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Ministry of Justice
Family and Sexual Violence Work Programme
Wellington

By email: FVinformationsharing@justice.govt.nz

Family violence information-sharing – feedback on draft Guidance

Introduction

The New Zealand Law Society welcomes the opportunity to comment on the draft guidance document, *Guidance on sharing personal information under the Family and Whānau Violence Legislation Bill* (draft Guidance).

Legislative background: the Family and Whānau Violence Legislation Bill

The draft Guidance has been prepared in support of the proposed new statutory information-sharing regime in the Family and Whānau Violence Legislation Bill (Bill), for family violence agencies and social services practitioners.[1] (The Bill is currently awaiting its second reading, and the draft Guidance will need to reflect any amendments that are made to the Bill prior to its enactment.)

The development of draft Guidance is a useful tool to assist family violence agencies and social services practitioners, by explaining in an accessible way the legislative requirements regarding information-sharing.

However, the Law Society recommends that the Ministry reconsider the decision to issue "guidance" rather than a code of practice. As the Ministry's website notes, the Bill specifically provides for codes of practice to be issued on operational issues, including information-sharing (section 124Y(2)(c)), but states that codes of practice are legislative instruments and cannot be as comprehensive as a guidance document. That is not necessarily the case. It also begs the question why section 124Y(2)(c) was included in the Bill. Most importantly, the legal status (if any) of the Guidance is unclear. The Law Society's preference is for the development of a code, as envisaged by section 124Y(2)(c) of the Bill; alternatively, the final document will need to explain to users what legal status (if any) it has.

General comments on the draft Guidance

The Law Society supports improved information-sharing to prevent family violence.[2]

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1 Family and Whānau Violence Legislation Bill, Part 1 Amendments to Domestic Violence Act 1995, new Part 6B – *Information requests, use, and disclosure, and service delivery codes of practice*.

2 NZLS submission 24.5.2017 on the Family and Whānau Violence Legislation Bill, at [117] – [136] https://www.lawsociety.org.nz/__data/assets/pdf_file/0012/111612/Family-and-Whanau-Violence-

The Law Society supports the overall objectives of the draft Guidance which include:

- providing the family violence sector with certainty around when, how and why information can be shared under law;
- ensuring the guidance is understandable, easy to navigate quickly and workable for the day-to-day decisions made by people in the family violence sector; and
- facilitating more consistent information-sharing practices.

The draft Guidance contains a great deal of useful information and is likely to be helpful to family violence agencies and social services practitioners.

However, the document would benefit from rewording for clarity and consistency in some areas, as discussed below. The relevant legislative sections should be referenced (for example, in footnotes or appendices), for readers who want more information.

Given the length and complexity of the material it would be also be helpful to reconsider the structure of the document, to ensure it is concise (eliminating overlaps and duplication) and logically structured, and to insert relevant cross-referencing between different parts of the Guidance. This would greatly enhance the document's readability and accessibility for users.

The Law Society's specific comments on the clarity and accuracy of the draft Guidance are set out below.

Specific comments

Part 1 – General Information

D: Who can share under the Family Violence legislation?

Definition of "social services practitioners" (p10)

The definition of "registered teachers", as one of the practitioners covered by the Bill, needs to be amended, for the reasons set out below.

Proposed section 124U defines the agencies and individuals that can share personal information as either "family violence agencies" or "social services practitioners"; a "social services practitioner" includes an individual who is "a holder of a teacher's practising certificate, or a limited authority to teach, under the Education Act 1989."[3]

However, the draft Guidance at p10 refers to a "social services practitioner" as including "registered teachers". The section 124U definition does not apply to all registered teachers, but only teachers with a practising certificate or limited authority to teach. Registered teachers would therefore only come within the provisions of the Bill if they hold a current practising certificate or limited authority to teach. The relevant paragraph on p10 should be amended for consistency with the Bill, to read:

> "Social services practitioners are teachers with a practising certificate or limited authority to

Bill-24-5-17.pdf. As noted at [121], the Law Society considers that the information-sharing framework in the Family and Whānau Violence Legislation Bill is preferable to the equivalent framework in the Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Bill. The Law Society recommended that the latter be aligned with the Family and Whānau Violence Legislation Bill, to avoid difficulties and confusion for agencies and families.

[3] Family and Whanau Violence Legislation Bill, clause 69, section 124U.

teach (under the Education Act 1989) …"

For completeness, the definition should also be corrected on p12.

G: What legal protection do I have if I follow the law?

Definition of bad faith (p11)

The draft Guidance explains that agencies/individuals who comply with the information-sharing provisions will be immune from legal liability and professional disciplinary processes, provided they do not act in "bad faith" (section 124X). "Bad faith" is not defined in the Bill but may be defined as behaviour that is malicious, fraudulent or dishonest.

The concept of "bad faith" will be of central importance and interest to the agencies and individuals covered by the Bill. It is therefore crucial that the draft Guidance provides clear information to readers about what actions might constitute "bad faith" and uses consistent definitions. Unfortunately, the current draft does not provide sufficient clarity around what constitutes "bad faith".

The draft Guidance (at p11) states that the following acts may be deemed to be in bad faith:

- sharing of irrelevant information,
- information shared with inappropriate people,
- information shared without a reasonable belief that the information being provided to another agency will assist them with a permitted purpose.

This is of little practical value as guidance because all the above acts could be done by someone acting entirely in good faith, albeit in error.

A more comprehensive, and accurate, discussion of "bad faith" is set out at p32:

> "Bad faith usually arises where someone has malicious or ulterior motives, or acts with intent to deceive. Where people are so grossly careless that it appears they have made no attempt to comply with their legal obligations, this might also be seen as amounting to bad faith".

