17 February 2017

Submission to Department of Premier and Cabinet

Family Violence Protection Amendment (Information Sharing) Consultation Draft Bill 2017

Domestic Violence Victoria (DV Vic), Victoria Legal Aid (VLA), Women's Legal Service Victoria, the Federation of Community Legal Centres (FCLC) and Law Institute Victoria (LIV) commend the Government's prompt action on the Royal Commission into Family Violence (Royal Commission) recommendations on information sharing and the important actions set out in the Government's recently released *Ending Family Violence: Victoria's Plan for Change.*

Together VLA, FCLC members, and LIV members provide Victoria's family violence legal services, providing the Victorian community with legal advice, court-based legal services, legal education, and legal information related to family violence. Women's Legal Service Victoria is a specialised Community Legal Centre supporting family violence survivors.

As the peak body for family violence services in Victoria, DV Vic has a broad membership of more than 80 state-wide and regional family violence organisations across Victoria that provide a variety of responses to women and children who have experienced family violence. DV Vic's members include every specialist family violence service, community health and women's health agencies, local governments and other community service agencies.

DV Vic, VLA, LIV, FCLC and Women's Legal Service Victoria welcome the opportunity to be involved in the development of a family violence information sharing regime and to provide the Department with our whole-of-sector submission regarding the consultation draft Bill.

In this submission we do not address in detail all aspects of the Bill. We would welcome ongoing engagement with the Department in relation to the detail of the regime. We further welcome the indications that this regime is to be rolled out gradually and carefully, and we endorse that approach. We suggest that a cautious approach be taken to legislation at this stage and that early experience of this regime is used to inform the two-year review.

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Principles of information sharing for safety

The purpose of the Royal Commission's comprehensive reforms is the safety and wellbeing of women and children affected by family violence, and the accountability of perpetrators. The family violence information sharing legislation is one important element of these reforms.

The family violence information sharing legislative regime will support the sharing of critical risk-pertinent information where it is currently not occurring due to confusion or concerns about breaching privacy laws. A clear framework will also legitimise informal information sharing that currently occurs across agencies as part of managing risk. We welcome the draft Bill's progress towards developing that framework, and submit that further consideration and detail in certain areas is required to keep women and children's safety paramount.

We set out below a number of areas of general principle for further development. Later in our submission we make specific proposals in some of these areas.

- **Prescribed organisations**

The information-sharing functions of the key organisations must be specific and highly prescribed through the legislation, as well as in regulations and protocols that guide the legislation's use. Bringing non-specialist or generalist/universal organisations into the family violence information sharing regime and allowing them to access personal information will only enhance the system's ability to keep women and children safe and hold perpetrators to account if these organisations possess and operate with a mature knowledge and understanding of the nature and dynamics of family violence. Training and workforce development will be critical, and it will take time for the skill level and practical experience of organisations to develop to a suitable standard. We believe that in the first instance prescribed information sharing entities (and roles within entities) should be kept to a very small group of organisations, with clearly defined roles and responsibilities.

- **Risk relevant information only**

The draft Bill does not specify the types of information that can be shared by information sharing entities, but we are pleased to see the principles in draft s144C giving guidance about the necessary connection to safety from family violence. Entities must understand their distinct purpose for sharing information; it is not to share every piece of information known about someone, it is to only share information that is relevant to managing risk of family violence. Later in our submission we suggest enhancements to draft s144C.

- **Self determination**

Family violence survivors have experienced a loss of power and control through family violence. This is particularly true for Aboriginal and Torres Strait Islander women, who face additional barriers and deterrence when seeking to access support services, particularly mainstream and non-culturally-specific services.[1] An information sharing regime designed to support their safety and recovery needs to be based on a principle of self-determination, that is, giving Aboriginal and Torres Strait Islander women control over what information is shared, with whom it is shared, and the potential consequences of sharing information – recognising the further loss of power that sharing information without informed consent entails. Aboriginal women and their communities need to retain control of information sharing.

