CHILD SAFETY, WELFARE AND WELLBEING INFORMATION SHARING PROPOSED LEGISLATIVE MODEL

SUBMISSION TO NOUS GROUP

Contact:

Sarah Bright, Senior Lawyer (Family and Children's Law) , Legal Policy
T: (03) 9607 9443
E: sbright@liv.asn.au
W: www.liv.asn.au

INTRODUCTION

The Law Institute of Victoria (LIV) is Victoria's peak body for lawyers and represents more than 19,500 people working and studying in the law in Victoria, interstate and overseas.

The LIV has a long history of contributing to, shaping and developing effective state and federal legislation, and has undertaken extensive advocacy on various law reform and policy issues. The LIV welcomes the Andrew Government's proactive approach to implementing the recommendations of the Royal Commission into Family Violence and working towards further reform building on those recommendations.

The LIV is grateful for the opportunity to provide the Nous Group on behalf of the Department of Health and Human Services (DHHS) with a submission as to the proposed amendments to the Child Safety and Wellbeing Information Sharing legislative framework and welcomes any further opportunity to provide feedback and be consulted on reforms.

This submission has been prepared by representatives of the LIV's Family Law Section (the Section), which is comprised of over 2,000 members practicing primarily in family and children's (child protection) law. As such, comments made in this submission are limited to members' experience in those jurisdictions.

Additionally, some commentary is based on contributions made by our representative members who sit on the Chief Magistrates' Family Violence Taskforce and who were involved in the consultations in relation to the Family Violence Information Sharing model.

INITIAL COMMENTS

The LIV acknowledges there is a need to build a stronger evidence data base to better assess, monitor and identify those children who may become at risk ideally at a stage prior to those children actually being at risk. To this end, the LIV supports the Australian Bureau of Statistics National Data Collection and Reporting Framework and other efforts in Victoria to address this issue.

However, the LIV is concerned to ensure that any proposed model whereby data about an individual, particularly vulnerable children who may be at risk, that is to be shared between prescribed organisations or persons contains appropriate safeguards to ensure rights of the child and other individuals, - including rights to privacy and the rights of children to be heard and participate in processes - are not unduly overridden.

The LIV is also concerned to ensure that any information sharing model does not have an unintentional adverse effect by sharing information that ultimately compromises the safety, welfare and wellbeing of children.

RESPONSES TO QUESTIONS IN CONSULTATION PAPER

Based on your experience, do you agree with the legislative challenges identified above? Why or why not?

Based on your experience, are there other legislative barriers to information sharing in the context of child safety and wellbeing?

Response

The LIV agrees that the major legislative challenges (as identified in the Consultation Paper) are:

- complex, confusing and restrictive legislation and policy requirements which pose real barriers to information sharing;
- information silos and bottlenecks with service providers experiencing real issues in being able to receive information from DHHS;
- The circumstances in which information can be shared are narrowly defined; and
- The ability to systematically share information is limited.

Which approach to the issue of a "threshold" for information sharing should Victoria's proposed regime adopt:

a. a "concern" threshold prior to information being shared; or

b. a system with "no" threshold similar to NSW's Chapter 16A (i.e. information only has to be related to a child's safety or wellbeing prior to information being shared)?

Why or why not?

Response

LIV members consider that it is important for there to be a minimum threshold for information sharing in Victoria.

The Consultation Paper notes that the threshold is, in:

- NSW: that there be a reasonable belief that this would assist the recipient to make any decision, initiate any investigation or provide any service, relating to the safety, welfare or wellbeing of a child or young person

- The UK: that there be a need to safeguard and promote the welfare of children

- In Scotland: that the likely benefit to the wellbeing of the child or young person arising in consequence of doing so outweighs any likely adverse effect on that wellbeing arising from doing so.

The Paper also notes a possible threshold could be introduced in Victoria so that information sharing is permitted where there is a "*concern in respect of the safety or wellbeing of a child or class of children*".

The LIV agrees that it is important that the threshold does not prevent a group of organisations from sharing information that would demonstrate a risk to a child if those were risks were aggregated – because no single piece of information held by any of the organisations demonstrates a risk in or of itself.

