



Human Rights Commission
Te Kāhui Tika Tangata

Submission on family violence information sharing guidance

September 2018

Introduction

1. The Human Rights Commission (“Commission”) welcomes the opportunity to submit on the Ministry of Justice draft guidance (“the Guidance”) on sharing personal information under the Family and Whānau Violence Legislation Bill under (“the Bill”).
2. The Commission supports the purpose of enhancing safe information sharing to provide for better and more consistent identification, prevention and response to family violence.
3. The Commission considers that proposed section 124V must be interpreted consistently with the purposive principles set out in proposed section 1B. These include the principles that:
 - j. *responses to family violence should be culturally appropriate and, in particular, responses involving Māori should reflect tikanga:*
 - k. ***decision makers should consider the views of victims of family violence, and respect those views unless a good reason exists in the particular circumstances for not doing so (for example, because doing so would or may compromise victims’ safety):*** (emphasis added)
4. In the Commission’s view, the draft Guidance is improperly weighted towards promoting practices that are inconsistent with respect for the views of family violence victims/survivors.
5. The draft Guidance also gives no express or implied consideration to the cultural appropriateness of information sharing practices.
6. Parts of the guidance display an interpretation consistent with principle 1B(j) (respect for victims’ views), for example:¹ *“[Information sharing] is an excellent tool. However, it should not be used as an excuse to remove people’s autonomy, except in circumstances where this is clearly justified.”*
7. However, overall the guidance directs practitioners towards displacing victim/survivors’ autonomy in favour of professionals’ decision-making about safety. This is particularly concerning because family violence survivors have by definition² experienced a loss of control through family violence. Support services should seek to restore control and respect survivors’ dignity and autonomy.
8. The Commission considers that more balanced guidance, according with the proposed section 1B principles, ought to be provided. This would not only align more effectively with the overall intent of legislative framework but would lead to better practices.
9. The Commission recognises, as does the Select Committee report on the Family and Whānau Legislation Bill,³ that privacy *and* sharing can both support safety. The guidance should support information collectors, holders and sharers to recognise that privacy rights and safety usually

¹ At page 27 of the draft guidance.

² Section 3 of the proposed Act

³ At page 10: https://www.parliament.nz/en/pb/bills-and-laws/bills-proposed-laws/document/BILL_72556/family-and-wh%81nau-violence-legislation-bill

align, and should support them to work with the people whose safety they are trying to promote when sharing.

10. The Commission's submission addresses the following range of interconnected risks, protections against which we suggest should be enhanced in the guidance:

- Risk of abuse of the scheme by perpetrators of abuse
- Risk of disengagement with services
- Risk of discriminatory impact of information sharing
- Risk of sharing which reduces safety

11. The submission also addresses the Commission's involvement in the broader context of the information sharing reforms.

Addressing risk of abuse of the scheme by perpetrators

12. For some of the families most at risk of serious violence, for example those who have relocated and concealed their new address from the perpetrator of the violence, a culture of more information sharing without consent presents a serious risk.

13. Instances of perpetrators posing as professionals, or even as victims,⁴ in order to get access to information about the person/people they have been violent towards can be hoped to be relatively rare, but will be a very serious risk when they occur. That risk should be guarded against.

14. Controls could include:

- a. An addition to the flowchart on page 14 of the guidance, to make sure that the entity/person being shared with is who they say they are and is an appropriate person to share with.
- b. An additional section in the "Sharing information" section of the guidance,⁵ discussing how to ensure someone is who they say they are if you receive an approach from someone you don't already know (for example, by calling them back on the main number for their office) and what to do if you cannot verify their identity (for example, refuse to share, and share instead with emergency services if it is an emergency or get advice from a manager, community services, or a school social worker (as relevant to your role) if it is not an emergency).
- c. More guidance about when information can be shared with victims.

Addressing risk of disengagement with services

15. In places the draft guidance shows good awareness of the importance of trusting relationship between professionals and people who are being subjected to family violence.⁶

⁴ See discussion of misidentification of perpetrators in Victorian Royal Commission into Family Violence.

⁵ Around page 17 of the draft guidance.

⁶ For example at the bottom of page 26 of the draft guidance.