- **Risk of discrimination and avoiding help**

If the information sharing regime is poorly implemented or is misused, there is a risk that women will avoid seeking support or reporting violence because they fear losing control of their information and having it shared widely across services. This will be particularly concerning to those who experience additional family violence-related risks and barriers, especially Aboriginal and Torres Strait Islander women, where the risk will be much greater when information is shared without their consent. Any perception or experience of sharing beyond what an Aboriginal woman has consented to is likely to lead to disengagement from

[1] Aboriginal Family Violence Prevention and Legal Service Victoria Submission to the Victorian Royal Commission into Family Violence (June 2015) page 23.

services and the exacerbation of strong distrust of services, particularly in relation to inappropriate Police responses and child protection responses and child removal.[2]

- **Misidentification of primary aggressor**

A large number of women are incorrectly identified as perpetrators of family violence, which can occur where professionals are not sufficiently informed and skilled in family violence perpetrator assessment or identifying trauma-based behaviour which may give rise to misidentification. This is a particular risk for Aboriginal and culturally and linguistically diverse women who, in addition, commonly experience racial discrimination and prejudice when engaging with Police and mainstream services. The information sharing regime may compound this problem where women's information is disclosed to a range of agencies with potentially significant adverse consequences, such as child protection notifications and intervention. Appropriate and timely safeguards need to be in place to ensure information is not shared that would put women and their children at risk of family violence and at risk of further trauma associated with criminalisation and further cultural and familial fragmentation.

- **Privacy and small communities**

In a family violence context, protecting privacy is a critical measure to ensure safety. Privacy and data protection are as important as information sharing to ensuring safety and wellbeing. With this in mind, the information sharing regime must be considered for communities that know each other well. For example, in small town communities where 'everyone knows everyone' there are already challenges to maintaining anonymity and confidentiality. Kinship and familial relationships within Victoria's Aboriginal communities can also create situations where clients and workers may know each other or have a kinship connection. A broader range of services having information about family violence risk will increase the likelihood of an actual or perceived breach of confidentiality or other duties, as well as conflicts of interest. The potential consequences must be more thoroughly considered. At a minimum, clearly defined roles and responsibilities for information sharing entities, and training and workforce development are essential. Additional consideration is required for culturally specific workforce development and protection.

- **Children should be treated differently**

The Royal Commission emphasised the distinct nature of adolescent violence in the home (AVITH), and the need for therapeutic and holistic interventions which reduce stigmatisation of children and young people.[3]

- **Oversight and monitoring of the scheme**

We welcome draft Division 9 (sections 144YA and 144Z) relating to confidential information complaints. However, we do not believe this alone will be sufficient for effective oversight and ongoing monitoring of the scheme. Robust governance and accountability structures will need to be considered in the implementation of the scheme to ensure that issues are identified and dealt with efficiently.

[2] Above, page 34.
[3] Volume IV, Chapter 23, page 149 onwards.

In light of the above overarching considerations, the remainder of this submission makes specific comments on the draft Bill, including recommended amendments.

Children's information: questions 1, 5 and 6

As noted above, it is critical that information sharing in relation to children and young people is treated in a specialist manner rather than merely left to the general regime. This is not currently accommodated by the draft Bill. Some of the issues we have identified include:

- **No provision for children's consent to information sharing**

  Children are able to consent, refuse consent, give instructions and express views in a wide range of legal contexts. It is appropriate that children's informed consent is sought when children reach an age where they are able to give that consent, for the same reasons that any victim consent is important. It is also consistent with children's internationally recognised human rights.[4]

  The age at which a child can give informed consent is not the same for every child, and consideration should be given to allowing for application of professional judgement as to a child's ability to consent or give a view.

  It may also be appropriate to consider allowing for professional judgement to determine that for some young people it is not in their best interests to seek consent even though they would be developmentally able to consent or refuse. This sort of professional judgement should be exercised by relevantly qualified practitioners in relevant roles.

- **Special safeguards**

  As noted above, the Royal Commission emphasised the distinct nature of adolescent violence in the home (AVITH), and the need for therapeutic and holistic interventions which reduce stigmatisation of children and young people.[5]

  Parents will be extremely unwilling to disclose AVITH if they are concerned their disclosure will criminalise their child. Further, inappropriate disclosures can lead to outcomes which reduce victims' safety, for example, disclosure of a youth criminal record to a school may result in prejudice which endangers the child's position in the school, marginalising the child, increasing risk of criminalisation and increasing risk to the victim.

