant challenges in creating and implementing the National Framework.

### Appropriate evidence gathering

74. As set out above, the information revealed in documents provided by child welfare agencies and police to the courts is likely to have admissibility concerns. Accordingly, the Law Council considers that the National Framework should be used to create guidance for courts so that they know when to treat such information as a trigger for additional evidence gathering and disclosure processes to occur, rather than as evidence in its own right.

75. The adoption of this approach may well result in a considerable additional workload across the agencies. It is essential, however, that any court tasked with making orders in the best interests of a child has prompt access to relevant information about the experiences of that child and their family, independent of the decisions by parties about the case narrative they choose to present.

76. This is not to suggest Australia's should be an inquisitorial system; rather, it is to encourage the use of the family law courts' well established powers to make such further inquiries on their own motion as are necessary to receive evidence relevant to the matters being considered. Rigour in the gathering and presenting of evidence must be prioritised, especially where the safety and well-being of children and their families is a priority.

## Co-location

77. The Law Council commends the pilot co-location initiative currently being implemented by the Government as part of the fourth manifestation of its National Plan to Reduce Violence against Women and their Children. The program commenced in January 2020 and co-locates State and Territory child protection and policing officials in 22 Family Law Court registries nationwide (besides the Northern Territory).[30]

78. Each State and Territory has implemented the pilot somewhat differently. State and Territory-based agencies each have different processes and procedures, which creates challenges for uniformity. However, the Law Council supports attempts to create national consistency where possible and the development of nationally consistent guidelines.

79. As the Law Council understands, the Western Australian and Victorian co-location models are being used as the basis for further co-location pilot sites in Queensland, Tasmania, South Australia, and the Australian Capital Territory.

80. If implemented effectively, the co-location model assists in promptly providing information which is critical to the courts' capacity to understand context and assess risk. It is crucial that the learnings from the pilot be carried forward into consideration of how this program should continue or change beyond its scheduled ending of 30 June 2022, and that the necessary funding continue to be dedicated to future delivery of the program.[31]

[30] See, Australian Government, 'Co-location of State and Territory child protection and other officials in Family Law Court Registries' <https://plan4womenssafety.dss.gov.au/initiative/co-location-of-state-and-territory-child-protection-and-other-officials-in-family-law-court-registries/>.
[31] Ibid.

81. On this subject, the Law Council repeats the support which it expressed in its submission to the ALRC on the *Review of the Family Law System – Discussion Paper (***ALRC Discussion Paper**), caveated by the need for funding and resources.[32]

82. It is noted the co-location pilot has been impacted by the COVID-19 pandemic, which has seen significant changes to court processes. As a result, practitioners often now appear virtually and are less frequently physically present in court. This has created some disconnect between the co-location service and the ability for practitioners to engage with it. It is submitted that stakeholders will be better positioned to provide comprehensive feedback on the pilot after a prolonged period of physical co-location has taken place.

83. The Queensland Law Society (**QLS**) has indicated that, at present, clear information about the co-location pilot, including guidance on who can access the service and how, is not easily accessible. Unfortunately, QLS has advised that this has resulted in inconsistency and confusion for practitioners and parties. It is unclear, for example, whether a party's representative can request information from the service, or whether this is restricted to judicial officers and Independent Children's Lawyers, where one has been appointed. These processes should be clear and consistent across registries, and courts are encouraged to develop and publish this information as a matter of priority.

84. As part of the co-location initiative, police or child safety authorities are able to provide summaries of information on a matter. While it is acknowledged that these summaries may be less detailed than material produced under subpoena, the advantage of receiving the information in a timely manner, particularly in urgent matters, is significant. In assessing the information provided, judicial officers must be equipped with the skill and expertise necessary to properly understand the nuances of a particular matter, including dynamics of relationships involving domestic and family violence and presentation of victims in these circumstances. Ongoing education on domestic and family violence is absolutely essential in this regard.

