

Submission to Department of Health and Human Services: Child Information Sharing Consultation Paper

6 October 2017

DOMESTIC VIOLENCE VICTORIA

 Victoria Legal Aid

**Domestic Violence
Resource Centre Victoria**



women's legal
service victoria

 **No To Violence**
Men's Referral Service


Federation of
Community Legal Centres
VICTORIA

 safe
steps | Family Violence
Response Centre

**BERRY
STREET**
We're for Childhood
SINCE 1877

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About the endorsing organisations

The following organisations have endorsed this submission and welcome the opportunity to be involved with the development of the Child Wellbeing and Safety Information Sharing regime.

As the peak body for specialist family violence services in Victoria, Domestic Violence Victoria (DVVic) has a broad membership of more than 80 state-wide and regional family violence organisations across Victoria that provide a variety of responses to women and children who have experienced family violence. Our members include every specialist family violence service, community health and women's health agencies, local governments and other community service agencies

Together Victoria Legal Aid (VLA), the Federation of Community Legal Centres (FCLC), and Women's Legal Service Victoria (WLSV) provide Victoria with family violence and child protection legal services, and provide the Victorian community with legal advice, court-based legal services, legal education, and legal information related to family law, family violence, and child protection.

The Domestic Violence Resource Centre Victoria (DVRCV) is a state-wide resource centre working to prevent and respond to family violence, with a particular focus on men's violence against women in intimate relationships. We provide training, publications, research and other resources to those experiencing (or who have experienced) family violence, and practitioners and service organisations who work with family violence survivors.

No to Violence incorporating Men's Referral Service (NTV/MRS) is the peak body for organisations and individuals working with men to end family violence in Victoria and New South Wales. We also provide telephone counselling, information and referrals for men in Victoria, New South Wales and Tasmania.

Safe Steps Family Violence Response Centre is the Victorian statewide 24/7 first response service for women and children experiencing family violence. We provide intervention, support and advocacy for some of the most vulnerable and at risk women and children in our community.

Berry Street is Victoria's largest independent child and family services organisation. We help children, young people and families recover from the devastating effects of violence, abuse and neglect. Our focus is on the right of every child to a good childhood, growing up feeling safe, nurtured and with hope for the future.

This submission is endorsed by:

Fiona McCormack, Chief Executive Officer, Domestic Violence Victoria

Nicole Rich, Executive Director, Family, Youth and Children's Law, Victoria Legal Aid

Helen Matthews, Principal Legal Officer/Acting Chief Executive Officer, Women's Legal Service Victoria

Serina McDuff, Executive Officer, Federation of Community Legal Centres

Jacqui Watt, Chief Executive Officer, No To Violence/Men's Referral Service

Annette Gillespie, Chief Executive Officer, Safe Steps Family Violence Response Centre

Emily Maguire, Chief Executive Officer, Domestic Violence Resource Centre Victoria

Sandie de Wolf, Chief Executive Officer, Berry Street

Executive Summary

The endorsing organisations for this submission welcome the opportunity to work with the Victorian Government and our community partners to prioritise strategies that emphasise our collective responsibilities to ensure the safety and protection of children. Our submission provides feedback that we believe will strengthen these responsibilities while also raising concerns about where information sharing may result in adverse, unintended consequences, especially in the context of family violence which is a significant harm impacting on children's rights and safety.¹ As such, we put forward a range of safeguards that the child information sharing regime should employ to engender a culture of information sharing that promotes safety. Furthermore, we make particular suggestions around making sure that information sharing mechanisms do not deter family violence victim survivors (adults, children and young people) from accessing services and do not exacerbate risk in circumstances where family violence perpetrators use information to control partners and children.

The key points of our submission recommend:

- Refining the purpose of information sharing within a risk management and rights-based framework with clear definitions of children's rights to safety, and direction for organisations and practitioners to act in response to risk.
- Making informed consent central to information sharing, including as an addition to the 'three-part' test, and as part of the legislative principles, guidelines and training.
- Greater specificity in descriptions of prescribed entities and their function in information sharing.
- Enhancing congruence with the Family Violence Information Sharing regime (FVIS) on a range of issues, including the information sharing purpose, and critical safeguards to prevent further harm from information sharing.
- Aligning with the *Privacy and Data Protection Act 2014* and the *Health Records Act 2001* to ensure that people are notified when information is shared about them, when safe and reasonable to do so, as a matter of supporting the management of any adverse consequences to children's safety that may arise from information sharing.
- Additional suggestions for record-keeping items in regard to consent and notifications and suggestions regarding specific tools to consistently document the required information.
- Training and capacity-building programs to develop consistent practices for child information sharing across the prescribed agencies, with a strong understanding of family violence.
- Further research and public consultation on the proposal for Child Link through rigorous analysis of the existing evidence-base, and the likely risks, benefits and alternative opportunities to strengthen information sharing platforms regarding risks to children.

Our submission responses are organised under key themes linked to the consultation questions. We look forward to continuing to work with the Department of Health and Human Services and the Department of Education and Training (the Departments) on this important reform and welcome opportunities for further discussion, in particular consultation on the drafting of legislation and the development of Ministerial Guidelines which will be issued under the new regime. We make reference to future legislation and guidelines throughout this submission.