  Both the child information sharing regime and the family violence information sharing regime need to treat children's information differently from adults', considering clauses such as sunset clauses, and limitations on access, in order to reduce stigmatisation.

We appreciate that the application of the regime to children – as victims, children of victims, perpetrators, and third parties (including former victims) – is a complex issue. We would welcome the opportunity to engage in further consultation, for example targeted workshops, around this area. The expertise of the Commissioner for Children and Young People will also be important in drafting these provisions and in reviewing the operation of the legislation.

[4] United Nations Convention on the Rights of the Child, article 12.
[5] Volume IV, Chapter 23, page 149 onwards.

Draft section 144C: principles

We suggest amendment of draft section 144C in order to emphasise the importance of victim consent, privacy, and self-determination. We suggest two new subsections and an amendment.

New sub-sections: self-determination and empowerment

The principles correctly emphasise that information sharing should focus on safety, but do not explicitly guide entities to actively seek consent where appropriate and to support victim self-determination, both of which are also essential to supporting safety.

We therefore suggest two new principles, stating that, "Information sharing entities should …"

- In deciding whether to collect, use, or disclose an Aboriginal or Torres Strait Islander person's confidential information, take into account principles of self-determination and the specific barriers that Aboriginal and Torres Strait Islander people face to engagement with support services.
- In deciding whether to collect, use, or disclose a victim's information, seek to empower the victim and maximise safety by seeking the victim's informed consent.

We suggest that practice guidelines relating to these principles should suggest advising victims of their right to seek independent legal advice. Aboriginal victims must be offered referral to a culturally safe legal assistance service.

Draft section 144C(2)(d): purposes of collection

Draft section 144C (2)(d) stipulates that entities should collect, use or disclose information only to the extent necessary to (i) maximise the safety of children and adults from family violence; and (ii) hold perpetrators of family violence accountable for their actions.

We agree with this inclusion of a principle that directs attention to the fact that information sharing should also be constrained or limited to appropriate functions. We note that, in managing risk to family violence, protecting privacy is as critical as sharing certain information is to ensuring safety. It is an unfortunate fact that sometimes privacy and safety comes at the expense of perpetrator accountability, but safety must always be the first priority. We therefore suggest consideration of deleting or amending (ii), to make clear that the perpetrator accountability purpose is subsidiary to a safety focus.[6]

Given there is no specific outline of the kinds of information that can be shared by entities, we are also concerned that a principle noting information sharing can be pursued to "maximise" safety could be too broad. We suggest changing (i) to "assess or manage risk to the safety of children and adults from family violence".

[6] The Royal Commission chapter on information sharing does not suggest perpetrator accountability as a reason for information sharing.

Draft section 144E: "excluded information"

We make a number of comments in relation to draft section 144E.

Draft section 144E: excluded information: clear drafting

One of the Royal Commission's overarching design principles for the new regime is that the "legislation should be clear and succinct, so that it can be effectively applied by front-line workers."[7]

As the Bill is currently drafted, before sharing any information every information sharing entity must be satisfied that none of the exceptions in 144E apply. This means that (for example) a homelessness intake service must be able to ascertain whether the information they share may (for example) prejudice a trial.

Our view is that this assessment will be difficult and potentially confusing for practitioners whose specialisation is not law. The requirement for all practitioners to make assessments about risks of prejudice and privilege may make the regime more difficult to follow, may create compliance costs as participants seek legal advice, and may not create a culture where sharing entities embrace and apply the practice willingly.

We suggest that options to address this include linking the s144E exclusions to particular professions, so that it is clear that not all professionals need to be concerned with understanding all the exclusions, and/or making it clear that these only apply to the extent that the entity could reasonably be expected to know or determine a factor.

Draft section 144E: safeguarding against mis-identification

The Royal Commission noted concerns about the frequent mis-identification of victims as primary aggressors, and the often significant consequences of that mis-identification.[8]

At present the draft Bill does not recognise and manage for this issue. We are concerned that this could create significant risks to victims and could possibly also generate an increase in systems abuse by perpetrators coming forward identifying themselves as victims in the first instance.

