



Northern Territory Legal Aid Commission

SUBMISSION

SUBMISSION TO THE SOCIAL POLICY SCRUTINY COMMITTEE

LEGISLATION DEALING WITH INFORMATION SHARING CONCERNING DOMESTIC VIOLENCE

1. Introduction

Thank you for the opportunity for the NT Legal Aid Commission ('NTLAC') to comment on the Domestic and Family Violence Amendment (Information Sharing) Bill 2017 ('the Bill').

2. About NTLAC

The Northern Territory Legal Aid Commission ('NTLAC') is an independent statutory body established under the *Legal Aid Act NT* (1990) and is governed by a Board of Commissioners appointed by the NT Attorney-General. NTLAC provides information, community legal education, legal advice, representation and assistance to persons in a range of matters, including:

- Domestic violence, via the Domestic Violence Legal Service ('DVLS')
- Family law, including Family Dispute Resolution;
- Child Protection Matters;
- Criminal law; and
- Civil law, including the Respondent Early Assistance Legal Service ('REALS').

NTLAC aims to ensure that the protection or assertion of the legal rights and interests of people in the Northern Territory are not prejudiced by reason of the inability to:

- obtain access to independent legal advice;
- afford the financial cost of appropriate legal representation;
- obtain access to the Federal or Territory legal systems; or
- obtain adequate information about access to the law and legal system.

NTLAC also provides early intervention and prevention services pursuant to the *National Partnership Agreement on Legal Assistance Services* the ('NPA') between the Australian and NT Governments. These services include legal information, education, referral, advice, advocacy and minor assistance.

NTLAC also provides Non-Legal Support Services under the NPA, including social and clinical support services to:

- Victims of domestic and family violence in the DVLS;
- Vulnerable clients in the Darwin Family Law Practice;
- Youth clients in the Darwin Criminal Law Practice;
- Respondents to domestic violence proceedings; and
- Vulnerable clients of the Commission in Alice Springs.

3. Consultation process

A more extensive consultation process should be undertaken in relation to this Bill, including a discussion paper and face to face consultation with key services whose clients will be impacted on by this.

The time frame provided to comment on this Bill was insufficient, particularly as most services were closed over the break from 22 December to 2 January. Following this many key staff are on leave in early January.

We received a letter from the NT Department of the Attorney-General and Justice on 21 December 2017 advising of the introduction of the Bill to Parliament on 23 November 2017. This Committee has sought comment on the Bill by 24 January 2018. We are not aware of any discussion paper circulated or any face to face consultations that have occurred about the content of the Bill.

NTLAC has consulted internally as much as is practicable in this time, however regret that due to other pressures and the time frame, our consideration of the Bill and our submission has not been as comprehensive as we would like it to be.

We and are concerned that victims' services will be impacted without the opportunity to provide considered feedback. We have contacted some victims services about this Bill in the process of writing this submission. They were not aware of it and were concerned to hear that it was occurring.

In contrast, the process to introduce and pass the information sharing legislation in relation to care and protection matters was extensive and provided sufficient time to 'iron out' and provide feedback on practical concerns.

4. Concerns particular to this Bill

NTLAC is concerned that the Bill is a disproportionate erosion of the rights of victims and respondents to privacy and confidentiality. Safeguards should be in place to limit the circumstances of information sharing to those where there is a serious or imminent threat to a person's life, health, safety or welfare as opposed to a person fearing or experiencing domestic violence.

The NT Bill favours the creation of a permissive regime that does not require a significant level of analysis to determine whether information may be shared. In our view, this places insufficient weight on the right to privacy.

This regime must be considered in light of the concern that persons experiencing or perpetrating domestic violence will not access important legal and clinical support services if they have a well founded concern that the information gathered could be too easily obtained.

