

12 March 2019

Family and Sexual Violence Work Programme
Ministry of Justice
Wellington

By email: FVinformationsharing@justice.govt.nz

Family violence information-sharing – updated draft Guidance

The New Zealand Law Society appreciates the opportunity to provide feedback on the updated version of the draft Guidance, *Sharing information safely: Guidance on sharing personal information under the Family Violence Act 2018* (updated draft).

Overview

The Law Society commented in September 2018 on the initial draft Guidance.¹ In reviewing the updated draft guidance, we note that some of our previous recommendations have not been adopted, and a number of important points are reiterated below.

In addition, we note that the updated draft guidance makes no reference to specific sections of the Family Violence Act. We had previously recommended it should, as this would aid users' understanding and would help make the guidance clearer and more accessible. References could be included as footnotes without making the text more complex or cumbersome.

We also question the justification for the request for the current consultation to be confidential, particularly when the previous consultation was not confidential. The information-sharing provisions are an important part of the new legislation and will affect many people – both the practitioners working in the area who will have to implement the new information-sharing regime, and those who will be the subject of information-sharing. It is important that the guidance is effective and informed by a wide range of perspectives and experiences. The usefulness and effectiveness of the guidance is diminished by the confidential nature of the consultation and the insufficient time (two weeks) given to comment.

Part 1: General Information

In our submission on 3 September 2018 we noted:²

“... the draft Guidance at p10 refers to a “social services practitioner” as including “registered teachers”.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

¹ Family violence information-sharing – feedback on draft Guidance, 3 September 2018, available here: http://www.lawsociety.org.nz/_data/assets/pdf_file/0007/126196/I-MoJ-FWV-Bill-Information-Sharing-draft-Guidance-3-9-18.pdf.

² Note 1, at pp2-3.

therefore only come within the provisions of the Bill if they hold a current practising certificate or limited authority to teach.”

The Ministry’s Summary of Feedback dated January 2019 acknowledged the need to ensure clarity as to who is affected by the guidance, stating at page 5:

“Many submitters suggested clarifying the generic terms used to describe who was captured by the Guidance to ensure that some practitioners are not inadvertently excluded.”

The updated draft guidance still incorrectly refers to a social services practitioner as including “registered teachers”. This is likely to give the misleading impression that all registered teachers are permitted to share information under the Act.

The updated draft gives the correct definition at the fourth bullet point in box 1 in the table on page 13. This is inconsistent with the definition on page 8. Such inconsistencies are likely to confuse rather than assist practitioners and may result in legal liability for registered teachers sharing information in circumstances when they are not permitted to do so.

Principle 3: You must consider sharing information

We reiterate our previous comment that it is important to put practitioners on notice that there appears to be no immunity from liability for a person or agency that fails to consider proactive disclosure when required to do so under section 124W.³ This information remains absent from the guidance. We suggest it should be included in the introductory section of Principle 3 at page 18.

Principle 4: You can share information for permitted purposes

In our previous submission we suggested that, when setting out common examples of sharing personal information, it would be helpful to include a reminder to practitioners that the information-sharing framework applies only to family violence and social service practitioners.⁴ The equivalent information is now at page 22 of the guidance in Section D of Principle 4 but does not include the suggested reminder. In our view, such a reminder would be helpful and would save practitioners from having to cross-reference other parts of the guidance to check whether they are covered.

Principle 7: You should record reasons for your decisions

The lack of immunity from liability referred to above under Principle 3 means that it is doubly important that reasons for deciding not to share information are recorded. However, the section in the guidance about recording reasons, at Principle 7 on page 29, focusses solely on decisions to share, but omits reference to decisions *not* to share. We recommend that the importance of recording a decision not to share is made clear in the introductory paragraphs of Principle 7.

³ Note 1, at p5.

⁴ Note 1, at p4.

Principle 8: You have legal protection from liability when you share information

In our previous submission we raised concerns about the definition of ‘bad faith’.⁵ In particular, we highlighted that the examples of bad faith used in the guidance were all capable of being done in good faith, but in error. We recommended that more appropriate examples are used.

While the amended explanation of bad faith at page 31 is clearer, the examples now focus on carelessness and recklessness, which may give a misleadingly narrow understanding: the distinction between acting in good faith but in error and acting carelessly is hardly likely to be clear cut. Further, using the term ‘reckless’ to define ‘recklessness’ is unlikely to be illuminating.

The definition of bad faith would be more easily understood if clearer examples were given.

Appropriate examples might include:

- sharing information because of a personal dislike for one of the parties concerned, rather than out of a genuine belief that it is necessary to protect against family violence; or
- not sharing information because the person cannot be bothered completing the paperwork.

Conclusion

We hope the Ministry finds these comments helpful. Please do not hesitate to contact the convenor of the Law Society’s Human Rights and Privacy Committee, Dr Andrew Butler, via the committee’s Law Reform Adviser Dunstan Blay (Dunstan.Blay@lawsociety.org.nz / 04 463 2962) if you have any questions.

Yours faithfully



Tiana Epati
President-Elect

⁵ Note 1, at p3.