SOCIAL POLICY SCRUTINY COMMITTEE
Public Hearing 14 February 2018

Domestic and Family Violence (Information Sharing) Bill 2017

RESPONSES OF THE DEPARTMENT OF THE ATTORNEY-GENERAL AND JUSTICE TO WRITTEN QUESTIONS FROM THE COMMITTEE

1. **While questioning the need for the Bill given existing provisions in the Information Act, the Commissioner for Information and Public Interest Disclosures advised that the test in Information Privacy Principle 2.1(d)(i) is often cited by service providers as a stumbling block to the sensible sharing of information about domestic violence.**

   a) What consideration has been given to amending this test so that the threat to an individual should not need to be both 'serious and imminent' but either serious or imminent' as proposed by the Commissioner?

AGD RESPONSE

The summary answer is that this option would not provide a comprehensive solution for the problems identified for sharing domestic violence information. However, the Department is proposing to support consideration of the Commissioner's proposal as part of a wider consideration of the *Information Act.*

The requirement of "serious and imminent" risk in the NT Information Privacy Principles (IPPs) under the *Information Act* is one of the key shortcomings of the current system that has led to the need for reform. However, amending the IPPs alone would not create a comprehensive information sharing regime to facilitate information sharing across the domestic violence sector.

The IPPs apply only to NT public sector organisations. Across the sector, there is a myriad of requirements that apply differently depending on the type of organisation.

For example, some NT non-public sector organisations are bound by Commonwealth law. The Australian Privacy Principles (APPs) generally apply to organisations with an annual turnover of $3 million or more, as well as health service providers and contracted service providers under a Commonwealth contract. Smaller non-government organisations (NGOs) may not be covered by the APPs or the IPPs.

If the IPPs were amended, it would only affect Northern Territory public sector organisations, and would not cover NGOs.

In contrast, the regime established by the Bill will apply to both public sector agencies defined as information sharing entities, and NGOs that are prescribed information sharing entities. If an NT organisation is covered under the APPs and is also prescribed as an information sharing entity, it must continue to abide by the APPs but will also be able to share information under the new regime by virtue of it being authorised by law.

Changing the requirement of "serious and imminent" risk under the IPPs to "serious or imminent risk" does not address the shortcomings of needing to establish a high level of risk prior to sharing information. If information cannot be shared, it might not be possible to assess the level of risk.

Another objective of the legislation is to facilitate early intervention and integrated service provision through direct referrals to services. Amending the IPPs would not address this objective.

The Bill shines a light on the particular dynamics of domestic violence, which requires information to be shared in order to provide more timely and appropriate assessments of risk and interventions. In doing so, it also aims to change professional cultures that prohibit information sharing. Facilitating information sharing for the purposes of assessing and responding to risk across the domestic violence sector, overcomes some of these barriers. This shifting of focus is seen as being critical.

In Victoria, an amendment to privacy laws was made to allow organisations bound by those laws to share information to lessen or prevent a "serious threat" to an individual's life, health, safety or welfare. Previously, Victorian privacy laws also required that a threat be "serious and imminent." This amendment complemented their new information sharing regime under Part 5A of the *Family Violence Protection Act 2008* (Vic), but it was not in itself considered sufficient to respond to the Victorian Royal Commission's recommendations in relation to the creation of an information sharing regime. The purpose of the privacy law amendment was that it would apply to all organisations bound by Victorian privacy laws, which represents a broader range of agencies than those covered by the Part 5A information sharing regime.

The Information Commissioner's suggestion is one that should be given serious consideration as part of a broader review of the *Information Act*, as well as to complement the regime proposed by the Bill. The Department anticipates developing options in the course of the proposals for the amendments to the *Information Act* regarding pro-disclosure reforms and other significant problems with the Act, including IPP2(1)(d)(i). It is important that there be an appropriate degree of consultation with the community on this issue. This would not occur if the amendment were to be included as a last minute addition to this Bill.