We suggest that one way to address this risk is to insert a provision allowing prescribed organisations to decline to share 'perpetrator' information without consent when the organisation has reason to believe a person has been wrongly identified as a perpetrator.

It is also important that the fact of a request is not communicated in any way that might give a perpetrator information about a victim (including the fact that a victim is accessing support services, and particularly where those support services are located).

- We give the hypothetical example of Kerry (Primary Aggressor) and Ashley (Victim/ Survivor). Kerry approaches a Melbourne support service alleging that Ashley is the primary aggressor. Ashley, the primary victim/survivor, seeks support from a regional support service in the small town where Ashley has relocated for safety. Both support services make and receive requests for information. Both services might wish to either refuse the requests or seek consent from their clients. However, it is important that

[7] Volume 1, page 187.
[8] For example, in volume III at page 17.

Kerry does not find out that Ashley has relocated and/or that Ashley is seeking support. Kerry knowing either of those facts could increase the risk to Ashley.

We suggest that safeguards to keep the fact of a request secret from a perpetrator – including perpetrators not identified as such – should be included in the Bill whether or not organisations are permitted to decline to provide information about a wrongly identified 'perpetrator' without consent.

Draft section 144E: Lawyers' obligations are modified

Were any lawyers to be included in the regime (for example, lawyers embedded in prescribed organisations providing other services), our view is that the Bill as currently drafted would modify or conflict with those lawyers' professional obligations.

Lawyers hold information which is not necessarily subject to privilege but which lawyers cannot disclose due to other professional obligations.[9] If the Bill does not intend to modify lawyers' obligations of confidentiality to their clients, the 144E(e) exclusion would need to be widened beyond privilege, to allow lawyers to refuse to share information if sharing would be in breach of professional rules.

If s144E(e) is not modified, the Act will require lawyers to breach professional obligations (and will purport to operate as a defence to that breach). Clients seeing lawyers inside the regime will have different access to information, and different privacy rights, from clients seeing lawyers outside the regime. This raises an access to justice issue as not all clients have the means to choose the lawyer they see. We therefore recommend that all lawyers be explicitly excluded from this regime, with the exclusion to be reviewed in two years' time, including by way of extensive consultation with the legal profession and its representative bodies.

Question 2: Prescribed entities

We make a number of comments regarding prescription of entities.

Tighter prescription as a safeguard

We welcome the indication[10] that a phased approach to prescribing entities is being considered. Our view is that the Appendix A list of entities is too extensive for an untested regime. We suggest the following safeguards against some of the risks of introducing a new regime concurrent with efforts to create culture change and ensure that families are not discouraged from help-seeking behaviour by concerns about wide information sharing with limited consent.

- Prescription of fewer entities as 'risk assessment entities': we suggest that prescription as a risk assessment entity should be limited to entities (and roles within entities) that carry expertise in understanding the dynamics of family violence. Entities with other specialisations (for example alcohol and drug intake services) should not be risk assessment entities.
- Prescription of fewer entities as information sharing entities, and

[9] For example, Australian Solicitors Conduct Rules, rules 4 and 9.
[10] Page 4 of the guide to the consultation draft Bill.

- Prescription of roles rather than entities: we suggest prescription of a limited number of roles rather than entire entities. An entity that would otherwise be prescribed could have a relevant officer prescribed (along lines we understand are being considered for the proposed Child Link – a system which collects much less sensitive information than is being shared in the family violence information sharing regime). Within specialist family violence agencies with relevant expertise, all roles may be prescribed.

We suggest this tighter prescription as a safeguard against the risks of disengagement – particularly by Aboriginal women – in the face of a perception of increased information sharing.

We also suggest it as a mitigation against the risk of wrongful identification of the primary aggressor, discussed earlier. The Bill does not ask entities to assess a primary aggressor. Instead it asks only whether a person "is alleged by another as posing a risk of family violence" before sharing for risk assessment purposes.[11] To protect against the harmful effects of mis-identification as perpetrators, risk assessment entities/roles must be very tightly prescribed. Below (at question 3) we suggest safeguards in relation to other prescribed entities.