NLAC favours the thresholds set in the Victorian and Queensland legislation which differentiate between the purpose of the use of the information, the classification of the person seeking the information and (in the Victorian Act) the weight of the evidence against the respondent. There is much more of a balance between the rights to privacy and confidentiality and the need to protect victims. NLAC also supports the requirement for the victim's consent to be obtained unless the disclosure is necessary to lessen or prevent a serious threat to an individual's life, health, safety or welfare.

The International Covenant on Civil and Political Rights ('ICCPR') provides that 'no one shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence...'. Without sufficient protections and analysis to determine whether information may be shared, this Bill enables circumstances in which there is an 'arbitrary interference with privacy' which is inconsistent with the ICCPR.

This Bill is not compatible with human rights as it does not balance the rights to privacy of the individual in the ICCPR with the right to safety and protection. It does not place a sufficient emphasis on the need to obtain consent to share information from a person who fears or is experiencing domestic violence wherever possible.

The Bill does not have a sufficiently high threshold to be applied by the persons and entities which are able to share and receive information.

Information sharing entity

It is likely that NLAC will be included in the definition of an 'information sharing entity' as, according to the definition of 'domestic violence related service,' NLAC is an assistance service provided to persons who fear or experience domestic violence or are affected by that domestic violence. Otherwise, it is not clear if NLAC would be an 'information sharing entity' as prescribed by regulation under section 124 B (f).

Mandating Information Sharing

In contrast to the Child Protection Information Sharing Provisions which do not compel information sharing, only permit it, 124H compels it in very broad circumstances. Mandating information sharing should only occur in very limited circumstances. In our view, the current mandatory reporting provisions are sufficient.

While the intention of this obligation may be to provide a stronger impetus for sharing information and to improve information sharing cultures that will improve the safety of victims and children, we submit that this is a matter that can be dealt with through internal procedures and training and does not warrant mandatory information sharing provisions.

We note that there is no penalty for “breaching” an obligation to disclose information, or any further legal mechanism in the Bill for pursuing a perceived “breach,” however this does not warrant mandatory information sharing provisions. Regardless of there being no penalty for breaching, the provisions compelling information sharing are more likely to be followed than breached, eroding the privacy of those whose information is shared.

We object to services being compelled to share any information that comes into their possession without the consent of their client beyond what is already provided for under mandatory reporting.

Recommendation:

- Option 1 Remove all provisions which compel information sharing (noting the QLD legislation has no such provision).
- Option 2 Limit the application of provisions which compel information sharing to very narrow circumstances, in line with the mandatory reporting requirements (similar to the VIC legislation).

Legal Aid Act

Section 55 of the *Legal Aid Act* contains secrecy provisions which apply to all employees of the Commission. While 124G provides that information must not be shared if it would contravene Legal Professional Privilege, not all employees are covered by *Legal Professional Privilege*, for example Social Support Workers, Administrative Staff, Helpline operators and Community Legal Educators.

We are concerned that these provisions do not exempt all legal aid staff who are also bound by s 55 in relation to non-client information.

Recommendation:

Options 1 and 2 above.

Safety Concerns

Information sharing principles in 124C should require a consideration of adverse consequences to the safety of the person in disclosing information.

Recommendation:

Replace ‘must’ with ‘should’ in s.124C(4) in that the Information sharing entity **must** consider whether disclosing the information is likely to adversely affect the safety of the person or another person.

The importance of consent

The Bill does not give sufficient regard to the right of the person to consent to information being shared on their behalf.

One of the stated intentions of the Bill as stated in the General Outline to the Explanatory Statement is:

it will reduce the need for victims to constantly re-tell their stories, and facilitate coordinated and timely responses.

The provisions of the Bill are a disproportionately broad response to the intention of the Bill where this objective could be achieved through the consent of the person whose information is shared where there is no serious threat to an individual's life, health, safety or welfare.