This definition should be used consistently throughout the draft Guidance, and the discussion at p11 should incorporate aspects of the p32 discussion and cross-refer to it.

Part 2: Sharing Information

Flowchart (p14)

The flowchart on p14 provides a quick overview of whether the agency/person should share information. The Law Society recommends the following changes:

- The second blue box in the flowchart contains a list of things "you need to consider" as to whether information should be shared. The list contains some important suggestions, but it would be helpful to make clear that the list is not exhaustive. The box could be amended to read "important things for you to consider include:".
- The final bullet point in the second blue box – consider "if any other rules apply to you" – is unclear; there should be a cross-reference to the comprehensive (and helpful) discussion at p32 of these "other rules".

- The flowchart should include an additional yellow box at the end, specifying that information can only be shared with an authorised recipient (i.e. "family violence agencies" and "social services practitioners", as discussed below).
- As a minor observation, the flowchart should be included in the table of contents.

C: When can I share information to protect someone? (p16)

The draft Guidance at p16 sets out common examples of sharing personal information that will help another agency intervene to protect a victim of family violence. The Guidance should include a reminder that the Bill's information-sharing framework applies only to "family violence agencies" and "social services practitioners" as defined in section 124U. These definitions should be referenced early in the draft Guidance (which would provide quick and useful cross-referencing at later points), and consistent terminology used throughout the document.

D: Communication is key – When you can provide information (p17)

The draft Guidance at p17 states:

> "If you receive a request for personal information from another agency, you're allowed to provide the information asked for as long as you've got good reason to think that:
>
> - the agency is covered by the Act;
> - the agency needs it for one of the permitted purposes; and
> - the information is relevant.
>
> If there is no request for information, but you believe it would be beneficial to disclose information for one of the permitted purposes, think carefully about who needs it."

As noted earlier, it would be helpful to readers to insert references to the relevant sections of the Bill where applicable. The excerpt quoted above refers to section 124V(4)(a), which enables the agency/practitioner to share information with an authorised recipient if they believe "on reasonable grounds" that disclosure will/may help the recipient to use the information for one of the permitted purposes.

It is not clear how far the immunity provision in section 124X extends, but arguably it may not cover a person who makes a good faith mistake about whether the recipient is covered by the Act. This is because the "belief on reasonable grounds" applies only to the *purpose* of the disclosure (section 124V(4)(a)), not the recipient of the disclosure.

The Law Society therefore recommends amending the relevant paragraph at p17 to read:

> "If you receive a request for personal information, you're allowed to provide information as long as:
>
> - the agency is covered by the Act; and
> - you have good reason to think that giving it to the agency will help with one of the permitted purposes in section 124V(1).
>
> You do not have to provide all the information requested if you think only some of it will actually help the agency achieve its permitted purpose. Only provide the information that you believe is helpful. On the other hand, if you have extra information that is not part of

the request that you think will help, you must consider providing that as well."

G: Proactive disclosures (p18)

Section G states:

> "Information sharing is not always triggered by a request. Don't be afraid to engage proactively with other people in the sector where sharing information will enable you to fulfil one of the permitted purposes. Sharing may also be part and parcel of what you have to do."

It would assist readers to refer at this point to the duty to proactively consider information disclosure in section 124W. The paragraph should read:

> "Information sharing is not always triggered by a request. If you have information and you reasonably believe disclosure of it may help prevent family violence, you have a duty to consider whether it would help achieve one of the permitted purposes if you provided the information to an authorised recipient."

Duty to consider sharing (p19)

As noted above, section 124W sets out a duty to consider proactive information disclosure.

However, it is unclear what the consequences of a failure to comply with section 124W will be. This section of the Guidance should note that there appears to be no immunity from liability for a person/agency that *fails to consider* proactive disclosure when required to do so by section 124W.

Similarly, as currently drafted the Bill appears to confer no immunity for a *decision not to disclose* information (section 124X expressly confers immunity only for disclosure of information). It will therefore be important for the person/agency to record reasons where section 124W requires proactive disclosure to be considered, and a decision is made not to disclose the information. The final sentence in this section on p19 should be amended to include the underlined words: "if you decide not to share information, even though one of the purposes applies, it is essential that you keep a note of why you made that decision."

Why is there a duty to consider sharing? (p19)

The draft Guidance also discusses at p19 why there is a duty to consider sharing and includes the following advice: "if one of the permitted purposes applies, then the starting point is that you *will* share the information". Although the following section on p20 discusses why information-sharing is not compulsory, the advice on p19 incorrectly implies that information-sharing is mandatory. The discussion should be amended to accurately reflect that the information-sharing framework is voluntary, not mandatory. The relevant sections of the Bill include:

a) The purpose in section 124T(1)(b) to "require family violence agencies and social services practitioners, in certain circumstances, to consider disclosing personal information for those purposes".

b) The ability to disclose information in section 124V(4): a person may disclose personal information if they believe on reasonable grounds the information may or will help the recipient; and

c) The requirement in section 124V(5) to have regard to the principle that victim safety should

usually take precedence over confidentiality and privacy, when "making a decision whether or not to disclose information under this section (which authorises, but does not require, a decision that information be made available)".

It may also be useful to consider combining the section on p19, 'why is there a duty to consider sharing?', with the section on p20, 'why is sharing not compulsory', to avoid potential confusion for readers.

Conclusion

We hope these comments are helpful to the Ministry. If further discussion would assist, please do not hesitate to contact the convenor of the Law Society's Human Rights and Privacy Committee, Andrew Butler, via the committee secretary Amanda Frank (amanda.frank@lawsociety.org.nz / (04) 463 2962).

Yours faithfully

Tiana Epati
Vice President