LIV members do not consider that the proposed threshold would have that effect.

The LIV considers that the issue of the threshold is an important component of any information sharing model and would welcome the opportunity for further consultation about this.

The term "Welfare" should not be omitted

The LIV notes that the Consultation Paper uses the phrase "safety, welfare and wellbeing" in its introduction but then appears to omit reference to 'welfare' when discussing different aspects of the proposed legislative framework, including in the context of threshold.

The term "welfare" is a legal term which is used both in the child protection context and also in the family law context. It has a clear legal meaning, is also able to be clearly understood by those in other sectors and by the community at large, and is broad enough to include medical and educational considerations.

LIV members were concerned about the omission of the term 'welfare' in the Consultation Paper and consider it is important that 'welfare' be included in the legislative framework for this information sharing regime.

LIV members consider that any threshold should be higher than 'wellbeing'. LIV members consider the term 'wellbeing' is vague, subjective and it should be defined in the legislative framework to clarify its meaning in the context of this information sharing model. LIV members would be concern if the threshold for sharing information could be met on the basis of 'wellbeing' without also being relevant to 'safety and welfare'.

Do you think that the list of principles is appropriate? Should any principles be added to or removed from the list?

The Consultation Paper suggests the following list of principles:

- Sharing information in the best interests of children, to protect and promote their safety or wellbeing is paramount. This takes precedence over the protection of confidentiality or of an individual's privacy.

- Prescribed organisations should only share information that abrogates another person's right to privacy and confidentiality to the extent necessary to protect and promote the safety or wellbeing of children.

- When sharing information, prescribed organisations should take steps to recognise the wishes and identity of the child and their family wherever appropriate. This means taking into account:

    - the desirability of strengthening, preserving and promoting positive relationships between the child and the child's parent, family members and persons significant to the child;

    - factors like the child's social, individual and cultural identity and religious faith; and

    - the child's age, maturity, sex and sexual identity.

- Where sharing information in relation to children from an Aboriginal background, prescribed organisations should take into account the need to protect and promote his or her Aboriginal cultural and spiritual identity and development by, wherever possible, maintaining and building their connections to their Aboriginal family and community.

Response

LIV members consider that that Principles 1 and 2 above appear to be in conflict with each other.

The LIV suggests that consideration be given to amending the wording of Principle 1 to delete that it 'is in the best interests of children to share information" but rather that that the sharing of information about children only occur when it is in the best interests of children to do so. The sharing of information may not be in the best interests of a child in all cases, especially if the information is shared with a person who poses a risk to the child.

A discretionary consent-based approach is needed to ensure the information sharing model can be adapted to meet the best interests of the child in each individual matter.

The LIV again reiterates that 'welfare' should not be omitted from the guiding principles.

Consistency with proposed new family violence information sharing model

The LIV agrees that any guiding principles established for information sharing in Victoria should also be informed by the approach taken in the family violence context. There is significant overlap between children in the child protection system and those who have been subjected to or exposed to family violence. For example, a study by the Australian Institute of Family Studies showed that in 2005 65% of parents of children who were entering state care for the first time had characteristics of family violence.[1]

Members raise concern about the practical complexity which may arise and ultimately impact on the willingness of organisations to share information if the Child Safety and Wellbeing Information Sharing model is significantly different from the family violence model recommended by the Royal Commission into Family Violence.

The LIV notes that consent of the victim underpins the design of the family violence model as consent of the victim is fundamental to empowering the victim to make their own decisions.

The LIV considers a consent based model should also be adopted for the Child Safety and Wellbeing Information Sharing model overall in Victoria to:

- Empower children and young people to give consent and have a say about the information about them which is shared.

  As noted above, there is significant overlap between child protection and family violence and, as with family violence adult victims, it is important for child victims of family violence and abuse to be empowered to make their own decisions or, where this is not appropriate due to the child's age or maturity, to at least have a say and be heard; and

- Empower Aboriginal and Torres Strait Islander children and young people and give effect to their right to self-determination;

- Minimise any unnecessary infringements on individual's privacy rights; and,

- Ensure consistency between the two systems.