In contrast, the Victorian legislation provides that consent of a victim adult (where there are no children involved) is required unless "the information sharing entity reasonably believes that the collection, use or disclosure of the confidential information is necessary to lessen or prevent a **serious threat to an individual's life, health, safety or welfare.**"

The NT Bill only mentions consent in section 124C(2) as a principle that reasonable efforts should be made to get the consent of the victim. If we are to compare the two jurisdictions to examine when the victims consent is overridden:

1. Victoria requires - "serious threat to an individual's life, health, safety or welfare"
2. NT requires – "a person fears or is experiencing domestic violence and the information may help the entity receiving the information to... provide or arrange a domestic violence related service to or for a person"

When that is combined with the very wide definition of Domestic Violence in the NT Act (such as economic abuse) it is an unreasonably broad and disproportionate removal of the victim's right to privacy.

We note the provisions of 124E, 124H and 124J all have references to 'serious threat', however this criteria is escapable in other subsections, for example:

- 124E allows the sharing of information if the entity believes on reasonable grounds that (124E(a)) a person fears or is experiencing domestic violence; and (124E (b) the information may help the entity receiving the information to (124E(b)(iii)) provide or arrange a domestic violence related service for a person.
- 124H allows for the sharing of information to
 - (a) assess whether there is a serious threat to a person's life, health, safety or welfare because of domestic violence; or ...

(c) provide or arrange a domestic violence related service to or for a person.

- 124J permits the use of shared information to
 - (a) assess whether there is a serious threat to a person's life, health, safety or welfare because of domestic violence; or...
 - (c) provide assistance or a domestic violence related service to a person.

Recommendation

That the importance of consent be given more prominence in the Bill as a preferred avenue which should only be overridden in circumstances similar to the Victorian Act.

It is also recommended that s.124E(b)(iii) be removed to bring the Act in line with the Queensland Act. 124E(b)(i) and (ii) are both consistent with the QLD Act but 124E(b)(iii) throws the net far too wide.

Impact on accused perpetrators

Unlike the Victorian Bill, the NT Bill does not distinguish between protection and assessment purposes. The impact of this on accused perpetrators' rights and freedoms is vastly different depending on the purpose.

The Victorian Act also distinguishes between an 'alleged perpetrator' and a 'perpetrator'. The former's information is more protected. If you want to seek information about an 'alleged perpetrator' you can only request information for an 'assessment purpose'. If you want the information for a 'protection purpose' then it can't be for an 'alleged perpetrator'.

The NT Bill groups assessment and protection purposes under the same section (s.124H) so they are treated the same. The use of the information is also treated the same and the class of persons who can request the information for either purpose is the same. In our view this is too broad.

Under the Victorian Act, it is harder to get information for 'protection purposes' as section 144LC(1)(a) (VIC) has an extra step. If "*the responding entity reasonably believes that the disclosure of the relevant information to the requesting entity is necessary for a family violence protection purpose*". So the responding entity has discretion to say that information isn't relevant and necessary.

Compare this to the 'assessment purposes'. This can only be done by a 'risk assessment entity' which is a smaller class than an 'information sharing entity'. There is no discretion for the responding entity to say that the information is not relevant or necessary. This is an important step to ensure there is not a 'fishing expedition' undertaken by requesting information without foundation.

Confidential information acquired by police under section.124M can be used for prosecution purposes. This may result in an unintended use of information sharing

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as information that the police could not ordinarily access becomes available to be obtained under s.124M. This seems broader than the purposes of the Act (as stated in the general outline of the explanatory statement) of:

‘assessing whether there is a serious threat to a person because of domestic violence, responding to threats and making referrals to specialist domestic violence services’.

Recommendation

Sections 124M (2) be amended after the words ‘unless’ to insert ‘the person whose information has been shared has consented and:’

5. Our Recommendations

- 5.1. The Assembly should not pass this Bill in the March sittings; and
- 5.2. The Assembly should defer the passage of the Bill to enable a consultation process to occur which is accessible to services which assist the people who will be impacted on by this Bill; or
- 5.3. Should the Assembly pass the Bill, in the March sittings it should do so with the amendments recommended in this submission.