

30 May 2023

Committee Secretary
Senate Legal and Constitutional Affairs Committee
legcon.sen@aph.gov.au

Dear Committee Secretary,

**Re: Inquiry into the Family Law Amendment (Information Sharing) Bill 2023
National Legal Aid Submission**

Introduction & summary

Thank you for your correspondence advising of the Inquiry into the Family Law Amendment (Information Sharing) Bill 2023 (12 May 2023).

National Legal Aid (NLA) supports the Bill as a measure to promote the safety and well-being of people, and the best evidence being before the family law courts when determining arrangements in a child's best interests.

NLA was consulted in September 2022 in relation to an exposure draft of the Bill and has contributed to consultations and family law reviews and inquiries in connection with information sharing and which have led to this Bill.¹

Resourcing to support information sharing including for the education, training, professional development, and occupational support of those people involved in this challenging and highly sensitive work, will continue to be necessary. Related concerns are addressed below.

About National Legal Aid and Legal Aid Commission Services

NLA represents the Directors of the eight Australian State and Territory Legal Aid Commissions (LACs).

LACs provide over 1.5 million legal assistance services each year including family law, family violence, child protection and criminal law legal services across the Commonwealth and State or Territory legal systems.

¹ Explanatory Memorandum p. 3 the Bill has been developed through close and lengthy consultations with peak national non-government organisations, and a targeted exposure draft was provided to these stakeholders.

In 2021-22:

- 23,000 Grants of Legal Aid for ongoing legal representation in Commonwealth family law courts, and 22,063 Grants of Legal Aid for ongoing legal representation in State and Territory courts for child protection and family violence matters, were made. Around 86% of the Grants of Legal Aid for ongoing representation in Commonwealth family law matters also involve family violence.
- 5,240 Independent Children's Lawyers (ICLs) were appointed by LACs in Commonwealth family law matters. 3,500 Independent Legal Representatives for children were appointed in State and Territory child protection proceedings.
- A further 47,668 Commonwealth family law duty lawyer and social support services were provided by LACs, as were 365,074 duty lawyer services in family violence, child protection and criminal law matters.
- Many legal advice and information services were also provided.

LAC clients can be party to multiple proceedings in different jurisdictions at the same time. LACs are frequently involved in individual matters which span each of the family law, child protection, family violence, and sometimes also criminal law jurisdictions.

The appropriate sharing of information to promote the safety of children and family members is therefore an essential concern of LAC practitioners.

Concerns

Information sharing arrangements

NLA looks forward to seeing proposed regulations, including prescribed agencies² and safeguards, and seeks to be consulted in relation to them.

Protocols and training, including cross-organisational training, will be essential to facilitate the appropriate sharing of information in a timely way and to minimise workloads, e.g., to support agency staff in identifying what can be shared without having to create new reports, and to help eliminate a risk of inappropriate sharing of information.

NLA confirms LAC' experience that there are substantial benefits in the co-location of the agency official at family law registries providing a clear point of contact to achieve timely relevant information.

Independent Children's Lawyers

LACs appoint ICLs upon receipt of Order and Request from the family law courts. ICLs have three key functions being children's participation, evidence gathering, and litigation management.³ ICLs are required to have undertaken specialised training for the role. There have for some time been serious and increasing ICL resourcing concerns due to a combination of limited funding, the

² Understood from the Explanatory Memorandum p.3 to be "participating State and Territory child protection, policing and firearm agencies".

³ See Rae Kaspiew et al, *Independent Children's Lawyers Study* (Australian Institute of Family Studies, Final Report, 2nd edn, (2014) xi.

extremely challenging nature of the work, and issues associated with recruitment and retention. Further information about ICLs is attached to this submission.

It is anticipated that, if passed, the Bill and associated practices will help to streamline and simplify the information flow between agencies and the family law courts. In turn this might help to a limited extent to contain this particular aspect of the ICL workload as functions of the ICL include gathering evidence and ensuring that it is in admissible form. However, a continuing concern is the volume of information often involved and the mechanism/s to be engaged to ensure scrutiny of all information to be shared at the flow and admissibility points. It is also noted that whilst proposed 67ZBK prohibits request for the issue of a subpoena by a party (including the ICL) without permission where an Order has been made under 67ZBE, that the subpoena process could be expected to continue to be relevant and important in ensuring that all the information that should be before the Court is. The need for information can be urgent and information can quickly become out of date. In relation to proposed 67ZBE there are some reservations because of any potential for the scope and/or timeframe of a particular 67ZBE Order not capturing all relevant information. Accordingly, the concern is that either the ICL be able to request subpoenas without permission or that there be an established mechanism to ensure that permission is very quickly achievable. NLA confirms that LACs seek to be consulted in relation to the regulations and any related protocols to be developed.

LACs will continue to monitor concerns about ICL workloads as appropriate.

Review 67ZBL

NLA notes the proposed Review of provisions (67ZBL), i.e., operation of the Sub-division and regulations made for the purpose of the Sub-division, and their effectiveness in meeting the Objectives of the National Strategic Framework for Information Sharing. A review will assist to inform any changes that need to be made to the legislation and regulations and potentially to associated practices.

Conclusion

Thank you for the opportunity to provide a submission to this consultation.

Yours sincerely,

John Boersig
Chair, National Legal Aid

Attachment A to NLA submission to the Family Law Amendment (Information Sharing) Bill 2023**Further information about Independent Children's Lawyers**

ICLs are provided by the LACs. ICLs "are ordered by the family law courts in family law parenting order matters involving the most serious cases of abuse and neglect on the basis of the *Re K (1994) FLC 92-461* factors. Once an Order is made, the court provides the Order to the local LAC with a request that the LAC appoint an ICL. It is the role of the ICL to ensure that the best interests of the child/ren are represented. The ICL role provides vital assistance which includes the gathering of all relevant evidence for the court. The ICL is independent of the parties. The ICL is often referred to as the 'honest broker'."⁴ In addition to gathering critical evidence, the ICL also manages litigation reducing the burden on court resources, and facilitates settlement wherever possible and appropriate, thereby saving court time and associated resources.

To be appointed as an ICL by a LAC, a lawyer needs to have successfully completed the ICL National Training course, have a minimum of 5 years relevant family law experience, and be accepted onto a practitioner panel or list held by the LAC. The need for further resourcing for ICLs, particularly in relation to numbers of appointments, and improved quality measures such as additional professional development and auditing of practices, has been widely recognised.⁵ There are around 600 ICLs nationally.

Grants of Legal Aid for Commonwealth Independent Children's Lawyers								
	2014-15	2015-16	2016-17	2017-18	2018-19	2019-20	2020-21	2021-22
Total	4,899	5,027	5,224	5,278	5,065	5,368	6,110	5,240

Some LACs ration appointments, and the courts, particularly in some locations, are mindful of funding constraints in making orders. Accordingly, the numbers of appointments do not reflect the real extent of need. COVID-19 has likely had an impact on appointments made, noting the increased appointments in the 2020-21 year. Average ICL case costs have also increased over time, including in relation to professional fees, and disbursements such as medical reports and expert witness expenses, and program administration.

NLA has raised ICL funding concerns with the AGD and has been working with AGD in relation to them.

⁴ National Legal Aid 2021-22 Pre-Budget Submission, 5.

⁵ For example, see Australian Law Reform Commission, *Review of the Family Law System*, ALRC Report No 135 (2019) 377.