Alongside limiting the actual information that is shared to the information that is specifically required to manage the risk,[12] we suggest that more focused prescription of entities will contribute to a regime that is safer, easier to understand, and easier to trust.

Prescribing legal services

We have given significant consideration to the role of lawyers and legal services in the information sharing regime and how legal professionals and services can contribute most constructively to an information sharing regime and culture. Legal assistance is a key point of possible early intervention, which can contribute to perpetrator accountability and family violence prevention.

We are of the shared view that legal services should not be prescribed entities at this stage. We have come to this view for a number of reasons, which have been described in previous submissions but are summarised below for ease of reference:

- Legal services are not able to share much of the information they hold, as much of it is "excluded information" subject to privilege.
- The information that legal services may hold that could be shared would be likely held by other prescribed organisations within the regime and therefore likely of little value to risk assessment. Unlike Victoria Police who hold charge and criminal history details, Corrections who hold release date and sentence details, and family violence services who may hold specific details revealed by a victim relevant to police investigation, legal services were not one of the organisations named by the Royal Commission as holding information vital to improving safety under this regime.
- The administrative burden of determining what information legal services can share would be heavy, particularly relative to how little (if any) unique information legal services can contribute to the sharing regime. The complexity of establishing whether

[11] Draft section 144Q(2)(a) read with Division 2.
[12] See our proposal above in relation to draft s144C(2)(d), purposes of collection.

any given piece of information is or is not privileged also works against the design principle that the regime be easy to apply and understand.

- Legal services do not tend to have a risk assessment or management role, but rather a risk identification and referral role. Legal professional rules allow information sharing without consent to prevent imminent serious physical harm or to prevent serious crimes.[13] In other instances, a lawyer's role is to identify and respond to risk with relevant supports and referrals. This role for legal services is promoted at VLA using the Client Safety Framework, which trains every VLA lawyer in every field to identify and respond to family violence risk, including by making referrals to specialists who operate in prescribed organisations. This role for lawyers as risk identifiers but not risk assessors or managers was also recommended by the Family Law Council's June 2016 Final Report on Families with Complex Needs.

In addition, many lawyers who assist clients in family violence matters are not staff in government or community agencies but private practitioners in various practice structures from sole practitioner to small, medium and large firms as well as barristers operating independently at the Victorian Bar. It would be difficult to prescribe private practitioners as "entities" under the regime, however, were some legal services to be prescribed and not others, concerns arise about parity between clients of privately paid lawyers and clients of the legal assistance sector. A key element of an equitable legal system is that free legal services or legally aided services are provided on the same basis as services available from lawyers paid directly by clients. Accordingly, as recommended above, we consider that all lawyers should be excluded at this time, pending further review and consultation in two years.

Social workers in non-prescribed legal services

Currently there are a range of service models in the legal sector under which non-legal professionals such as a social worker or financial counsellor work closely with lawyers to address client needs holistically.

This means that another consideration relevant to the legal assistance sector is whether there is a need for non-legal professionals within legal services to share or access information relevant to risk under the regime.

Assuming legal services are not included in the regime, we note the issue that a social worker working with a victim in a legal service may have different access to risk information than a social worker in a community health service or family violence service. This could create the potential for inequity and increased risk.

We have considered this potential, and our view at this stage is that the regime provides adequate mechanisms for the necessary sharing in this situation:

- A social worker embedded in a community legal service can always voluntarily provide information to prescribed organisations with client consent.
- Under standard information sharing law, with the client's consent, the social worker can request, and any organisation can provide, any information about the primary person.

[13] Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015, rules 9.2.4 and 9.2.5, available at http://www.legislation.nsw.gov.au/regulations/2015-244.pdf.

- Under draft s144P any prescribed organisation can choose to disclose perpetrator information to the primary person for a 'family violence protection purpose'.[14]

The question of the position of a social worker embedded in a legal service will also need to be addressed in relation to a range of other people outside the regime.

There will be a range of organisations and individuals to whom the legislation does not apply (for example privately funded counsellors) who will possess or require information relevant to family violence risk and need to engage in information sharing with those within the regime. These people outside the regime will need to use existing laws (as modified by clause 405 of the Bill, which removes the requirement that a serious threat be "imminent" before information is shared without consent).