85. In addition, it is important to ensure the co-location service operates in a culturally safe manner. This may include delivering ongoing cultural awareness training for staff, employment of First Nations staff and co-ordination with appropriate First Nations services, such as Aboriginal and Torres Strait Islander Services. QLS also recommends appropriate consultation is undertaken with First Nations organisations and communities in implementing and evaluating the service.

86. The Law Council acknowledges the considerable work invested in setting up the co-location project to ensure the system operates effectively. To continue to operate effectively, the co-location service requires appropriate staffing and infrastructure. The Law Council emphasises the importance of providing ongoing resourcing to support this.

87. Finally, the co-location service plays an important educative role for both the family law courts and other agencies. QLS understands the service has assisted in providing valuable insight into how other jurisdictions operate and in setting realistic expectations.

## Proposed national data sharing platform

88. As stated in the briefing note, the National Framework contemplates a technological solution such as a national data sharing platform to facilitate information sharing between the federal and state/territory jurisdictions and systems. While this is a laudable goal,

[32] Law Council of Australia, 'Submission to the Review of the Family Law System: Discussion Paper' (16 November 2018) at response to Proposal 6-8.

the slow development of the National Domestic Violence Order (**DVO**) Scheme has shown that it will not be without its challenges.

89. The commencement of the National DVO Scheme in November 2017 was a significant step, not only in making information about DVOs accessible, but also in having the orders themselves recognised and enforceable across all jurisdictions in Australia.[33] The Law Council considers that this has better ensured the safety of victims and their children. It should be recognised, however, that, despite widespread acceptance of the benefits of the scheme, it was years in the making. Hurdles ranged from securing compatible data and Information Technology systems, to financial and human resourcing implications.

90. Noting these challenges, the Law Council supports the proposed scoping of a technological solution to facilitate information sharing between the federal family courts and State and Territory criminal justice and child protection systems. It is anticipated this will be a significant undertaking which will require cooperation across jurisdictions and stakeholder groups. It is of course essential the protocols governing the accessing and releasing of information from the database would need to be harmonised across jurisdictions.

91. The ability to obtain up to date information from other agencies across jurisdictions, readily and quickly, would increase the capacity of the courts to make informed decisions about safety at an earlier stage.

92. Recognising these challenges, and that the costs of creating and offering ongoing support and maintenance for a national data sharing platform will be significant, the Law Council offers it support in providing ongoing consultation in relation to the scoping and design of any such platform.

## Risk-screening process

93. The Law Council supports the aims and rationale of the Lighthouse Project, and welcomes this initiative aimed at improving outcomes for people experiencing family violence. Comprehensive, early risk assessment and tailored support throughout the litigation process is critical in supporting families impacted by family violence.

94. The Lighthouse Project is in its early stages and updates on progress will help inform all stakeholders as to the impact it is having on the delivery of protective measures for families and to the resources needed to provide proper and timely assistance for families involved in high-risk cases. It is the Law Council's understanding that the Project is resource intensive and ongoing input for resources will impact on its success. Whilst resourcing is a matter for the Federal Government, it is clear this Project will also be impacted by any information sharing protocols and mechanisms between the relevant justice systems.

95. To reiterate, appropriate ongoing resourcing for the Lighthouse Project will be critical to its success. The Law Council has been advised that for some practitioners, the majority of their matters would fall into the 'Orange' or 'Red' categories. Consistent with this, there is some concern that the project may suffer 'volume creep' and without any extra judicial resources to support it, the timeframes and other goals may not be able to be maintained.

96. It is noted that recent amendments to the Family Law Act will make risk screening information confidential and inadmissible. The Law Council welcomes this amendment,

[33] See, Attorney-General's Department, 'National Domestic Violence Order Scheme' <https://www.ag.gov.au/families-and-marriage/families/family-violence/national-domestic-violence-order-scheme>.

which is likely to encourage honest disclosure and is consistent with the focus on public health rather than evidence gathering.

97. The establishment of a systematic approach to screening matters for family violence risks and triaging of matters according to the identified levels of risk by the Courts is welcomed. The Law Council looks forward to the early evaluation of and the roll out of the pilot to all registries, upon a positive evaluation, as soon as possible.