2. **The Department of Health also questioned the justification for the Bill, noting that the Family Safety Framework currently in place allows government and non-government agencies to use a shared risk assessment tool to determine levels of risk; share information accordingly; and to collaboratively manage risk.**

    a) ***In determining the need for the Bill, was the Family Safety Framework evaluated?***
    b) ***Can you clarify for the Committee how the provisions in the Bill differ from and improve on the Family Safety Framework?***

AGD RESPONSE

In summary, yes, the operations of the Family Safety Framework were considered in developing this Bill. The Bill supports and builds upon existing measures to provide integrated responses to domestic violence, including the Family Safety Framework.

The Family Safety Framework is an integrated service response to families experiencing domestic and family violence who are at high risk of injury or death. A key feature is regular meetings, led by NT Police in partnership with other front line government and non-government agencies, for the purposes of information sharing and case management of clients.

The Family Safety Framework operates under the Information Privacy Principles and information sharing protocols between government agencies and relevant NGOs.

In accordance with the IPPs, the Family Safety Framework only permits information sharing that is consistent with the IPPs, meaning that a referral to the Family Safety Framework will only be accepted if a person is to be considered at "serious and imminent" risk. If they are not considered to meet this risk threshold, the victim will not be eligible for the Family Safety Framework due to the risk of non-compliance with the IPPs.

The Family Safety Framework has recently been evaluated by Territory Families. The evaluation found that:

> *stakeholders identified barriers to information sharing such as differing perceptions of risk between agencies (eg some agencies focus more on the [Risk Assessment Framework] score rather than professional judgment or other supporting information), and the NT Privacy Principles requirement that a threat be "imminent" and serious. Proposed amendments to the Domestic and Family Violence Act regarding information sharing may help resolve these issues.*

Pg 7, "Review of the Family Safety Framework in the Northern Territory 2016-2017":
https://territoryfamilies.nt.gov.au/ data/assets/pdf file/0005/470849/Review-of-the-Family-Safety-Framework-2016-17-Summary-of-findings-and-recommendations.PDF

Accordingly, the evaluation supported the need for the Bill.

The Bill will permit information to be shared when the information sharing entity that holds the information reasonably believes that a person fears or is experiencing domestic violence, and the information may help the entity to assess whether there is a serious threat to a person's life, health, safety or welfare because of domestic violence. It may also be shared to lessen or prevent a serious threat posed by domestic violence, or to arrange for a domestic violence related service to be provided.

Subject to finite resources, under this Bill the Family Safety Framework (and other integrated response initiatives) will be capable of accepting referrals for a broader range of purposes, including conducting initial risk assessments across agencies in order to evaluate whether a person is at serious risk of injury or death, and providing referrals to appropriate domestic violence related services.

3. **Proposed subsection 124C(4) provides that in disclosing information about a person, an information entity should consider whether it is likely to adversely affect the safety of the person or another person. To safeguard against any unintended consequences to the safety, dignity or reputation of the client or another person it has been suggested that the word 'should' be replaced by the word 'must'.**

   a) ***Does use of the word 'should' rather than 'must' in proposed subsection 124C(4) allow any discretion as to whether an information entity considers these factors?***

AGD RESPONSE

The summary answer is "no," because this is already covered by section 124G(1)(vi) which imposes a duty on the information sharing entity to consider whether sharing information could endanger a person's life or physical safety.

Section 124C provides for general information sharing principles that will apply to information sharing entities for information shared under the Chapter. The section uses language to guide how information sharing entities ought to conduct themselves. Section 124C(1) explains that these principles "should be used for guidance in relation to the collection, use or disclosure of information that is authorised or required to be collected, used or disclosed under this Chapter."

As noted in section 124C(5), the principles do not create legal rights or give rise to any civil cause of action. This is why it uses the language of "should" rather than the language of "must."

However, section 124G(1)(vi) expressly prohibits information being shared if the entity that holds the information believes on reasonable grounds that giving the information could endanger a person's life or physical safety. Penalties apply to contravention of this section under section 124L, which makes it an offence to intentionally engage in conduct that results in disclosure of the information and the person is reckless in relation to the result. This means that information sharing entities are bound to consider whether sharing of information would endanger a person's life or physical safety.