The additional principles to guide the information sharing for children in a family violence context should not just include,

> "when sharing child safety and wellbeing information in the context of family violence, prescribed organisations should recognise that family violence is an attack not just on an individual, but on their whole family and any parent-child relationships that exist within it"

but also recognise when children are victims of family violence in their own right.

[1] https://aifs.gov.au/publications/family-matters/issue-96/children-australia

Too often in the children are referred to as being subjected to, exposed to or witnessing family violence and they are not expressly identified as victims separate to that of the adult affected family member.

Members of the LIV's Family Law Section consider as problematic the proposed additional principle that:

> *sharing information, with a view to strengthening and validating the non-violent parent-child relationship*.

In any subsequent family law or child protection proceedings, the Family Courts or the Children's Court may determine that the care arrangements for the child may not be to live with the non-violent parent.

There may be other factors which limit the capacity of the non-violent parent to meet the needs of the child and orders may be made for the children to live with another person (e.g. a grandparent) and spend time with the non-violent parent (and possibly the violent parent if the risk to the child in not spending time with the violent parent outweighs the risk to the child of spending time provided the risk to the child is sufficiently minimised with appropriate safeguards in place to protect the child).

It may be more difficult for the non-violent parent (and subsequently more difficult for the children) to accept the ultimate care arrangements for the children if their view formed prior to any legal proceedings were influenced (and in particular 'validated') by service providers being guided by these information sharing principles.

The LIV agrees the additional principle should include "assisting the child or young person and non-violent parent to understand the degree of any risk to the safety and wellbeing of the child posed by family violence".

Do you think there are any specific organisations or workforces that should be included or excluded from Victoria's proposed information sharing scheme? If so, please identify and provide rationale.

The Consultation Paper notes that the list of prescribed organisations in:

- NSW are NSW Police, public service agencies or authorities, schools, public health organisations and private health facilities
- The UK are local authorities, health authorities, police, prison officials, college principals
- Scotland are service provider in relation to a child or young person
- Victoria could be:
-
    - Victoria Police,
    - state government departments, community services that are state funded (aged care services, child and family services, childcare services, preschool, maternal child health services, supported playgroups,

disability services, drug and alcohol services, family violence services, health care services, homelessness services, mental health services, out of home care services, sexual assault services)

- Courts (Magistrates' Court, Children's Court, County Court, Supreme Court, Victorian Civil and Administrative Appeals Tribunal)
- Relevant Commonwealth agencies (noting this would allow Victorian organisations to consult with Commonwealth agencies, but the legislation would make clear that Commonwealth agencies are not required by Victorian law to comply
- Schools (public and private), TAFE or other entities that provide educational services to children and young people (e.g. pre-schools, child care centres and early childhood learning services)
- Hospitals (public and private)
- Support and Safety Hubs (when established)
- Certain workforces including registered health professionals (e.g. nurses, medical practitioners, psychologists) and registered school teachers and principals.

Response

The LIV consider that the list of prescribed organisations in Victoria within the 'trusted circle' should include the family courts.

The LIV suggests that a cautious approach be adopted prior to extending the prescribed organisations to include groups like sporting clubs and faith based youth groups taking into account the evidence made to, and comments made by, the current Commonwealth Royal Commission into Institutional Responses to Child Sex Abuse.

LIV members are very concerned about the breadth of the organisations prescribed which may increase the risk of information being shared that goes beyond that required to protect the safety, wellbeing and welfare of the child.

Are there any grounds for refusal on the excluded information list that should be added or removed? If so, please identify and provide rationale.

The Consultation Paper proposes that responding entities could decline to provide information if it reasonably believes that to do so would:

- endanger a person's life or physical safety; or

- prejudice the investigation of a contravention (or possible contravention) of a law; or
- prejudice a coronial inquest or inquiry; or
- contravene legal professional privilege or client legal privilege; or
- enable the existence or identity of a confidential source of information in relation to the enforcement or administration of a law to be ascertained; or
- prejudice a court proceeding; or
- contravene a court order; or
- be contrary to the public interest.

