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ISSUES IN GOOD PRACTICE

Privacy, information sharing and coordinated practice – dilemmas for practice by Karen Wilcox, Clearinghouse Good Practice Officer¹

Introduction

One of the main advantages of an effective coordinated response to domestic and family violence is the process for sharing information across agencies working with victims of violence. This process enables all agencies to be informed of risk issues, to screen effectively and to minimise secondary victimisation. Without it, victims can be required to tell their stories repeatedly to agencies in the child protection, domestic violence, criminal justice, family law and welfare/ economic support systems. Information sharing between agencies and the family courts also assists them to establish the truthfulness of allegations of violence or substance abuse, and to support quality decision making, which takes account of different factors that impact on the wellbeing and safety of children.

Unfortunately, across most jurisdictions, information sharing to assist management of risk and safety is ad hoc or patchy. One of the stumbling blocks to effective information sharing has been the limits on information exchange imposed by the contradictory but important principle of privacy. Relatedly, the confidentiality of discussions between service providers and those seeking assistance also impairs effective communications across agencies. This has created a dilemma in the development of good practice.

This discussion will examine the dilemma for practitioners attempting to address the need to respect laws and practices relating to client confidentiality and individual privacy, while supporting collaborative and safety focused case management. In doing this, privacy will be defined loosely, as it is the collective effect of legal, professional and practice obligations which currently constrains information exchange at the level of collaborative practice.

In addressing this particular practice issue, it is helpful to conceive of the range of understandings of privacy which impact on service provision for victims of violence. These include, but are not restricted to: professional and agency codes of practice; victim privacy; personal information privacy in the various privacy regimes of the states, territories and Commonwealth; and court privacy practices.

This discussion will, therefore, allude to the broad ambit of notions of privacy which potentially impact on collaborative practice focused on victim safety. Theoretical discussion of notions of privacy in contemporary Western legal culture will be left to other arenas of debate.

Privacy laws in Australia

Most states and territories have introduced laws to protect privacy. These vary in scope and focus, with some jurisdictions, such as New South Wales (NSW), Tasmania, Queensland

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and Victoria, adopting comprehensive privacy laws, and others including privacy provisions within their freedom of information laws. South Australia (SA) has a Cabinet agreement which incorporates privacy principles and applies to government agencies. In addition, there are privacy principles in most jurisdictions, as well as specific regulations governing judicial, police and health sectors.

Commonwealth legislation also contains a number of relevant privacy provisions. Section 10 of the *Family Law Act 1975* directs family counsellors and family dispute resolution practitioners not to disclose their communications. In addition, the *Privacy Act 1988* sets out responsibilities for Commonwealth agencies and non-government organisations, as well as two sets of principles – the Information Privacy Principles (for government) and the National Privacy Principles (for non-government organisations). This Act was recently the subject of a review by the Australian Law Reform Commission (2008).

Various professions, for example the legal, health and counselling professions, are also subjected to their own privacy and confidentiality codes, which in some instances are the subject of legislation. This creates a complex, messy and often contradictory set of rules for practitioners, and makes the sharing of information across agencies very difficult in most jurisdictions.

The 'privacy v safety' dilemma

Privacy is an important issue which impacts on victims of violence in several ways. First, securing privacy around whereabouts has been a cornerstone of safety planning for victims of family and domestic violence, but has become increasingly difficult in the age of the internet. Second, privacy around proceedings dealing with domestic violence can be important in minimising shame and discrimination, which victims of violence experience, and in protecting the wellbeing of children living with violence.

To this end, the need for victim privacy has been partly addressed through protection order law in some states and territories. In the Victorian legislation, courts can be closed if victims experience 'undue embarrassment' (s68). Processes and practices in court are also important. For example, some courts require all protection order applicants to be present in court during the list, while others allow individual matters to be called one at a time, in order to respect victim privacy. The law in Victoria (s166(2)) and the Australian Capital Territory (ACT) (s111) also prohibits publication of any identifying details, as does the new South Australian legislation (s33).²

Many jurisdictions also prohibit the publication of details which might identify children, for example, the ACT (s111), Victoria (ss166-169), Northern Territory (NT) (s123) and Tasmania (s32). In the NT and Tasmania, courts may order prohibition of publication of victim's details but this does not pertain to the victim's need for privacy. The *Family Law Act 1975* (s121) also limits publication of information relating to proceedings.

For example, if police hold information about a violent incident, exchange of this information can enable court support services to assist the victim to obtain the most effective protection order to meet their needs. Similarly, prosecutorial practice can be enhanced by knowledge of the history of violence held by child protection, counselling or court support agencies.

The recent release of several reports on the problems arising when the *Family Law Act 1975* (and the related systems) deal with domestic violence has further illuminated this issue. The reports by Professor Richard Chisholm (2009) and the Family Law Council (2009), in particular, note the difficulties which arise in relation to the provision of appropriate information to the family courts from child protection, health, police, family dispute resolution practitioners and family counsellors. In addition, the recent consultation paper released by the Australian and New South Wales Law Reform Commissions (2010) notes this problem as an important issue for consideration. The lack of effective pathways for such sharing of information has shifted the onus to victims to provide evidence, and has compromised the

² The South Australian Parliament has passed new protection order legislation, the *Intervention Orders (Prevention of Abuse) Act 2009*, but this Act has not yet commenced.

capacity of family law decision making to appropriately address issues of safety and wellbeing.