Section 124G(1)(vi) therefore covers the key aspect of the conduct under section 124C(4), which is the risk of unintended circumstances to a person's safety. It does not cover unintended consequences to person's "dignity or reputation." However, if information was permitted to be shared under the Chapter for assessing risk, responding to risk, or providing a relevant referral, it would be difficult to argue that a person's dignity or reputation should take precedence over their safety.

4. **A number of submissions received by the Committee raised concerns that the Bill does not place sufficient emphasis on the need to obtain consent to share information. The Victorian legislation provides that consent can only be overridden where there is a 'serious threat to an individual's life, health, safety or welfare', whereas the Bill only requires that "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."**

   a) ***Can you clarify for the Committee the justification for displacing a person's right to privacy without a reasonable belief of an actual serious threat of domestic violence?***

AGD RESPONSE

In summary, the focus of this Bill is that of sharing information for the purpose of dealing with "domestic violence". Domestic violence covers more than just actions that relate to serious threats to a person's life health, safety or welfare.

Additionally, a "reasonable belief of an actual serious threat" should not be a pre-requisite for sharing information due to the difficulty of forming such a belief without the ability to share information in order to properly assess and evaluate risk.

A number of different agencies may be involved with the same parties. For example police, health, education, housing, and non-government legal and social support services. When information from all or some of them is considered together it may affect the perceived level of risk and urgency, and the nature of any response. For example, a victim may not be identified as being at 'serious risk' where they are subject to regular low to mid-level violence, or to verbal and psychological threats rather than physical harm, although it is known from the literature that when combined with other factors this type of conduct may indicate serious risk.

The Victorian legislation has different consent requirements depending on who the information concerns. Consent is not required to share information about perpetrators of family violence. This is for the obvious reason that seeking a perpetrators consent may put the victim at risk. Consent is required for adult victim survivors, unless sharing is necessary to lessen or prevent a serious threat. It is not required if a child's safety is at risk.

In the Northern Territory, there are particular obstacles in obtaining the consent of victims. Police provide the primary response in domestic violence situations. Many victims refuse to provide their consent to police. Decisions about consent are influenced by a range of reasons including language and cultural reasons, as well as by mistrust and misunderstanding of the purpose and utility of sharing information. This results in agencies being constricted in the assistance they are able to provide.

A number of victim services consulted believe that removing the absolute requirement of consent would serve to better distinguish support services from police and other authorities, and thereby take the pressure off the victim having to give consent at a distressing point in time.

Social and legal support services for victims also emphasise the importance of being able to reach victims at the earliest possible point in time through early referrals. This allows a greater chance of effecting early intervention and undertaking safety planning before a situation escalates.

The Bill greatly enhances the capacity to make referrals, again taking away the onus from the victim to provide consent when this is not always practicable at the time of an incident. It would be particularly useful for police to have the capacity to make quick referrals for victims when they issue a section 41 domestic violence order, so that the victim can receive support and guidance from both legal and social services at a critical point in time.

Victim services have noted that they are cognisant of the risks and capable of taking appropriate steps to not increase the danger to a victim when they approach them. The risks would be mitigated by regulations or Guidelines providing for conditions that providers must comply with in approaching individuals where a referral has been made without a person's consent.

5. **To avoid confusion and provide greater clarity for information sharing entities when making assessments about whether information should be shared, the Central Australian Women's Legal Service suggested that the term 'serious threat' be more clearly defined in the Bill.**

   a) ***Can you clarify for the Committee what constitutes a 'serious threat'?***
   b) ***In the absence of a definition of 'serious threat' in the Bill, what guidance will be provided to service providers to ensure consistency in how this is to be determined?***

AGD RESPONSE

In summary, the Department considers that "serious threat" means a serious threat to the life, health, safety or welfare of a person because of domestic violence. It would not be sensible to try to list what constitutes serious threat, given that there are an indefinite number of factors that would influence whether something is a serious threat or not.

The assessment of whether a threat is serious requires exercise of professional judgment. A subjective threshold is inevitable under any kind of information sharing regime.

The Guidelines published under section 124N are likely to include guidance with regards to how serious threats should be determined, with reference to the prescribed risk assessment and management framework.

