Privacy Commissioner
Te Mana Matapono Matatapu

Privacy Commissioner's submission to the Justice and Electoral Committee on the Family and Whānau Violence Legislation Bill

Executive summary

1. The Family and Whānau Violence Legislation Bill ("the Bill") is an omnibus Bill that amends the Domestic Violence Act 1995, the Bail Act 2000, the Care of Children Act 2004, the Crimes Act 1961, the Criminal Procedure Act 2011, the Evidence Act 2006, and the Sentencing Act 2002. The Bill's purpose is to ensure legislation relating to family violence is more complete and fit for purpose and better supports a co-ordinated and effective response to family violence.

2. My comments relate solely to the new information sharing provisions contained in clause 69 of the Bill (hereafter, unless otherwise stated, all sections referred to are inserted by clause 69). Clause 69 introduces a new Part 6B entitled "Information requests, use, and disclosure, and service delivery codes of practice" that provides an information sharing regime for "family violence agencies" and "social services practitioners". This regime would allow agencies and practitioners providing services related to reducing the harm from family violence to use and share personal information for purposes related to family violence.

3. I support the Bill's intent to reduce the harm from family violence and to clarify that agencies can share personal information where necessary to do so. My view is that the enabling information sharing provision contained in section 124V is an appropriate way to achieve this. While the sharing of personal information under section 124V has implications for individual privacy, it is justified given the purposes for which information may be shared. It is appropriately constrained by the type of agencies that may share information and the protection of privileged information. In addition the Bill provides for a code of practice to guide how the information sharing is to operate in practice (section 124Y).

4. I recommend that the requirement that agencies must consider the principle that helping to ensure a victim is protected takes precedence over confidentiality and principle 11 of the Privacy Act (section 124V(5)) be removed from the Bill. This section is unnecessary as section 7 of the Privacy Act means that the enabling information sharing provision in the Bill already takes precedence over principle 11.

5. I recommend that the Committee seek assurance from agencies that will be subject to the information sharing provisions as to whether they support the duty to "consider disclosing" information (section 124W). I am concerned that this duty could create a potentially harmful presumption of information sharing. However, I note that at the policy stage, the Minister of Justice undertook to carry out further consultation on the information sharing provisions, and my view is that if agencies delivering family violence services support the duty to "consider disclosing", then I would not object.

6. At the time of lodging this submission the Children, Young Persons and their Families (Oranga Tamariki) Legislation Bill is being considered by the Social Services Committee. That Bill contains an information sharing regime for "child welfare and protection agencies" which differs considerably from the information sharing provisions contained in the Family and Whānau Violence Legislation Bill. If both Bills are enacted without revision there is a risk that they will prove difficult and confusing to apply in the great number of cases that involve both family violence and child abuse.

7. I therefore draw to the Committee's attention the need to align these two pieces of legislation. In my submission to the Social Services Committee I recommended that the approach to information sharing being taken in the Family and Whānau Violence Legislation Bill be preferred, and I repeat that recommendation here.

The Bill will make it clear that agencies can share information where necessary to reduce the harm from family violence, and includes appropriate safeguards

8. I support the enabling information sharing provision in section 124V. This section would allow family violence agencies and social service practitioners to share information for the purposes of carrying out risk or needs assessments, making decisions or plans related to family violence, and protecting victims from family violence. I also support the provision of immunity for sharing of information in good faith under section 124V (section 124X).

9. While the information sharing provision in section 124V has implications for the privacy of a potentially significant number of New Zealanders, my view is that this is not disproportionate given the harm caused by family violence and the appropriate constraints and safeguards included in the Bill.

10. The information that can be shared is appropriately limited by the purposes set out in section 124V(1)(a) – (c). These purposes are clear and limited to assessing whether individuals are at risk and then taking actions to respond to that risk or to incidents of family violence.

11. The parties who may share information are limited by the definitions of "family violence agency" and "social services practitioner." These definitions are appropriately limited to:

    - government agencies;
    - NGOs that are partly or wholly funded by government (i.e. are operating government contracts);
    - individual practitioners who provide services to victims or perpetrators of family violence; and
    - agencies, such as schools and health service providers, who may have information about, or be involved in responding to, family violence.