The Paper also notes "In the Victorian context, there may need to be additional grounds available to Child Protection to withhold certain types of information from being shared. These would be justified due to the sensitivity of the information Child Protection holds; the extensive powers given to Child Protection to obtain information during the course of investigations; and, the specialist skills and training of Child Protection practitioners."

Response

The LIV considers that it is important for an exception to apply to information sharing under this proposed model where the sharing of the information:

a) would compromise the safety, welfare and wellbeing of a child, or person;

b) would contravene legal professional privilege (which is a privilege of the client, not their legal representative);

c) would result in the responding entity otherwise breaching a law.

The LIV would welcome the opportunity to provide further feedback in relation to this once the Exposure Draft for the Bill is available for consultation. The LIV is particularly interested to know more detail about the circumstances in which it is proposed that Child Protection be able to withhold certain types of information so this can be considered in further detail.

Do you think consent model 1 or consent model 2 is preferable for the child information sharing regime? Why? Are there other models of consent that should be considered?

Response

Consent model

LIV members do not agree with a 'no consent' model.

The LIV suggests that an alternative model be considered whereby:

- consent is required, including consent of children where the requested information relates to them and the child is over 10years old:

- Sharing of information without consent can occur when:
    - there is, or there is likely to be a risk, to the safety, welfare or wellbeing of the child;

    - The person from whom consent would be required is unable to provide the consent (i.e. lacks the capacity to give consent).

The guidelines that are proposed to be developed to assist the prescribing organisations comply with the information sharing scheme could provide examples of when sharing of information under these 2 categories would be met.

LIV members consider that this suggested method of evaluating risk is not overly complicated and is similar to the method currently used by those organisations and agencies who are mandated to report child abuse or family violence.

Alternatively, a hybrid model could be considered whereby when the purported sharing of information is to occur within the trusted circle, there be no consent required but the proposed model comes into play when it is proposed that information be shared outside the trusted circle of prescribed organisations.

The LIV acknowledges and appreciates the practical issues which arise in implementing a consent- based model for information sharing but considers the protection of the rights of individuals and children which would be compromised if consent was not required should outweigh these practical difficulties.

LIV members consider that it is important that the information sharing regime be sufficiently flexible to facilitate the exercise of discretion and professional judgement by those participating prescribed organisations.

The LIV would welcome the opportunity to assist the DHHS develop these guidelines and to be involved in further consultation about this.

Whose Consent?

It is not clear from the Consultation Paper what is meant by consent – e.g. whose consent would be required?

The LIV considers that in relation to information about a child, it would be inappropriate for a model that is based on information sharing in a child protection context, for the consent to be required from the parent or guardian of a child and not from the child themselves.

The LIV considers that the proposed Child Safety and Wellbeing Information Sharing regime be a model which protects and gives effect to the rights of children, including their right to be heard and have a say in what happens to them. The right of a child to be heard, "…is set out in Article 12 of the Convention of the Rights of the Child (CRC) and is considered to be one of the four central principles of the CRC. This means that it is a right that underpins the interpretation and implementation of all other rights."

The LIV agrees with Megan Mitchell, National Children's Commissioner that legislation, programs and practices in the child protection context should work "…with, rather than for, children and young people'[2].

In the context of child protection, one of the key processes which gives effect to this right is the ability of children to have their own independent legal representation. Currently, children over the age of 10 years old are able to directly instruct their own lawyer in the state Children's Court regime and their views are able to be taken into account in family law proceedings through the intercession of an Independent Children's Lawyer.

The LIV considers the Child Safety and Wellbeing Information Sharing regime should mirror this and require the consent of children to be provided prior to the sharing of information about them when the child is aged 10 years or over save in the risk circumstances as outlined above.

Should a prescribed organisation be able to share information with a child, parent or carer to manage a threat to the child's safety? Should this list be narrowed or expanded?

