

Tasmania Legal Aid Submission

Issues Paper no.32 – Review of Privacy Laws in Tasmania

Background - Tasmania Legal Aid

TLA provides legal services to help Tasmanians understand their rights, navigate the system to resolve their legal issues, and get the assistance they need. We support and advocate for vulnerable and marginalised Tasmanians and work with our clients, staff, service partners and community to improve the legal system.

Whilst TLA provides specialist family violence services through our Safe at Home and Family Advocacy and Support Services, all sections of TLA assist clients and communities who experience – or use – abuse and violence.

In terms of how TLA staff are involved in the sharing or preservation of personal information:

- as providers of legal services, TLA staff are regulated, directly or indirectly, by specific provisions about how we handle information.
- TLA staff see how information moves as a result of processes such as police or child safety investigation, provision or denial of health and other services, report-writing by experts, and processes such as subpoenas, evidence-giving, and court and tribunal decision-making.

General

This short response, focussed on the issues occurring in the context of family violence as observed by the Safe at Home lawyers broadly agrees that the Issues Paper is timely and that there ought be purposeful, current and forward-looking consideration of rights and responsibilities, and raises some additional considerations.

Privacy in the Context of Family Violence

Effective and consistent data recording and data-sharing is key to recognising behaviours which indicate risk, which is not just risk of *any* family violence, but risk of escalation, of serious harm and of lethality, and to understanding prevalence and reduction of harm.

Much of the information is also deeply personal.

Perhaps especially in the context of family violence, a major aspect of privacy which has been largely overlooked is that personal information within families or personal relationships rarely concerns just one person. The Issues Paper touches upon the complexities of dealing with images of children, but does not otherwise examine the problem of one person's information cutting across another person's safety.

There are two major intersections of privacy and safety:

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- Where information sharing is needed for a person and/or organisations to understand and adequately respond to risk of harm – encouraging broad and easy sharing of personal information;¹
- Where sharing information contributes to a risk of harm:
 - By family violence offenders and those supporting them (including systems and organisations) accessing information about the victim-survivor;²
 - By family violence offenders and those supporting them (including systems and organisations) disseminating information about the victim-survivor, such as images or mental health information;³
 - By victim-survivors experiencing negative consequences of information-sharing,⁴ or becoming reluctant to share information if it may be disclosed or to access a service which may disclose information. .

In considering the right to privacy, we would support clarity around when that right is overridden by other considerations and to what extent. This may assist also with consequent difficulties, such as alleged offenders threatening or making complaints,⁵ or threatening defamation proceedings.⁶

A particularly vexed issue is the sharing of information with victim-survivors concerning reports to police and court proceedings where they are the complainant. For example, the Magistrates Court of Tasmania ceased publishing information on daily court lists of what charges people had listed in Court, ostensibly for privacy reasons. These lists had been used by victim-survivors to identify the offender's other offending, 'red flags' and periods of heightened risk to

- be more vigilant or enact safety plans
- use as evidence of problematic behaviour in applications for family violence orders

¹ As discussed in various coronial proceedings: for example

https://www.magistratescourt.tas.gov.au/_data/assets/pdf_file/0011/352010/Kupsch_Jessica_Ann_.pdf

It is acknowledged that sometimes risk information may not be enough to predict rare risks, such as of filicide, however sharing information that may lead to reasonable and effective interventions is important:

https://www.coronerscourt.vic.gov.au/sites/default/files/2018-12/lukegeoffreybatty_085514.pdf

² A key example being location (<https://www.theguardian.com/australia-news/2021/aug/17/pressure-on-queensland-police-to-sack-officer-who-leaked-address-of-domestic-violence-victim>), but this can also relate to any information which either identifies a vulnerability or can be used for shaming or systems abuse.

³ For example: <https://www2.dvac.org.au/wp-content/uploads/2021/03/Briefing-paper-series-April-2020-Issue-4.pdf> Anecdotally, clients not infrequently describe offenders contacting friends, family and workplaces to share 'damaging' information given in confidence.

In addition, negative comments in organisational records – which may be inaccurate, over-reaching or reflective of common FV myths believed by the recorder – can impact upon investigations or Family Law proceedings.

⁴ For example, victim-survivors being made responsible for managing the risk posed by the offender, http://rcfv.archive.royalcommission.vic.gov.au/CustomData/Exhibits/HAD/WIT.0075.001.0214_R.pdf p493ff.

⁵ Including to professional bodies, anecdotally common in Family Law proceedings.

