



## Submission in response to the Family Law Amendment (Information Sharing) Bill 2023

### Acknowledgment of Country

Youth Law Australia acknowledges the Traditional Owners and Elders of the Bedegal People of the Eora Nation as the custodians of the land on which we work. We pay our respects to their Elders past, present and emerging, and commit ourselves to the ongoing journey of Reconciliation.

### Introduction

1. We welcome the opportunity to respond to the Family Law Amendment (Information Sharing) Bill 2023 (**the Bill**), and we acknowledge the important role that information sharing schemes can play in enhancing the safety and wellbeing of children and young people.
2. We endorse the submission of Women's Legal Services Australia in relation to this Bill. We do not seek to repeat the matters raised in that submission, instead we make some brief additional observations and recommendations here.

### Further consultation

3. Key aspects of any information sharing scheme include its scope (which agencies are prescribed) and its safeguards, noting that information sharing schemes often override other laws including privacy laws. These aspects are not merely mechanical. They are substantive features of such schemes.
4. Under the current Bill, however, these matters will be contained within regulations. While the Explanatory Memorandum gives some indication of their proposed content, there has not yet been an opportunity to comment on draft regulations.
5. We note also that arrangements made to support the implementation and operation of an information sharing scheme are central to its efficacy. Clear and consistent guidelines that prescribed agencies can apply when making decisions about information sharing will be important.<sup>1</sup> These might be prepared by the Family Court, or by the Minister or Department. It

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<sup>1</sup> See Royal Commission into Institutional Responses to Child Sexual Abuse, Final Report, Volume 8, Recordkeeping and Information Sharing, p 14.



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will be important that there is comprehensive exposure of and consultation on these guidelines as well as the draft regulations.

### Greater focus on the rights of children and young people involved in the family law system

6. The scope of information that could be captured under the new provisions is potentially broad, and intended to capture (among other things) disclosures a child or young person may have made. It may also capture other personal and sensitive information about these children or young people. We note that children and young people involved in family law proceedings may also be a notifier of family violence, child abuse or other harm.
7. In addition to the international human rights referred to in the Explanatory Memorandum, we note that the *Convention on the Rights of the Child* includes the following rights:
  - a. Article 12: children have the right to say what they think should happen when adults are making decisions that affect them and to have their opinions taken into account, as well as a right to be heard in any judicial and administrative proceedings.
  - b. Article 16: children have the right to privacy.
8. We consider that the Bill doesn't adequately reflect these rights, and that there is an opportunity for the Bill and associated materials (regulations and guidelines) to give greater agency to children and young people who become involved in the family law system.
9. We note that children and young people are, in the vast majority of family law cases, not parties to the proceedings and may have little say in decisions to institute proceedings, or in the conduct of proceedings.

### Consultation with affected children and young people

10. It is generally considered best practice for an information sharing agency to consult with a person who is the subject of information, before that information is shared.<sup>2</sup> This is the case even if the law permits information sharing without that person's consent. There are a number of reasons for this, including that it provides an opportunity to ascertain any concerns about the accuracy of information, to correct information, and to give the person an opportunity to object to or raise any other concerns about the sharing of that information. Consultation may also enable an affected person to seek legal advice about their rights. In the case of children and young people, consultation can contribute to better decision-making on the best interests of the child.<sup>3</sup> As the Royal Commission into Institutional Responses to Child Sexual Abuse has observed, consultation in the context of information sharing can assist in ascertaining whether any exceptions to information sharing obligations should be invoked, and it promotes transparency, accountability and fairness.<sup>4</sup> Of course, there will also be some situations in which there may be good reasons not to consult before sharing information.

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<sup>2</sup> See for example the discussion in Royal Commission into Institutional Responses to Child Sexual Abuse, Final Report, Volume 8, Recordkeeping and Information Sharing, pp 227-228.

<sup>3</sup> See in Royal Commission into Institutional Responses to Child Sexual Abuse, Final Report, Volume 8, Recordkeeping and Information Sharing, p 228.

<sup>4</sup> Royal Commission into Institutional Responses to Child Sexual Abuse, Final Report, Volume 8, Recordkeeping and Information Sharing, pp 228-229.

11. In many cases it will be appropriate and desirable to consult with a Gillick competent young person before their personal or sensitive information is shared by a prescribed agency, or used by the Family Court. Accordingly, we recommend that the Bill and/or associated regulations or guidelines provide that a Gillick competent young person is consulted by a prescribed agency unless there is a good reason not to do so.
12. This could be given effect, for example, through the following mechanisms:
  - a. the definition of *Protected material* could include situations where the disclosure of information would be contrary to the best interests of the child;
  - b. the safeguards could include provisions on consultation with affected children and young people about the use of their sensitive or personal information, and about any potential risks of disclosing that information;
  - c. in addition to advising the court about risks of disclosure (new section 67ZBG), the Bill could enable the prescribed agency to advise the court of any views or objections from a Gillick competent young person about the disclosure of their information.
13. Regulations and/or guidelines could assist in ensuring that prescribed agencies turn their minds to whether they should consult with a Gillick competent young person.<sup>5</sup> In other words, they could act as a prompt for prescribed agencies and the Court to consider the rights of children and young people, and to guide the exercise of their discretion under the scheme. They could also provide a guide to situations in which consultation may not be appropriate or in the best interests of a young person.
14. Where a prescribed agency does consult with a Gillick competent young person, it will be appropriate for it to give the young person information on any rights they have to access their information, and to seek to correct it or add to it. This should include information about accessing free legal assistance to assist that young person to fulfil these rights. As the United Nations High Commissioner for Human Rights has recognised, 'Access to justice is a fundamental right in itself and an essential prerequisite for the protection and promotion of all other human rights.'<sup>6</sup> It includes being 'enabled to access relevant information and to effective remedies to claim their rights, including through legal and other services'.<sup>7</sup>
15. We note that it may be appropriate and desirable for information to be shared even if a child or young person objects to this course, but in such cases it may be appropriate for the Court to be aware of such objections.

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<sup>5</sup> See for example the guidance given by the Royal Commission into Institutional Responses to Child Sexual Abuse on 'Informing an individual and considering their views before sharing their information' in Royal Commission into Institutional Responses to Child Sexual Abuse, Final Report, Volume 8, Recordkeeping and Information Sharing, pp 229-230.

<sup>6</sup> United Nations General Assembly, *Access to justice for children*, Report of the United Nations High Commissioner for Human Rights, 16 December 2013 [3].

<sup>7</sup> *Ibid* at [5].

## Conclusion

16. Thank you for the opportunity to comment on the Bill. In summary, our recommendations are as follows:
- a. that there be further consultation on the draft regulations and supporting guidelines;
  - b. that mechanisms be included in the scheme (either in the Bill, regulations and/or supporting guidelines) to require prescribed agencies to consider whether to consult with a Gillick competent young person before sharing their personal information;
  - c. that guidance be provided to prescribed agencies on consulting with Gillick competent young people and providing them with information to enable them to exercise their rights.
17. We would welcome the opportunity to participate in further consultation on these important issues.

## About us

18. Youth Law Australia (YLA) is an accredited national community legal service that is dedicated to helping young people understand their legal rights, and find solutions to their legal problems. Any child or young person (or an adult representing them) can ask us about any legal problem at any time, and receive free and confidential legal advice and help. Youth Law Australia seeks to be as accessible as possible to children and young people, in particular through facilitating help-seeking through online means.
19. We are dedicated to addressing human rights abuses of children and young people in Australia, and we monitor and advocate for their rights and best interests.

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