12. The people about whom information can be shared is appropriately limited by the definitions of "victim" and "perpetrator". These definitions include perpetrators who "may have committed", and victims who "may experience" or "may be affected by" family violence. This allows agencies to share information before violence has occurred or has been confirmed to have occurred, in keeping with the Bill's objective of proactively addressing risks and reducing harm. In keeping with the Bill's recognition of the significant harm done to children and others who witness family violence, the definition of "victim" would allow agencies to share information about children and others who have been "affected by" family violence.

13. The Bill retains agencies' discretion about whether or not to share information, and privileged information is protected (section 124V(7)). This is very important. Agencies working in difficult and sensitive areas such as family violence must be able to build relationships of trust with their clients and with each other. Any move towards mandatory information sharing, where the ability of individual practitioners to use their judgement to do what is best for their clients is reduced, risks undermining these vital relationships of trust.

14. The Bill includes principles that agencies should collaborate to identify and respond to family violence (section 1B(k) inserted by clause 7) and that agencies should consider and respect the views of victims (section 1B(j) inserted by clause 7). These principles, combined with the enabling information provision (section 124V), appropriately guide and enable agencies to work together to reduce harm, including sharing information where necessary to do so.

15. Codes of practice (section 124Y) that agencies must comply with (section 124V(6)), provide a further safeguard. The Bill allows for codes of practice to be issued by Order in Council to guide the delivery of services, including "assessment and management of risk related to family violence" and "information requests, use, and disclosure" (sections 124Y(2)(a) and (c)). My view is that setting out further detail about how the information sharing provisions are to operate in practice is an appropriate safeguard given the breadth of information sharing allowed for.

16. I **recommend** that the Bill include a requirement to consult with the Privacy Commissioner before codes of practice that relate to the use or disclosure of personal information are finalised. The Departmental Disclosure Statement that accompanies the Bill states that the Ministry of Justice's view is that because the current Cabinet Manual requirements for consultation with the Privacy Commissioner would apply to the codes, including this consultation requirement in legislation is unnecessary (section 3.5.1). However, the Cabinet Manual is subject to the discretion of the Executive. Because of the significant implications for individual privacy created by the information sharing provisions in the Bill, my view is that this consultation requirement should be provided for in legislation.

17. Consultation with the Privacy Commissioner is a common minimum protection for legislative provisions related to information sharing. Similar consultation requirements are included, for example, in the Intelligence and Security Act 2017 (section 127), the Policing Act 2008 (section 95D), the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 (section 146), the Education Act 1989 (section 347), and the Social Security Act 1964 (section 11B).

The direction to agencies that protecting victims takes precedence over confidentiality and principle 11 of the Privacy Act should be removed from the Bill

18. Section 124V(5) states that in determining whether to disclose information, agencies must have regard to the "principle" that protecting victims should usually take precedence over confidentiality of the information (section 124V(5)(a)) and principle 11 of the Privacy Act 1993 (section 124V(5)(b)).

19. I **recommend** that section 124V(5) be removed from the Bill. The assumption inherent in the drafting that confidentiality and keeping people safe are mutually exclusive is fundamentally flawed. Very often confidentiality and privacy are essential components of keeping a victim safe.

20. The effect of section 124V(5)(a) is to provide for presumptive sharing of information regardless of any applicable confidentiality. This is unnecessary and potentially harmful, as there is a risk that people will be deterred from seeking help if they believe their information cannot be kept confidential.

21. Section 124V(5)(b) is unnecessary and confusing. Section 124V of the Bill already clearly overrides principle 11 because of section 7 of the Privacy Act (this section states that where there is conflict between the principles of the Privacy Act and another piece of legislation, the other legislation takes precedence).

22. I understand that the intent of section 124V(5) is to encourage family violence agencies and social service practitioners to collaborate, to proactively share information, and not to be held back from doing so because of concerns about breaching confidentiality or privacy. Respecting privacy and confidentiality is an important part of building relationships of trust between agencies and their clients and therefore keeping people safe. Guidance to the sector on difficult issues such as when to break confidence would be more appropriately contained in a code of practice or professional guidance than in primary legislation.

The Committee should seek assurance that family violence agencies support the inclusion of a duty to "consider disclosing"

23. Section 124W of the Bill provides a duty to "consider disclosing" information whenever it is requested under section 124V(1) or whenever there are reasonable grounds to believe it will or may help ensure a victim is protected from family violence.

24. During the policy development process for the Bill I gave my qualified support for a provision that agencies "must consider" sharing information, which notes that there is a risk that such a provision could be read as creating a presumption of information sharing. Presumptive information sharing risks having a detrimental impact on the trust relationships essential to effective information sharing, and may deter vulnerable people from engaging with support services. It is also unnecessary; section 124V already makes it clear that agencies can share information.