6. **As highlighted by the Central Australian Women's Legal Service, information sharing relies on the accuracy of the information provided and that sharing inaccurate information may put victims at further risk.**

   a) ***In the absence of explicit provisions within the Bill, what mechanisms will be put in place to ensure that victims or defendants have the opportunity to correct information which is not accurate?***

AGD RESPONSE

In summary, the Department considers that the IPPs are adequate to deal with this issue.

Information sharing entities will be required to utilise professional skills and judgment to ensure that they share accurate information, and to ensure that any sharing of information does not place victims at further risk. Under section 124G(1)(vi) information cannot be shared if this could endanger a person's life or physical safety.

The Guidelines published under section 124N are likely to include guidance with regards to ensuring that information that is shared under the regime is accurate and does not place victims at increased risk.

The mechanisms established under the IPPs and the APPs will continue to apply in relation to the correction of personal information.

IPP 3 provides that: "A public sector organisation must take reasonable steps to ensure that the personal information it collects, uses or discloses is accurate, complete and up to date."

IPP 6.3 provides that: "If a public sector organisation holds personal information about an individual and the individual establishes that the information is not accurate, complete or up to date, the organisation must take reasonable steps to correct the information so that it is accurate, complete and up to date."

IPP 6.4 provides that: "If - (a) an individual and a public sector organisation disagree about whether personal information about the individual held by the organisation is accurate, complete or up to date; and (b) the individual requests the organisation to associate with the information a statement to the effect that, in the individual's opinion, the information is inaccurate, incomplete or out of date; the organisation must take reasonable steps to comply with that request." IPP 6.5 provides that: "a public sector organisation must provide reasons for refusing to provide access to or correct personal information."

APP 10.1 provides that: "An APP entity must take such steps (if any) as are reasonable in the circumstances to ensure that the personal information that the entity collects is accurate, up-to-date and complete."

APP 13.1 provides that: "If an APP entity holds personal information about an individual; and either: the entity is satisfied that, having regard to a purpose for which the information is held, the information is inaccurate, out of date, incomplete, irrelevant or misleading; or the individual requests the entity to correct the information; the entity must take such steps (if any) as are reasonable in the circumstances to correct that information to ensure that, having regard to the purpose for which it is held, the information is accurate, up to date, complete, relevant and not misleading."

7. **Proposed subsection 124G(iv) provides that information must not be shared if it would contravene any legal professional or client legal privilege. The NT Legal Aid Commission has suggested that the Bill should also include an exemption where sharing information would contravene the secrecy provisions pursuant to section 55 of the *Legal Aid Act* which all Legal Aid Commission staff are subject to.**

   a) ***Is there any reason why such an exemption could not be included under subsection 124G(1)(a)?***

AGD RESPONSE

In summary, the Department's position is that section 55 of the *Legal Aid Act* should operate subject to the proposed Act.

Section 55 prohibits members of the Legal Aid Commission and employees of the Commission from disclosing personal information about the Commission's clients. Section 55 operates subject to the general principles of criminal responsibility in force under the *Criminal Code*. For offences under the *Legal Aid Act* sections 23-25 of the *Criminal Code* operate so that a person who shares information in accordance with the proposed provisions would not be guilty of a breach of section 55. In addition, section 124S of the Bill provides that the Chapter has effect despite the operation of any other law in the Territory that prohibits or restricts the disclosure of information.

The various limitations listed in section 124G on information that can be shared provide sufficient safeguards for information held by the NT Legal Aid Commission that it would not want to disclose because it could prejudice their client's legal case or relationship with the service. These include limitations on information that would contravene legal professional or client legal privilege, and information that would prejudice any court or tribunal proceedings.

Legal assistance services provide a range of legal and social support services for perpetrators and victims of domestic violence. The NT Legal Aid Commission is one of the largest providers of legal assistance services in the NT. The Commission offers a range of services for both perpetrators and victims, and these services are likely to have different approaches due to the various needs of their clients.