16. The Ministry will certainly appreciate that, for a range of well-recognised reasons, particularly marginalised groups are often distrustful of authority and find it difficult to trust that their interests will be protected when their information is shared or when the state makes decisions about their wellbeing.⁷
17. The Commission suggests that the risk that sharing (or a fear of sharing) presents to a trusting relationship can be better guarded against.
18. For example, consultation question 10 asks about materials, tools and templates useful for implementation of the guidance. The Commission suggests that model conversations with people whose information you are collecting or seeking to share would be valuable. Template conversations could guide information collectors and sharers to: emphasise the person's agency; encourage the person to do the sharing themselves if desirable; and invite the person to discuss and manage any safety concerns arising from sharing.
19. Again, more emphasis on consent and engagement would also mitigate this risk.

Addressing risk of discriminatory impact of information sharing

20. The Commission expects that the Ministry referred to the [Victorian Family Violence Information Sharing Guidelines](#) in developing this draft guidance.
21. One aspect of those Victorian guidelines which the Human Rights Commission would like to see carried through to the New Zealand Guidance is the specific guidance in relation to sharing the information of members of particular groups who experience discrimination and unconscious bias, which can lead decision-makers to draw inaccurate conclusions and can lead those who most need support to disengagement from services (as mentioned earlier).
22. The introduction to the Victorian guidelines states that:⁸

“Practitioners who are authorised to share [by the legislation] must be aware that unconscious bias and prejudice often factor into professional judgements and [must] therefore work to ensure all decisions made in relation to [information sharing] are non-discriminatory.”

23. The Victorian guidelines include sections about: “Considerations when sharing information about Aboriginal people” (chapter 7); and “Additional considerations for particular communities” (people with disabilities, people from culturally and linguistically diverse backgrounds, older people, people from lesbian, gay, bisexual, trans and gender diverse and intersex communities, and people from regional, rural and remote communities).

⁷ The Royal Commission into abuse in state care can be expected to explore some of this well-recognised experience.

⁸ At page 9:

https://www.vic.gov.au/system/user_files/Documents/fv/Family%20Violence%20Information%20Sharing%20Guidelines%20-%20Guidance%20for%20Information%20Sharing%20Entities.pdf.

24. Like Australia, New Zealand has a high rate of intervention in indigenous families, and indigenous families have intergenerational experiences which promote distrust of authority. There are many other communities (including disability and rainbow communities) with experience of government services that are not well equipped to deal with their particular needs.
25. While overall less detailed and comprehensive than the Victorian guidelines, the draft New Zealand guidance could still call on information sharers to consider the frequent experiences of marginalised groups, and taking into account the risk of unconscious bias to ensure that they are considering talking with members of these groups about how they share.

Addressing risk of sharing which reduces safety: Consent as a first step

26. Rights conversation around the draft guidance and the Bill it will implement rightly centres on the balance between rights associated with freedom from family violence, and the right to privacy.
27. The basis of human rights is human dignity. The human dignity of the victim/survivor is best promoted when they enjoy both privacy and freedom from violence.
28. The Commission's submission is that the right to privacy can be better protected in the guidance, in a way that will enhance enjoyment of the rights associated with freedom from violence.
29. Upholding a victim/survivor's agency and privacy – by seeking their engagement and consent to sharing – promotes the dignity that is protected by privacy, as well as promoting safer sharing.
30. The guidance recognises that the purposes of sharing are more likely to be met if information is shared with consent.⁹
31. The Commission suggests some changes to the guidance to meet the goal described on the consultation webpage, that the guidance “should drive the right behaviours, **building consent in as a first step** while facilitating more consistent information sharing practices.”¹⁰
32. Consent as a first step needs to be reflected in all three documents being consulted on. Later sections of this submission make suggestions relating to the one-pager and the A3 poster. In relation to the main guidance document:
 - a. “Part V: Collect information appropriately” should be moved to the front of the guidance. Collection comes first in the information sharing cycle, and conversations at the time of collection set the framework for information to be shared in future in a way that does not surprise the person whose information is shared.
 - b. In the summary on page 13, point 6 of the summary should be amended to “Seek consent, unless unsafe or impractical”, and should be lifted up the list to at least number 3.