It is crucially important for consideration and clear guidance to be given as to how those outside the regime will relate to those inside, to ensure that the existence of the family violence information sharing regime does not discourage lawful sharing outside the regime.

Question 3: Differentiation of prescribed entities

We share the concerns expressed in the Guide to the consultation draft Bill, that "risk may escalate with the sharing of de-contextualised information among entities".

We see this as a particular concern in relation to sharing under draft sections 144M-O. Under those sections, prescribed organisations can request and share information using the regime's thresholds, without any specialised assessment of family violence risk taking place.

- For example, a school and an aged care service can share without consent the information of someone they determine presents a family violence risk, if they believe that sharing would reduce that family violence risk. They could then share that information with someone they had determined to be a victim. (144M)

Our view is that differentiation of prescribed entities is not the only way to address this issue. There do not need to be more than two classes of prescribed organisations. Another way to address this issue is to better proscribe the powers and obligations of prescribed entities.

We recommend that only 'risk assessment entities' should be able to compel the provision of information, and that 'protection entities' sharing without consent should be able to share only with 'risk assessment entities'. This would mean amendments to 144M-O to provide that:

- Risk assessment entities could compel other prescribed entities to respond to requests for information for risk assessment purposes (current 144J and K)
- Prescribed entities could voluntarily provide information to risk assessment entities for risk assessment purposes (current 144I)
- Only risk assessment entities could voluntarily share information with non-risk-assessment entities for family violence protection purposes (amended 144M)
- When a non-risk-assessment prescribed entity (a protection entity) sought information without consent, they would have to seek it from a risk assessment entity (amended

[14] Under our proposed amendments (below), this would occur through a risk assessment entity.

144N), and a risk assessment entity could compel it from any prescribed entity (amended 144O).

In deciding whether to disclose requested information to a protection entity (and whether to seek it from another prescribed entity), the risk assessment entity would have the benefit of much more information and context than a non-risk-assessment entity, would have more specialised knowledge and training, and would be less prone to wrongly identifying a victim as a perpetrator.

We note that under our suggested changes:

- All entities (prescribed or not) will still be able to (under standard privacy laws):
    - Share any information proactively with consent
    - Request any information proactively, and require its disclosure if it relates to the requesting victim
- Victims can request perpetrator information, which a risk assessment entity will be able to provide if they consider the victim needs it for managing a family violence risk (144P)
- Risk assessment entities can proactively share information with a victim or with any other prescribed organisation (144P and 144M)
- A protection entity can disclose perpetrator information without perpetrator consent:
    - to the extent necessary if there is a serious risk; or
    - voluntarily to a risk assessment entity (144I), (which can then choose to proactively share with the victim (144P) or with another prescribed entity - 144M).

Alongside more specialised prescription of risk assessment entities and protection entities, we believe this would create a much safer and more specialised regime, appropriate for the first two years of the new information sharing regime.

Question 4: Victim consent and "has not refused consent"

We appreciate that the test for whether a victim "has not refused consent" is likely to be difficult to apply, raising questions of how specific that refusal needs to be, how long a refusal lasts, and so on. Nonetheless, we see it as an important safeguard in the legislation as currently drafted; a victim should not have information shared when they have refused consent to have that information shared (or have failed to give explicit consent) and there is no serious threat to them.

We support retaining the safeguard, though recognise that better clarity in the drafting of the safeguard would make it clearer that this is not a "back door" to sharing without seeking consent. Explicit and informed consent is fundamental for Aboriginal and CALD women who continue to be marginalised, and for whom communication styles may be misinterpreted by workers not sufficiently aware of the barriers presented by cross-cultural communication.

Section 144R victim consent

We have suggested above that child consent be considered, and that a general principle of a presumption that consent will be sought be introduced.

We also suggest additional modifications to clarify the primacy of victims' control, in line with the Royal Commission's guiding principle that "… the new regime should replace existing privacy protections only to the extent necessary and should also preserve victims' control over sharing their information."[15]

We suggest that clarity – and victim control and autonomy – would be supported by a legislated presumption that victims' express and informed consent is always sought before sharing.