25. In the Cabinet paper seeking policy decisions for the Bill, I noted that the Minister of Justice intended to carry out further consultation on information sharing matters with agencies providing family violence services, including professional bodies and NGOs. I stated that: "If those agencies support such a "must consider sharing" provision, and consider that the potential benefits of the proposal outweigh the potential risks to the victims, I would not object to the proposal."[1] I have not seen the results of any such consultation that answers the question of whether agencies support the inclusion of a duty to "consider disclosing" information.

26. I therefore **recommend** that the Committee seek assurance from the community organisations that will be affected by the duty contained in section 124W on whether they support its inclusion. If not, it should be removed from the Bill.

Aligning information sharing requirements for agencies providing services related to family violence and vulnerable children

27. The Children, Young Persons and their Families (Oranga Tamariki) Legislation Bill is, at the time of lodging this submission, being considered by the Social Services Committee. That Bill contains an information sharing regime for "child welfare and protection agencies", which aims to make it clear that agencies can and should share information where necessary to reduce the harm from child abuse.

28. There is significant overlap between the harm caused by child abuse and family violence. As stated in the principles of the Bill, "children are particularly vulnerable to family violence, including seeing or hearing violence against others", and "children are at particular risk of lasting harm to their current and future wellbeing" (sections 1B(c) and (d) inserted by clause 7).

29. Despite this, the two information sharing regimes currently before Parliament differ considerably in a way that creates the risk of significant confusion and difficulty for agencies, as illustrated in the scenario below.

[1] Cabinet Social Policy Committee paper titled "Reform of Family Violence Law Paper One: Context and Supporting Integrated Responses", paragraph 106. Retrieved 23/5/17 from https://www.justice.govt.nz/assets/Documents/Publications/fv-reform-paper-1-context.pdf

Information sharing scenario

A social worker becomes concerned that a woman and her children are suffering violence at the hands of the woman's boyfriend. The social worker may wish to gather information from others involved with the family, such as the woman's midwife and doctor, to confirm their concerns before taking action.

In this case, which involves both family violence and vulnerable children, the social worker would have to decide whether to act in accordance with the 'rules' for information sharing contained in Children, Young Persons and their Families (Oranga Tamariki) Legislation Bill or the Family and Whānau Violence Legislation Bill. Depending on their choice, different rules will apply.

For example, if the social worker chooses to act under the Children, Young Persons and their Families (Oranga Tamariki) Legislation Bill, they will have the power under section 66 (inserted by clause 38) to compel the midwife and doctor to provide them with information. However, if this information is provided in breach of a professional duty of confidence, section 66B (inserted by clause 38) prevents this information from being shared with any other agencies who may be involved with trying to help the woman and her children.

If the social worker chooses to act under the Family and Whānau Violence Legislation Bill, section 124V (inserted by clause 69) will make it clear that the midwife and doctor are able to share information in response to the social worker's enquiries. However, they are not compelled to do so, and will be able to use their professional judgement to determine what is in the best interests of the woman and her children. This information can then be shared with other agencies involved with helping the family.

30. This confusing situation risks slowing down information sharing necessary to keep people safe; the opposite of what both Bills are aiming to achieve. I draw to the Committee's attention the need to align these two pieces of legislation.

31. My view is that the approach taken in section 124V of the Family and Whānau Violence Legislation Bill should be preferred, and that clause 38 of the Children, Young Persons and their Families (Oranga Tamariki) Legislation Bill should be amended to be consistent with this section. As discussed above, the approach in the Family and Whānau Violence Legislation Bill is clear, proportionate and contains appropriate constraints and safeguards. The proposed information sharing regime for child welfare and protection agencies, by contrast and as set out in my submission to the Social Services Committee, is disproportionate, confusing and may have negative unintended consequences.

Conclusion

32. The information sharing provisions in clause 69 of the Bill clarify that agencies can share information where necessary to reduce the harm from family violence, and are appropriately constrained. My recommendations – to delete section 124V(5), confirm that agencies support section 124W and if not remove it, and to include a requirement to consult with the Privacy Commissioner before finalising codes of practice that involve personal information – are intended to remove inappropriate and confusing elements and ensure appropriate safeguards are included.

33. I request to speak to the Committee regarding this submission.

John Edwards
Privacy Commissioner