⁶ For media discussion, see: <https://www.mamamia.com.au/defamation-family-violence/>; https://www.equalitynow.org/news_and_insights/weaponizing-defamation-lawsuits-against-survivors-violates-international-human-rights/

- Use as an early indication of material relevant to a child's best interests in Family Law proceedings, particularly at the interim stage, before more detailed evidence is gathered on subpoena.⁷ (Some information is available to complainants through the Court Support and Liaison Service, but it is comparatively limited.⁸)

On the other hand, the desirability of having open courts and access to information about the criminal justice system is reduced by the issue of misidentification of victim-survivors as offenders.⁹ Having an (especially unjustified) Order or charge against them can cause victim-survivors to be humiliated and suffer additional consequences, including directly or indirectly financial (fines, loss of employment). Offenders may actively use the existence of charges or orders to blame, threaten and isolate victim-survivors. Wide access to that information exacerbates those negative effects for misidentified victim-survivors.

The clash between privacy and just outcomes/safety is also reflected in the workplace. For example where grievances or complaints are made between employees, the victim of the behaviour is commonly not informed of the consequences or outcomes for the offender.¹⁰ There are circumstances where people associated with the offender have been in a position to access the victim's information through the third person's workplaces, including home address and financial information. Anecdotally, this has been confirmed where:

- It happens that the information was unlikely to have been obtainable any other way, and the third person's employment is known to the victim-client; and
- The workplace is willing to act on a complaint and can track who accessed the file.

Another issue for victim-survivors is that it is very common for an offender to have a series of abusive or violent relationships. In these situations information is held which may be relevant to patterns of conduct and risk assessment, but equally, a person may be reluctant to have such information disclosed to anyone. There is a question of whether and how the interests of the earlier and later victim-survivor are balanced.

Given the crossover of family violence offending and child abuse or maltreatment,¹¹ this may also obscure the risk to children of later relationships.

Privacy and safety considerations are significant to the question of how information-sharing about family violence can occur between government and non-government

⁷ For example: offending against other victims, a resurgence in alcohol or drug abuse (eg: drink-driving or drug-related offending), and stressful life events (such as prospective incarceration).

⁸ For example, only charges where the victim-survivor is the complainant.

⁹ <https://lens.monash.edu/@politics-society/2021/12/17/1384272/the-continuing-problem-of-misidentification-for-family-violence-victim-survivors>

¹⁰ Unsurprisingly, given the proportion of people who meet their partners at work, in addition to sexual harassment, failed relationships can be problematic, with an opportunity for stalking or emotionally abusive behaviours: unwanted approaches, persistent messaging over workplace communications tools, spreading rumours, and so forth. In addition to the issue of victims of the behaviour being treated as contributing (such as being directed to 'behave professionally') employers cite workplace regulations and privacy provisions as reasons for not informing them what outcomes, determinations or requirements there are in relation to the other person.

¹¹ Bancroft L, Silverman J and Ritchie D, *The Batterer As Parent* 2nd edition, Sage Publications Inc, California, USA, 2012.

organisations. There are questions around the inability to ‘guarantee’ regulated information-handling in NGOs, which can present a barrier for government organisations sharing information, where there are mutual clients but no contractual arrangements.

Surveillance is also a double-edged sword: it may be protective,¹² or it may be intimidating and part of a pattern of coercive control.¹³ The provisions of legislation, such as the *Listening Devices Act 1991* (Tas.) and other criminal offences must be sufficiently comprehensive and nuanced as to be able to deal with both.

In practice, stalking and harassing behaviours are not frequently prosecuted, and may not be recognised as family violence or as a breach of an order when reported. Anecdotally, clients frequently report harassing or stalking behaviours to Police but are informed that it is ‘not stalking’ or ‘not enough’.

This is potentially exacerbated by current understandings and practices: following a decision about the meaning of ‘harassment’, the term was removed from the standard orders available on Family Violence Orders.¹⁴

Therefore, we would agree with the Issues Paper that the current stalking and harassing provisions and/or practices may be inadequate to protect victims from surveillance, stalking and harassment.