Guidelines can explain that this consent can be ongoing, aiming to facilitate sharing that promotes safety while ensuring that victims fully understand the purposes, consequences and implications of sharing – giving effect to informed consent, autonomy and self-determination for Aboriginal victims in particular.

We also suggest the deletion of subsection 144R(b), which allows sharing without consent to lessen a "threat" when seeking consent is "impractical" or "unreasonable" or "likely to escalate that threat". The examples given in the Guide to the consultation draft are where the victim is in a coma or cannot be contacted without the perpetrator being alerted. In those circumstances, we believe that the ability to share without consent in the face of serious risk (subsection c) should be adequate. If the risk is not serious, then the victim's views should be sought when practical. We note also that perpetrators' information can still be shared without consent before the victim gives consent.

Question 7: Third party ("connected person") consent

It is of course important to recognise that third parties will include past victims of the relevant perpetrator. On that basis, we suggest amendments along the lines suggested in relation to s144R, taking into account the above discussion of the importance of victim consent.

There should be further provision that third parties' anonymity will be preserved wherever possible.

In relation to third parties who are children, we refer to our content under question 1, above.

Question 8: subpoenas

We support the suggestion that the information collected under the regime should be immune to subpoena. We would welcome an opportunity to review draft provisions relating to subpoenas as this can be a technical area.

We suggest that the information immune to subpoena should not be limited to counselling records, and that all subpoenas should be directed to the original source of information (the point where the information is most complete, up to date, and in context, and where subpoenas are most likely to be resisted if appropriate).[16]

Our view is that the Bill should not be introduced without safeguards against subpoena being introduced. Subpoenas are currently frequently used as a tool of systems abuse by

[15] Volume 1, page 187.
[16] Uniform rule 21.1.2 regarding "robust advancement" of a case requires lawyers to subpoena the original source, but does not apply to litigants in person.

perpetrators,[17] and the collation of information through the sharing regime will present a new avenue for this abuse if it is not controlled.

This is a particular risk in the Commonwealth family law system. This state legislation may not be sufficient to protect against subpoena issued under the Commonwealth *Family Law Act*. We recommend that discussions occur with the Commonwealth government with a view to ensuring equivalent safeguards regarding inappropriate subpoena are enacted under Commonwealth legislation.

Review

We welcome draft section 144ZA providing for a review of the new information-sharing regime within two years of the regime's introduction. This review period will be particularly useful for the legal assistance sector to further consider how and whether it should be included in the regime and how the complex challenges highlighted might be addressed by the regime after a period of operation. We note the Royal Commission's recommendation that the review be carried out by the Attorney-General in consultation with the Privacy and Data Protection Commissioner.[18]

Implications of other information sharing regimes

We note that as feedback is being sought on this draft Bill, an information sharing regime for child safety and wellbeing is also being considered. The key purpose of the family violence information sharing regime is to enhance the safety and wellbeing of women and children affected by family violence.

As mentioned earlier, the Royal Commission emphasised the need for information sharing legislation to be clear and easy to use. We are concerned that an additional regime could potentially undermine the family violence information sharing regime by causing confusion among practitioners and the broader community, particularly given the expanding role of generalist/universal organisations in sharing information relevant to family violence risk.

There needs to be careful consideration of possible unintended consequences, such as perpetrators accessing information about women and children affected by violence. We therefore recommend the Victorian Government consider waiting until the family violence information sharing regime has been introduced and its effectiveness monitored and evaluated before considering the need for any additional information sharing regime.

The signatories to this letter would welcome further consultation in relation to the proposed detail of the scheme, including clauses of the Bill yet to be drafted. We appreciate that this is a complex regime with many interlocking elements. We have made the suggestions we are able to within the limited time available but would welcome further opportunities to collaborate on considering the regime further.

[17] Sense and Sensitivity: Family Law, Family Violence, and Confidentiality: Women's Legal Service NSW (May 2016) page 21
[18] Volume 1, page 193.

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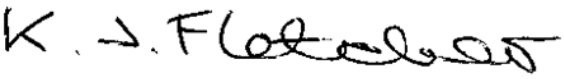

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