Sharing information outside the trusted circle

The Consultation Paper notes that in circumstances where there is a protective parent or carer, it may be vital for prescribed organisation to be able to share information with that person in order to assist them to protect or manage a risk to the child. It also may be important to share information with a child to assist the child to assess and manage their own risk. Provisions of this nature are not included in Chapter 16A in NSW but may be appropriate to include in the Victorian model.

The example given was when a prescribed organisation would be able to share information with a mother that the father (her ex-partner) has relapsed into illicit substance use. This information

[2] Children's Rights Report 2016, page 15. Children's Rights Report 2016, page 15 https://www.humanrights.gov.au/sites/default/files/document/publication/AHRC_CRR_2016.pdf

would enable the mother to act protectively to manage the risk should the father attempt to have contact with the child.

While the LIV is supportive in principle of the idea of sharing information with the persons who have the care of children to assist them actively manage risk to those children, the LIV is concerned about the proposal for information to be shared outside of the trusted circle as it would be extremely difficult to define the categories of persons for whom it would be safe to share information about a child.

It was mentioned during the Consultation session that parent may be defined as 'someone with parental responsibility".

The legal definition of 'parent' is complicated and its definition varies across jurisdictions and areas of practice, including the Family Law Act 1975 (Cth), Assisted Reproductive Treatment Act 2008 (Vic), Status of Children Act 1974 (Vic), Child Support (Assessment) Act 1989 (Cth), Children Youth and Families Act 2005 (Vic).

The Family Law Act 1975 (Cth) creates rebuttable statutory presumptions of parentage that further complicate the issue and there is also the statutory presumption that all parents have parental responsibility until a court orders otherwise.

This is extremely concerning to members of the LIV's Family Law Section as, if implemented, has the potential to actively increase risk to children as:

- It is possible for a parent who poses a risk to a child to still have parental responsibility for that child even if the child does not live, spend time or communicate with that parent. In such a case, sharing information about the child with that parent may pose a direct threat to the safety, welfare or wellbeing of that child and their family.

- It would be impossible for a prescribed organisation to assess whether or not a party did have parental responsibility without a copy of any family court orders and a legal understanding of their interpretation. This information is held by the Commonwealth Federal Court (in the CommCourt database) and is not currently directly accessible by state authorities. This added complexity to the scheme is counter-productive to the generation of a proactive sharing of information culture.

- Whether or not a person has parental responsibility for a child is a separate question to whether that same person poses a risk to the child. Parental responsibility has a distinct legal meaning in family law and has nothing to do with whether that person lives, spends time with or communicates with the child. A person with parental responsibility may have no relationship at all with the child.

LIV members note similar concerns in relation to the proposal to share information with the carers of children.

The LIV also considers the phrase 'protective parent' to be problematic as there is no clear guidance on what this means. Does it require an assessment by DHHS that a parent is acting

protectively? If so, this would limit the use of the information sharing regime to facilitate early intervention and prevention.

Is “managing a threat to the child’s safety” an appropriate test for the sharing of information outside the trusted circle of prescribed organisations? Should the test be expanded to managing a threat to a child’s safety or wellbeing?

Response

The LIV considers the sharing of information outside of the prescribed organisations to be a significant change which, if not appropriately safeguarded, has the potential to increase the risk to children and members of their family.

For example, the carer or parent of a child with whom the information about the child could be shared could be the perpetrator of family violence against that child or otherwise be the (or a) person responsible for posing a risk to that child. Family violence is a common factor in many families where children are at risk and inadvertent sharing of information about a child with such a person could very easily increase the risk to the child, including by alerting the perpetrator who may then adopt more coercive measures to avoid being detected by authorities or for children who (either with another family member or of their own accord) have sought safety by leaving the family home sharing of information could disclose that child’s location or movements so they can found by the perpetrator.

The LIV considers it would be extremely problematic if “managing a threat to the child’s safety” was the test to be used for the sharing of information outside the trusted circle of prescribed organisations as:

- It limits the sharing of information for the purpose of identifying whether a threat exists;

- What is defined as a “threat” will differ as between jurisdictions, areas of practice, professional organisations and sectors.

