THE LAW SOCIETY
OF NEW SOUTH WALES

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9 August 2021

Mr Michael Tidball
Chief Executive Officer
Law Council of Australia
GPO Box 1989
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By email: nathan.mcdonald@lawcouncil.asn.au

Dear Mr Tidball,

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

Thank you for the opportunity to comment on the Attorney-General's Department (**AGD**) Consultation Paper on Operationalising the National Strategic Framework for Information Sharing between the Family Law and Family Violence and Child Protection Systems.

In principle we support processes that facilitate the family courts' awareness of family violence risk for the purposes of protecting vulnerable parties through case management and determining the substantive legal issues. We agree that, currently, the use of subpoenas to inform the courts about family violence can be cumbersome, particularly for self-represented litigants, and does not necessarily produce documents that are relevant and appropriate.

While the proposed reform may help to address these issues, the benefits must be balanced with the risk of exposing the parties to further violence if private or sensitive information is brought to light or made available to the parties. In addition, we note the proposed reform will require proper resourcing and training of the courts and agencies involved.

We look forward to commenting further when a detailed proposal and/or draft legislation is available.

Our responses to the focus questions are set out below.

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

Focus Question B1:

> *Do you foresee any issues with the processes outlined above? If so, do you have any suggestions for processes or approaches to dealing with the identified issues?*

We agree that the power to make a 'short form' order and/or an order under an amended s 69ZW should be discretionary. There would be cases where the court has identified the existence of family violence risk, but considers it is adequately informed by the existing evidence as to the nature or extent of that risk.

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Where the court considers it does require more information to assess family violence risk, the 'short form' process would seem an appropriate initial step in doing so. We note that the process will be most effective if the order identifies all the information relevant to risk while minimising the capture of irrelevant information. We suggest the court's power should be defined so that a 'short form' order is capable of eliciting 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 of complaints or charges of family violence, while in others it may be sufficient to obtain recorded convictions or prior court orders. It will also be important for the court 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.

We suggest that where the 'short form' process indicates there are records of interest, the parties should be notified and have the opportunity to make submissions in relation to a possible s 69ZW order. This will ensure that any other factors or information that 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 the order, and which information should be shared with the court and the parties, so as to minimise the risk to victims/survivors. It is important that information is not inappropriately shared with perpetrators which could pose a risk of harm to a victim/survivor or their family.

In relation to whether information elicited through a s 69ZW order is made available to the parties, in our view this should be a matter for the court's discretion, primarily taking into account the safety of the parties and their families. 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. Clear protocols should also be in place around the parties' access to, and use of, the information produced; these should be aligned with the court's risk management procedures for the protection of victim/survivors.

We note the proposed reforms may have resourcing implications for the relevant state and territory agencies. The ability of agencies to comply promptly with a 'short form' order or a s 69ZW order will be crucial to the efficacy of the reform, particularly as the need to assess risk will often be urgent. Training will also be required on relevant privacy principles, and on identifying the various types of information that can be shared in light of family violence risk. We note, for example, models such as the 'Safe and Together Model' which aims to help child welfare professionals to use language in their documents that focuses on the risk to children posed by perpetrators rather than victims/survivors.[1]

There may also be resourcing implications in positioning the courts to manage and/or review any documents produced in response to a s 69ZW order. In the experience of our members, in matters with extensive involvement by child-protection authorities and/or police, thousands of pages of documents and records can be produced.

Focus Question B2:

> *Do you think family safety information sharing would be useful in property matters? If so, how? Are there any practical considerations different to parenting matters that should be considered if property proceedings are included in the National Framework?*

We support the proposal to extend family safety information sharing to property matters. This would allow safety factors to be considered in the management of these matters, while facilitating additional safety measures such as referring vulnerable parties to support services.

[1] 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.

There may be 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.

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

Focus Question C1:

> *Do you hold any concerns about sharing these forms of information? Are there additional forms of family law court information you believe may be helpful to AISEs assessing or responding to family safety risk?*

We are particularly concerned 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 reports commonly contain expert opinions about health or historical circumstances which, unlike the findings in a judgment, are not the product of tested evidence. Clear protocols should be developed on the extent to which such information is shared, and on its use by the recipient agency.

Additional forms of family court information which could be helpful include Child Dispute Conference Memorandums. These documents are often prepared early in the matter, 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.

D. Exceptions and safeguards to information sharing

Focus Question D1:

> *Are there any risks not considered, particularly with respect to self-represented litigants? Are other exceptions or operational safeguards not already contemplated necessary?*

There are benefits to providing self-represented litigants with an alternative to filing a subpoena as a means of informing the court of family violence risk. The formalities around issuing subpoenas, including the management of conduct money, can be time-consuming and difficult for a self-represented litigant to navigate.

However, as discussed in response to question B1, we suggest the parties should have an opportunity to make submissions as to the scope of the order. This will allow parties to submit that one of the exceptions applies. In effect, it will preserve the ability, which is currently available when a subpoena is issued, for a party to object to production before the information is shared.

In some cases, however, the parties, and indeed the court, may be unaware as to whether information or documents captured by an order fall within the scope of one of the exceptions. Determining that question would be an administrative decision which would fall to the relevant agency staff. This again points to the importance of adequate resourcing and training of agency staff.

If you have any further questions in relation to this letter, please contact Sue Hunt, Principal Policy Lawyer on (02) 9926 0218 or by email: sue.hunt@lawsociety.com.au.

Yours sincerely,

Juliana Warner
President