Additional comments

It is noted that a certain amount of uncertainty exists in some circumstances because ‘publication’ is not defined. This is a feature of State and Commonwealth law, such as the State law concerning actions for defamation (a threat sometimes made by offenders) and the *Family Law Act 1975*. Historically, when dissemination of information effectively occurred at public meetings or in printed material, it was clear when publication had occurred. With advances in communications technology and a tendency for individuals to move geographically, people increasingly use technology for private communications as well as wider publication. This is complicated by the ability for an individual to reach larger audiences, such as by social media, and the possibility of an initially limited communication being widely shared – which may be with or without the person’s agreement. The line between public and private, published and shared in private has become blurred. In family violence circumstances, this again leads to a difficult balance: on the one hand, uncertainty about what is permitted can lead victims to avoid disclosing and help-seeking, so clarity is important. On the other, where the same action can in one situation be reasonable help-seeking and in another can be further family violence, considerable flexibility is required.

¹² Such as a victim of family violence surreptitiously recording a handover of their child to the other, sometimes abusive, parent where there is opportunity for and risk of verbal abuse and/or threats of violence; or makes a known but unwanted recording where that is an effective curb on the offender’s abusive behaviour.

¹³ Such as a family violence offender overtly recording the victim of family violence at handover of the child, whilst berating her about parenting, in the context of threats to report the victim to Child Safety Services.

¹⁴ [Family Violence - Application for a Family Violence Order \(docx, 56KB\)](#) p12. Formerly, the standard order was not to threaten, harass, abuse or assault.

The decision: <http://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/tas/TASMC/2013/33.html>

Data

Alongside confidential file-related records, Tasmania Legal Aid holds data (information for the purpose of file management and reporting to funders) about clients, including practical information such as names, birthdates, contact and financial details, and other people involved); demographic information, including as to categories of vulnerability; and information about the types of services provided and referrals made.

In order for data-gathering to be worthwhile, what should be collected needs to be carefully considered, with clear requirements and definitions. Data must be collected in an efficient manner (which may involve working with existing systems on data capture), and to be funded adequately.

We – both funders and organisations - must question why is this data being collected, by whom, what will be done with it, and who else may access it? In addition to a cost-benefit analysis in financial terms, a privacy lens ought to be applied, so that the cost of collecting and interpreting data is considered alongside the benefits and demerits to the victim-survivors and the systems that support them.

Contracting with Clients

The privacy legislation is assisted - or undermined - by the policies and processes adopted by organisations which collect information. One aspect of this is ensuring that clients are informed about what will be collected and how it may be disclosed, in the form of 'contracting' with clients. Where organisation are required by funders to collect and report on information, the funder ought to provide a summary of collection and disclosure matters for those organisation's clients.

Given levels of literacy in Tasmania and as clients may be vulnerable or live with disability, clarity and brevity is important. It is observable that terms and conditions of service are long-winded, hard to read and – online – encourage clicking-past, and do not include a responsibility for the worker/organisation to ensure clients understand.¹⁵ This can undermine the foundation of agreement to information use and disclosure.

Genuineness of consent to information-sharing is a real issue: where a service may be denied if agreement is not given, clients and consumers may feel they have little alternative and be forced to agree, or – if very concerned about disclosure – may disengage entirely from the service even where there is unaddressed risk of harm. Funders should be open to receiving feedback for client directly around their concerns about the use of their data and a mechanism established for this.

Community Legal Education and Information

In order to protect privacy, and rectify and compensate breaches, there must be well-known and accessible processes for questioning and reporting, together with Continuing Legal Education and Information (CLEI) for both people and workers to recognise intrusions or mis-use and seek effective help.

¹⁵ These issues were considered when implementing the TLA *Managing Client Confidential Information Policy*, which does require staff to be satisfied that clients understand the use of information.

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Materials produced for CLEI must be pitched at a variety of levels and be available in a variety of media. They must be capable of reaching a significant proportion of the population and being understood by vulnerable people.

Conclusion

TLA hopes that the review of Privacy Laws in Tasmania will support the protection of people's privacy *and* personal safety in the face of new and challenging technological developments and the age-old challenge of ensuring sufficient information is known about risks to safety and to life to enable effective interventions.

For legislative measures concerning privacy to succeed in addressing these aspects of family violence, it will be necessary for a range of materials to be developed for very different parts of the community, and for improvements in policy, process and legislation to follow any reforms, translating the provisions into flexible, effective interventions.

A risk is that a failure to drive and support positive change, or ill-adapted change, will see victim-survivors being subjected to further abuses of power and being further endangered and disempowered; vulnerable people further limited, constrained or discriminated against; the misuse of information linked with unsafe investigative practices or unfair convictions; and offenders who have addressed their criminal behaviour being unable to be socially accepted despite reform.