⁹ For example, at page 26 of the draft guidance

¹⁰ <https://consultations.justice.govt.nz/policy/information-sharing-guidance-fv-sector/#survey> (emphasis added)

- c. In the diagram on page 13, there should be a white box labelled “safe sharing” with detail about risk mitigations like checking the identity of the person receiving the information, and asking the victim for consent and for information about the risks of sharing.
 - d. In the flowchart on page 7, the “collect” stage should refer to discussing future use and sharing, to form the basis of ‘no-surprises’ sharing in future.
 - e. In the flowchart on page 14, consent should be a rectangular box on the flowchart.
 - f. Page 22’s commentary on the importance of talking to the victim is valuable. It should be given more prominence, for example by:
 - i. Making this the first section in what is currently “Part II: Sharing information”. If victim consent can be gained, or the victim can share the information themselves, then the rest of the chapter is unnecessary. Safety through engagement should come first in the guidance as well as in practice.
 - ii. Amending the heading, for example to “Talk with the victim: their safety comes first”
 - iii. Moving the final paragraph (“Talk to the victim...”) to make it the second paragraph on the page
 - g. In the foreword, adopt content about talking with the person you are trying to keep safe, promoting collection practices that emphasise agency and trusting relationships.
 - h. The first paragraph on page 26 under the heading “Where does consent fit in?” should be amended to better summarise the more nuanced approach the rest of the guidance takes to the relationship of safety to consent.¹¹
33. As well as making sure consent is the first step in the guidance, there are other ways the guidance could better promote the agency and human dignity of family violence survivors, for example:
- a. On page 22, in the case study, “you can *send them somewhere else*” could say “you can *offer them other options*”
 - b. In the case example on page 21, Carmen should also consider telling Maria that she is going to share the information with Police¹²
 - c. Similarly, in the case example on page 27, Sarah should discuss future sharing with Karen when she first collects Karen’s information. She should explain to Karen the purpose of the risk assessment and its possible uses. Sarah should then seek to tell Karen when she has shared information.

¹¹ For example, it might instead say, “Safety is the starting point for thinking about information sharing under the Act. Consent is often a foundation stone for successful and safe information sharing (cross reference to section about talking to victim before sharing). However, if it is not safe to seek consent, you can still consider sharing without consent.”

¹² in accordance with guidance on page 28 of the draft guidance.

- d. In the case example on page 20, Reana’s duty to consider seeking Kate’s consent should be emphasised. This would be a good case example to show best practice, by showing Reana seeking consent and supporting Kate to access services. If Kate does not consent, Reana should still notify her of the sharing, ideally before she shares so that Kate can raise with Reana any concerns Kate has about sharing.
- e. The final sentence on page 23 should be emphasised. It should be a standalone paragraph and be explained further. For example, “Consider whether you can get the advice you need without identifying the person you are concerned about.”
- f. On page 30, guidance should be given that if “you’re not sure whether all the information you’re giving is correct”, you should make sure you are clear about that when you share the information.
- g. At the bottom of page 43, the guidance should suggest considering the reason you are not collecting directly from the person concerned, before collecting indirectly.

Other suggestions about the draft guidance: foreword

- 34. The foreword to the guidance has not been presented in the draft. The Commission suggests that this foreword should be consulted on. It will set the tone for the guidance. It should carefully discuss:
 - a. Principles 1B(i), (j) and (k) – cultural appropriateness, respect for victims’ views, and collaboration between decision makers
 - b. Privacy and safe information sharing as two contributors to safety and freedom from family violence
 - c. The importance of trusting relationships and ‘no surprises’ sharing, promoting the agency and dignity of the people whose information is shared
 - d. An emphasis on safe information sharing guided by human dignity, including recognition of the experiences of members of marginalised communities
- 35. The foreword should support a presumptive approach to obtaining consent as the ethical bedrock of any information sharing regime.

Consultation question 10: Materials, tools and templates

- 36. Model conversations are suggested above (at paragraph 18).
- 37. The Commission also suggests checklists to prompt the right considerations when sharing. The checklists should link to the relevant parts of the more detailed guidance.
- 38. The Commission anticipates that the Ministry would consult key representatives of the specialist family violence sector about model conversations and any other additional resources.