There may be many instances where it is appropriate and necessary for a legal assistance service (that has been prescribed as an information sharing entity) to be able to request and share information that is relevant to assessing or responding to domestic violence threats, or providing referrals to domestic violence related services (noting that as a matter of practice legal assistance services will generally seek their client's consent to do so).

For example, the Domestic Violence Legal Service, which is the NT Legal Aid Commission's dedicated victim service, may wish to request information on behalf of its clients that would assist them to undertake safety planning, such as obtaining conditions of bail, parole or suspended sentences. They may wish to share information with other organisations that they know to be working with the same client, if they are concerned for their client's welfare and want to ensure that an appropriate intervention is made.

The Bill is centred on the rights of victims to be safe from harm, but in doing so it does not jeopardise the rights of perpetrators (or victims) in legal proceedings. If it were prescribed as an information sharing entity, the NT Legal Aid Commission, would, like any other information sharing entity, be entitled to refuse to share information that contravenes legal professional or client legal privilege, places a client in danger, or prejudices their client's legal proceedings.

8. **It has been suggested that the proposed information sharing regime may have the unintended consequence of facilitating fishing for, or access to information that would not otherwise be obtainable and may inhibit victims and perpetrators from accessing help or disclosing to service providers.**

    a) ***Given existing mandatory reporting requirements, and noting that the Child Protection information sharing provisions do not compel information sharing, can you clarify why section 124H was considered necessary?***
    b) ***Why does section 124J not include safeguards against the forwarding of shared information to other agencies without the permission or knowledge of the agency that first supplied the information?***

AGD RESPONSE

In summary, the proposed information sharing regime does not facilitate "fishing" for information, and it would not be sensible to include a requirement in the legislation to consult with the agency that first supplied the information in every instance.

Section 124H obliges information to be shared for specific purposes, namely, to:

> assess whether there is a serious threat to a person's life, health, safety or welfare because of domestic violence; or
>
> lessen or prevent a serious threat to a person's life, health, safety or welfare because of domestic violence; or
>
> provide or arrange a domestic violence related service to or for a person.

Section 124A of the *Domestic and Family Violence Act* requires the mandatory reporting of domestic violence in the Territory. An adult commits an offence if they fail to report to a police officer that they have formed a belief, on reasonable grounds, that a person has, or is likely, to cause harm to another person with whom they are in a domestic relationship; or, the life or safety of a person is under 'serious or imminent threat because domestic violence has been, is being or is about to be committed.'

Mandatory reporting creates an obligation to report actual, suspected or potential instances of domestic violence to the police, but it does not facilitate information sharing between agencies for the purposes of assessing or responding to domestic violence.

The Victorian legislation includes an obligation that compels information sharing for a family violence assessment or protection purpose (sections 144KC, 144LC).

The information sharing provisions under the *Care and Protection of Children Act* do not contain an analogous obligation. It was considered that this regime should build on the child protection provisions, and provide further impetus for improving cultures of information sharing where there is a defined need to share information. However, there are no penalties or legal causes of action for failing to share information.

The Guidelines may provide procedures for requesting information, and these are likely to stipulate that an information sharing entity must make it clear for what purpose, and why, the information is required. If the information is not relevant to one of these purposes, an information sharing entity is not required to share it.

In some instances, it may be desirable to consult with the agency that first supplied information before forwarding it on to other parties. For example, to maintain the integrity of the information and so that the primary entity is aware of and can respond to any implications. The Guidelines may also include guidance in this regard.

However, this may not always be practicable, and a person's safety should be the primary consideration. The purpose of the legislation is to facilitate information sharing. The creation of a consultation requirement for each piece of information that may be subsequently shared creates an overly bureaucratic system, which is counterproductive to the Bill's aims.

In particular, dealing with a large government agency (such as the Department of Health) to obtain their approval prior to being able to use information obtained through the regime creates unnecessary obstacles to agencies that are trying to act promptly in domestic violence situations. The clear permitted purposes for sharing information under section 124E, and the limits on information that may be shared under section 124G provide sufficient safeguards to ensure that information is shared for a proper purpose.

Agencies will need to be properly trained to ensure that information sharing occurs in accordance with these requirements, and that staff use professional judgment in dealing with information they request, obtain and share.