For example, police and those in the educational sector may define a ‘threat’ to mean an immediate threat to the physical safety of a child. In contrast, a threat in the context of family law may mean a threat of risk of harm to the child (harm being defined quite widely in the Family Law Act to mean physical or psychological from being subjected, or exposed, to abuse, neglect or family violence). What may be a threat in a child protection context may be interpreted differently again because, while they are a ‘best interest’ jurisdiction, they are primarily concerned with children who are the most at risk and there is more of an element of immediacy and more of a need to intervene to ensure physical safety as there is in family law matters.

Again, the LIV reiterates the need for ‘welfare’ to be included and for the test to not be limited to only “safety and wellbeing”.

Would a systematic and proactive approach to sharing key information (e.g. service participation) assist prescribed organisations in forming an overall assessment of the cumulative risk factors associated with a child?

Response

The LIV is supportive of multi-disciplinary and integrated approaches to service delivery. This is particularly important when dealing with children and families who are at risk and who may need additional support from services. A systematic and proactive approach is required.

A regime that better facilitates the sharing of information will not by itself reduce the risks and improve safety for children – coordinated action is required.

The LIV considers that the legislative framework should include a clear statement of the purpose of the regime which should then guide how the shared information is ultimately used.

What Information and how it can be used

The LIV considers that clear guidance in the legislative framework about what information is to be shared and how it is able to be used by the receiving entity is actually relevant and required to safeguard the rights of individuals under this model.

The LIV would welcome the opportunity for further consultation about this.

Should data and de-identified information be linked to more effectively evaluate programs, design and plan services for children?

Response

Yes. It is the LIV understands that the fragmented nature of the service provision for children in Victoria has resulted in many organisations having to effectively compete for resources and increased levels of resources are spent trying to secure funding to ensure the future of that service delivery.

A more evidence-based approach that is supported by de-identified information and data would assist to identify those services which are effective and for which funding should continue. Increased transparency of decision making would also assist.

Are there any additional risks associated with implementing a child information link as a means for facilitating information sharing as intended by the new legislation?

Response

The LIV considers there are many risks associated with implementing a child information link.

The LIV is particularly concerned:

- to ensure that any platform to promote and facilitate information sharing in the child protection sphere does not unduly infringe on the rights of children and their families (including their rights to privacy);

- about how the proposed platform either integrates, or is developed being mindful of future integration with, other systems in place of being developed in related jurisdictions, including those at local and federal level and systems in other states apart from Victoria;

- about the risk to children and families, including those who have not been identified as being at risk, arising from the misuse (intentional or inadvertent) of the information, particularly when the information is being shared with non-professional organisations (i.e individuals) and the LIV is interested in finding out more about the proposed safeguards for the information.

- about the extent to which the information to be shared may impact on related legal proceedings, including criminal proceedings, child protection and family law in which the children and young people are involved.

Request for Further Consultation

The LIV notes that at the end of the consultation in relation to the legislative model for this Child Safety and Wellbeing Information Sharing model, it was announced that the Department of Education and Training (DET) were developing a platform, “Child Link”, to support and implement the new child safety and wellbeing information sharing legislation. A short 10 minute presentation followed, including a 2 page slide presentation, the details of which were not contained or made clear in the Consultation Paper.

While it was beneficial to include some information about Child Link to help inform the consultation about the proposed framework, the LIV is concerned about the potentially significant impact Child Link could have, if further detailed consultations with the sector are not undertaken. From the limited information about Child Link that was provided, it was clear that the proposed platform has the potential to make a significant positive impact if it is implemented well and addresses the concerns raised by various organisations, including concerns about the rights of children and privacy rights of individuals.

However, it also has the potential to have significant adverse effect on the safety, welfare and wellbeing of children and their families if the platform is finalised without proper consultation with relevant stakeholders, including those who may not have initial access to the platform but who work with vulnerable, 'at risk' children and families across local, state and federal systems.

The LIV, thanks the DET for providing the information they have regarding Child Link.

However, the LIV requests and would welcome the opportunity for further consultation and to make submissions once a Consultation Paper with further details of the Child Link platform is made available.