One-page overview

39. In the [draft one-page overview](#), we welcome the inclusion of the sentence explaining that “*The Bill is not intended to be used to collect a large amount of data about a large number of families or to promote large-scale data gathering from non-governmental organisations to government agencies.*” This is an important clarification of the purpose of the Bill.
40. The Commission would also welcome a sentence recognising the relevant principles of the Act and the role of engagement with the person whose information is being shared.

A3 poster: linking to guidance

41. It is appropriate that an overarching representation of the child and adult information sharing regimes is presented. We appreciate the effort to achieve this but suggest that this poster be reconsidered to better balance simplification with accuracy.
42. The Commission suggests that the [draft A3 poster](#) should be re-thought to align better with the guidance, and to make it clearer that it is a simplification, not a statement of absolute legal powers, and should direct users to the guidance for more information.
43. For example:
- a. The “collecting information” box should refer to the “Collect information appropriately” section of the guidance. It should also make clear that the usual course of action should be to collect personal information directly from the person.
 - b. The “using and sharing information” box should refer to sharing as permitted by the guidance. It should also mention the obligation to address consent.
44. The Commission would also welcome a central image that recognises the diversity of families, bodies and gender expression. We expect this could be easily achieved by, for example, showing only the torsos of larger stylised figures holding smaller ones.
45. Additionally, the “using and sharing information” box should not refer to using information to “plan ... family violence”.

Context of the development of the guidance

46. The Commission understands that the Ministry has consulted closely with the Office of the Privacy Commissioner in the development of this guidance. We support this engagement.
47. We understand that guidance implementing the Oranga Tamariki Act information sharing regime will soon be consulted on. We look forward to being involved in that consultation and will be seeking alignment.
48. The Commission has appreciated engagement with MSD in relation to the Privacy, Human Rights and Ethics (“PHRaE”) framework. We suggest referencing the framework in the guidance, requiring all decision-makers to whom the PHRaE is relevant to use the PHRaE when making information sharing decisions.

49. Training around the implementation of the guidance will be critical. This is illustrated in the contrast between different parts of the guidance. In the case example on page 20, “Reana is concerned about [a student and mother’s] wellbeing but is unsure what she, as a teacher, can do”. On page 23, the guidance suggests, to users including teachers, that “Your professional experience in the family violence area is likely to give you strong instincts about what’s genuinely useful to share.” This illustrates the reliance on professional experience and expertise that is not held by everyone subject to the scheme. Accordingly:
- a. the guidance should include reference to places to seek advice; and
 - b. training about the guidance will be vital.¹³

Summary of recommendations

50. The Commission suggests making a range of enhancements to the guidance, focussed on further guarding against the risks associated with sharing without consent, and better encouraging sharing that best promotes safety and accords with the principles of the Act, including:
- a. Ensuring the guidance interprets s124V consistently with principles (j) and (k) in s1B
 - b. Using the foreword to set a tone of human dignity and safe sharing built on consent (paragraphs 34-35)
 - c. Including specific guidance about addressing the risks of discrimination and unconscious bias (paragraphs 20-25)
 - d. Restructuring the guidance to “build consent in as a first step” (including specific suggestions at paragraphs 26-32)
 - e. Adding controls against the risk of perpetrators seeking information (paragraphs 12-14)
 - f. Providing checklists and model conversations about consent (paragraphs 15-19 and 36-38)
 - g. Better promoting the human dignity throughout the guidelines (paragraph 33)
 - h. Re-working the A3 poster to better align with the guidance (paragraphs 41-45)
 - i. Adding to the one-pager to reference the Act’s principles (paragraph 40)
 - j. Referencing the Privacy, Human Rights and Ethics (“PHRaE”) framework in the guidance (paragraph 48)
51. We would anticipate further consultation with family violence response experts on these changes.
52. The Commission also recommends:
- a. Training for all users of the guidance (paragraph 49)
 - b. Providing support and advice (phoneline or similar) to users of the guidance (paragraph 49)

¹³ See Victorian government model, referenced in guidelines, for example in boxes on page 9 and 20.