9. **Given that the information to be shared will invariably be of a confidential nature and may be provided without the consent of the parties affected, it has been suggested that provisions within the Bill regarding who may give or receive information on behalf of information sharing entities are far too broad.**

    a) ***What justification is there for extending such authority to a person who is not primarily involved in assessing threats or taking action and has not been allocated the role of giving or receiving information by the entity in question as provided for under section 124K (a) (iii)?***

    AGD RESPONSE

    In summary, the Department considers that the current provisions are an adequate regime to govern the sharing of information.

    Section 124K provides that information may only be given, received or used by a person whose duties are relevant to:

    > assessing threats to life, health, safety or welfare because of domestic violence;
    >
    > taking action to lessen or prevent threats to life, health, safety or welfare because of domestic violence;
    >
    > providing assistance or a domestic violence related service to a person.

    The Guidelines should make it clear that the purpose for sharing or requesting information should generally relate to that person's duties. For example, if a person is employed to provide domestic violence related services, but those services do not include taking action to assess or respond to domestic violence threats, that person could only receive a narrow range of information that relates to providing their specific service. They will not generally be able to disclose or request information relevant to assessing or responding to threats.

    However, this general principle should not, for example, constrict cross-agency meetings and information sharing where a victim's case is being managed by a number of services with different roles in assessing risk, responding to risk and providing services. Such a requirement would affect how Family Safety Framework meetings currently operate, by requiring information to be discussed in a complicated manner to delineate the different roles of services (which are likely to overlap).

10. **As provided for under section 124N, the Committee understands that the CEO must make administrative guidelines for the operation of the Bill.**

    a) ***Given the nature of the procedures to be covered by the guidelines and the impact on service providers, can you clarify for the Committee why the requirement for consultation on the guidelines is limited to the Information Commissioner?***

AGD RESPONSE

In summary, section 124N is only intended to mandate an obligation to consult with the Information Commission. It is not meant to suggest any expectation that the consultation would be limited to the Commissioner. The Department does not see any problem in providing a statutory obligation for wider consultation.

The Information Commissioner is named in the Bill due to the expertise and primary interest of the Commissioner in the matters raised by the Guidelines, as well as the need to ensure consistency across information and privacy laws.

Given the critical significance of the guidelines, it is anticipated that the relevant agency will consult broadly across the domestic and family violence sector on the draft Guidelines.

11. **The Committee understands that a discussion paper on proposed provisions in the Bill was to be circulated to key stakeholders prior to the Bill's introduction.**

    a) Can you explain to the Committee why the proposed information paper was not circulated as planned?

AGD RESPONSE

In developing the proposals for the legislation, the Department had anticipated releasing for comment an exposure draft of the legislation prior to introduction. However, as part of the Government's commitment to domestic violence reforms the decision was made that the legislation should be formally introduced into Parliament as quickly as possible.

This was done having regard to the fact that the Scrutiny Committee process would provide a meaningful opportunity for public consultation involving both the Committee's own processes and those of the Department. The Committee's processes are such that there is usually a period of at least 3 months between the time of introduction of a Bill and the time of passage. In this case, the Bill was introduced on 23 November 2017, with the Bill likely to be debated in the period 13 March – 22 March 2018, which is a period of almost four months.

Government agencies have had an opportunity to comment on the Bill throughout the Cabinet process, commencing with approval to draft the legislation in May 2017 which included an opportunity to comment on all the key aspects of the Bill. Government agencies have also been informed of the Bill's development through the Department's consistent attendance at the Domestic Violence Cross Agency Working Group throughout 2017.

The Department has engaged in consultation subsequent to the Bill's introduction and stakeholders have been provided with information about the Bill and invited to request meetings with the Department. Interest in further consultations/explanations has been relatively limited. The main interest has focused on how the legislation will work in practice and how it will be implemented.

The Department plans to hold information sessions on the Bill in Katherine, Alice Springs and Darwin over the next few weeks.

Further consultation will take place in the drafting of regulations and Guidelines which are intended to provide much of the relevant detail.