These issues point to the existence of a dilemma for practitioners attempting to coordinate responses to domestic and family violence while respecting victim autonomy.

Laws which enable information exchange

Some states and territories have attempted to address this dilemma – and clarify practice obligations – through legal solutions. These solutions reflect a prioritising of the Duluth principles of risk, safety and perpetrator accountability.

In some cases, information exchange between child protection, courts and police is facilitated through protection order law. In Tasmania, court support, counselling services, prosecutors and Legal Aid have access to information (s37). These measures are vital in ensuring the successful practical operation of the integrated response to domestic violence, Safe at Home. Similarly, Western Australia's (WA's) protection order laws allow for information sharing (s70A), while SA's new protection order laws will require public agencies to disclose the whereabouts of defendants, thereby facilitating location of perpetrators by police (s38).³

Jurisdiction	Current domestic violence information sharing legislation
Australian Capital Territory	<i>Domestic Violence Agencies Act 1986</i>
South Australia	<i>Intervention Orders (Prevention of Abuse) Act 2009, s38</i>
Tasmania	<i>Family Violence Act 2004, s37</i>
Western Australia	<i>Restraining Orders Act 1997, s70A</i>

Other states and territories have followed different legal paths. The ACT has legislated for some cross-agency information sharing. In particular, ACT police are able to disclose information to crisis support organisations where this might aid the organisation in rendering assistance (*Domestic Violence Agencies Act 1986* s18). The NT requires the reporting to police of information relating to risk of death or serious injury, under s124A of its *Domestic and Family Violence Act 1986*. This duty applies not just to agencies but to all adults.

It is also possible to address restrictions on information exchange through the exemptions to the laws which create those restrictions. For example, the *Victorian Health Records Act 2001* provides for the disclosure of information where this is necessary to 'lessen or prevent a serious and imminent threat to an individual's life, health, safety or welfare' (s2). Similarly, the *Family Law Act 1975* (s10) enables exchange of information by counsellors, mediators or report writers where there is risk of harm to a child and/or to prevent imminent death, threats to health or commission of a crime. In NSW, Queensland and Victoria, police are not required to comply with privacy principles in relation to their policing duties. In addition, in Victoria, an exemption to the exchange of information by health authorities arises where there is imminent threat to life, health safety or welfare. The Commonwealth *Privacy Act 1988* contains a similar provision in relation to government agencies.

Often laws are cemented by memoranda of understanding, although where these are locally developed and/or lack cabinet direction and accountability structures, they are unlikely to be effective.

³ For specific details of protection order legislation, see the Clearinghouse Topic Paper 19, available on our web site at www.adfvc.unsw.edu.au.

Information sharing can be achieved through several mechanisms. These include interagency practice protocols (e.g. ACT's Family Violence Intervention Program) and regular case meetings (e.g. SA's Family Safety Framework, Tasmania's Safe at Home). Another useful mechanism is access to a shared database. For example, Tasmania has a sophisticated shared information system, accessed through a shared server, which enables government agencies to stay informed of police interactions with offenders, child protection matters, and court processes, among other things (see the Clearinghouse Good Practice database entry 137 at http://www.adfvc.unsw.edu.au/good_practice.html). Such a system to streamline information exchange is of immense value where the state or territory is the main provider of services.

In states such as NSW, where service provision for victims of violence is ad hoc, and varies enormously across localities – depending on the provision of NGO services, as there is not a statewide system of domestic violence services and children's post-trauma services – resourcing a state system of domestic violence outreach would be an essential first step before safety-focused information exchange between agencies could be of value.

The way forward – national systems for information exchange

The National Council to Reduce Violence against Women and their Children (2009, p. 104) recommended that protocols to facilitate information sharing across the family law and family violence sectors be introduced. This reflects the council's focus on the importance of ensuring safety for victims of violence and their children.

In addition, adoption of the recommendations found in Section 9 of the Family Law Council's recent report would greatly assist in the resolution of some of these issues. Although they relate to family law, the inclusion of recommendations 9.8 and 9.9 – which refer to the production of reports and information by police and child protection authorities; and information sharing between police, the courts, Legal Aid and child protection agencies – would assist the family courts to arrive at a safety-focused assessment of children's interests.

Discussion questions contained in the Australian and New South Wales Law Reform Commissions' (2010, p. 481) report similarly identify the need for obligations on state and territory agencies to provide information to family courts. The report also outlines the importance of information exchange across service pathways in the family law system, and between this system and state and territory agencies, so that dispute resolution is equally informed by evidence of risk and the need for safety.

Further resolution of inconsistencies between privacy laws and information exchange might be achieved if the exemptions contained within existing privacy regimes, noted in the previous section, could be enhanced. Building on these exemptions, it may be possible to introduce more effective principles governing the exchange of information for safety reasons. This would require commitment across all levels of government to improving the coordination and seamlessness of responses to family and domestic violence.

In implementing changes to existing limitations on information exchange, governments do not necessarily need to compromise individual victim rights to privacy in court settings. Indeed, the introduction of a regime such as Tasmania's which enables information sharing, complemented by privacy provisions relating to non-publication of matters and court listing practices respecting privacy, suggests a way forward in enhancing victims' experience of systems designed to protect their rights and safety.

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