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

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

Dear Committee Secretary

Inquiry into the Family Law Amendment (Information Sharing) Bill 2023

Thank you for the opportunity to make a submission to the Committee’s inquiry into the Family Law Amendment (Information Sharing) Bill 2023.

The Family Law Council (“the Council”) supports the Family Law Amendment (Information Sharing) Bill 2023 which is intended to introduce a framework for information sharing aimed at improving access to information from state and territory family violence and child protection systems (“state agencies”) that is relevant to matters being considered in family law proceedings.

In that respect we note that section 43 of the *Family Law Act 1975* (“the Act”) specifically requires courts exercising jurisdiction under the Act to have regard to the need to protect the rights of children and to promote their welfare. Information held by agencies, including about issues of neglect, necessarily impacts upon the welfare of children.

The Council notes the interaction between the summary or short form information contemplated by s67ZBD and the focus upon more detailed documentary information contemplated by proposed s67ZBE. Given the significant number of cases in which information is requested in child related family law proceedings, the Council recognises the need to achieve a balance between the court being provided with information as quickly as possible, and ensuring the information being provided is as detailed as possible.

In that respect, the Council notes feedback from judicial officers that, in those states where co-located officers from state agencies have been placed in the Federal Circuit and Family Court of Australia (“the FCFCOA”), co-located officers are providing great assistance. This includes, where required, making every endeavour to obtain information as quickly as possible. This can be vital

with respect to urgent applications, such as an urgent application for recovery of the child where issues of risk need to be quickly assessed, or Evatt List and Lighthouse matters.

The information is also vitally important when dealing with Critical Incident List matters. That is a List where urgent consideration is given to placing the children with a non-parent in circumstances where their parent or parents have become incapacitated or deceased including, tragically, sometimes by violence at the hands of the child's other parent. Those matters often do not have a natural contradictor, hence information from the co-located officer can give a better view of any serious risks of harm to the children.

The Council notes and appreciates that co-located officers are making every endeavour to provide summary information as quickly as possible, but sometimes with reservations in circumstances where there has been insufficient time to undertake a detailed search of the totality of information held by a state agency. The Council acknowledges that it is appropriate for those officers to have legislative protection in circumstances where they are providing what can be highly sensitive information to the court. In our opinion, section 67ZBD facilitates the provision of such summary information on an urgent basis while giving protection to those officers. Significantly, state agencies will, at their own initiative, be able to provide information that the agency considers relevant to the issues being considered by the courts (ss67ZBD(5) and ss67ZBE(5)).

At the same time the Council agrees that it is appropriate for the court, at any stage, to have the power to issue a request for more detailed information pursuant to proposed s67ZBE with a consequent obligation on the agency to advise the requesting court if any information has been withheld, and the basis upon which that has occurred. The court and the agency will then be in a position to engage in a dialogue, assisted by co-located officers, to determine if the information is critical and what safeguards can be put in place to address the agency's concerns.

The Council is of the opinion that the safeguards set out in the legislation in respect to protecting the privacy of citizens to the greatest extent reasonably possible are appropriate.

However, the Council notes a potential procedural fairness issue with respect to proposed 67ZBH, which requires the court to admit into evidence any particulars, documents or information provided by an information agency which they intend to rely upon when determining a matter. The section ensures that the parties to the proceedings are aware of the information and have an opportunity to make submissions regarding the admissibility of the documents and issues of weight.

There is a risk, however, that where the identity of the complainant is not disclosed, a person who is the subject of adverse commentary in the documentation provided by the state agency may be denied the opportunity to test the credibility of the informant or complainant.

In that respect, for instance, there is a risk that a complaint or report may have been made to a state agency or agencies about a litigant in family law proceedings for ulterior purposes. That could include, for example, seeking to manufacture evidence in support of their case and against their opponent.

An additional concern is the potential for systems abuse if a person is motivated to make a complaint or provide a report to state agencies for the purpose of coercing or controlling the litigant involved in the family law proceedings. In those circumstances Parliament may wish to include a provision similar to s69ZT(4) of the Act which clarifies that the court will give such weight to the evidence as it thinks fit in the circumstances.

The Council supports the inclusion of s67ZBH(5) which provides that the court is not required to admit documents if it only intends to rely on the documents for case management purposes, such as, risk screening and triaging of a matter on the basis of risk. This includes by referring the case, if necessary, to the Evatt list which focuses on those more complex cases in which there are allegations of serious violence and/or child abuse.

Finally, the Council notes that the effective operation of the proposed information sharing arrangements is, in the Council's view, predicated upon the continuing operation of the successful co-location pilot that has been operating in most registries of the FCFCOA and in the Family Court of Western Australia since 2009.

This is because access to co-located officers facilitates information exchange as to the nature of the proceedings in respect to which information is sought so that a targeted search can be undertaken for relevant information. At the same time, feedback can be provided on behalf of the state agencies as to the broad nature of documentation in possession of the agency so that further consideration can be given to the making of a further request for additional and/or updated information.

In that respect, the Council notes that the Information Sharing Protocol between the courts and the state agencies will be a particularly important document. The Council has not had the opportunity to consider a draft of that document and considers that its development and implementation will require consultation with the state agencies and Independent Children's Lawyers ("ICLs") given their critical role in information gathering, which could occur through National Legal Aid and the Family Law Section of the Law Council of Australia.

This consultation will confirm the nature of the documentation state agencies have that might be relevant, focusing on limiting the workload and streamlining the processes associated with information sharing, for example, accessing reports or "standard" documents that the state agency has already prepared without having to create new reports. Timely, effective information sharing processes are more likely to be facilitated if the impact on the workload of state agency staff is minimised.

It is the Council's view that the protocol should provide for documentation concerning not only the parties to the litigation but also other persons who may be relevant to the care and support of the child or children the subject of the proceedings. Without in any way being exhaustive, that information should include information that is commonly provided with respect to a person's criminal history and other interactions with law enforcement authorities. Information should further include details as to whether the person has, or has applied for, gun licences or has criminal associations with outlawed or prescribed organisations.

Please do not hesitate to contact the Secretariat of the Council in the event that any additional clarification is required of the matters we have raised in this submission.

Yours sincerely

Deputy Chief Justice Robert McClelland
Chairperson
E-mail: familylawcouncil@ag.gov.au