¹ Victorian Government (2016). *Roadmap for Reform: Strong Families, Safe Children*, Melbourne, p. 3.

Refining the purpose of information sharing

What issues should the guidance materials cover to support prescribed organisations to share information for the purposes of promoting children’s wellbeing and safety?

Provide a purpose within a risk management, rights-based framework

We first recommend that the fundamental purpose for information sharing in the proposed legislation for the Child Wellbeing and Safety Information Sharing regime (the Child Information Sharing regime or CIS regime) is further refined before any matters pertaining to Ministerial Guidelines and implementation are developed.

As it stands, the current stated purpose, *“to promote the safety or wellbeing of a child or group of children”* is very broad, lacks direction toward action, and is susceptible to subjective bias that could undermine the beneficial intentions of the legislation and lead to adverse consequences for children and their protective parents/carers.

While we understand that there is a concern held by some that legal definitions for ‘safety’ and ‘wellbeing’ may potentially limit appropriate information sharing, we do not agree that this is necessarily the case nor that these terms are indeed commonly understood. Risk aversion around information sharing is not necessarily a matter of legislative stringency, rather, it is an issue of providing clear articulations of key definitions within legislation and ensuring that appropriate application of the law is guided by training, capacity-building, resourcing and monitoring. For example, the clear, articulated definition of family violence within the [Family Violence Protection Act 2008](#) has provided a shared language and understanding of the range of family violence behaviours, including those that directly and indirectly impact on children. This has been widely beneficial for driving capacity development and best practice responses to family violence across legal, government and community service settings. With the addition of the new FVIS regime, this shared understanding will be enhanced by clear direction to share information within a risk management and rights-based framework.

Without definition, a common, shared understanding of safety and wellbeing cannot be assumed. These terms will be interpreted through individual experience, ideological frameworks, differing professional backgrounds, and social positionalities. The term ‘wellbeing’ in particular is subject to broad interpretation and is difficult to apply with meaningful comparisons across different contexts. Certainly wellbeing for children is an important outcome across a broad range of social, cultural, physical, psychological, economic, environmental, and developmental domains, but it is also produced dynamically within intersectional experiences and circumstances.

Undefined terms in the legislation is also unlikely to address inconsistent practices across different parts of Victoria. We are very concerned that this will lead to adverse outcomes for children and their families, particularly where they are already subjected to punitive, systemic marginalisation. Notably, this will have a significant impact particularly on Aboriginal children who are disproportionately over-represented in the child protection system (while simultaneously the Aboriginal community controlled organisations that provide culturally safe self-determining services for Aboriginal families are under-resourced). We refer you to the submission by the Aboriginal Family Violence Prevention and Legal Service Victoria for expertise on this issue.

We are also concerned about the impact where broad interpretations of safety and wellbeing could adversely affect people from culturally and linguistically diverse backgrounds, people with disabilities, people experiencing mental health or substance dependencies, and/or those who are economically disadvantaged. For example, women with disabilities are often deprived of their rights and agency when systems that share information about them collude with perpetrators on so-called ‘wellbeing’ matters, about either themselves, their children or both. This can lead to significantly negative outcomes, including the preventable removal of children from their care.² We recommend that any further progress on the development of this child information sharing regime includes direct, targeted consultation (rather than generalised discussions) with the aforementioned groups who will be most adversely impacted by these changes.

In addition, we recommend that the legislation utilise a more refined purpose within a risk management and rights-based framework to address these issues of broadness and direct organisations and practitioners to take action to prevent possible or further harms to children. Our suggestion is that the purpose for information sharing in the CIS is to: *“to assess and manage risks to the safety of a child or a group of children.”*

In this refined purpose the subjective term ‘wellbeing’ is removed, and replaced with the clearer and more definable term ‘safety’. ‘Safety’ is inclusive of wellbeing, where wellbeing is understood as an outcome of safety in a range of domains (e.g. physical, cultural, social, psychological, etc.). We suggest that ‘safety’ should be defined in the legislation in terms of protecting children’s rights to be safe from all forms of harm, violence and abuse.

‘To promote’ is also removed as it is also very broadly interpreted and does not direct an organisation or practitioner to undertake any type of action as a result of information sharing. Assessing and managing risk, on the other hand, fits within a risk management and rights-based framework and gives the organisation or practitioner direction about what they must do in response to sharing information.

Furthermore, this more refined purpose will:

- attend to the drivers of child information sharing reform to ensure that relevant agencies are working together to prevent harm and intervene in situations where there are possible or known safety risks to children;
- ensure that information is shared appropriately according to a defined articulation of safety to minimise subjective bias and enable professional conversations within a shared language and understanding;
- direct organisations to take risk assessment and risk management action to respond to any type or level of risk to children’s safety (inclusive of family violence and the range of other risks to children within familial, institutional and social settings);
- link the specific risk assessment and risk management purpose to the range of activities that are already described in part (b) of the three part test; and

² Healey, L. (2013). *Voices Against Violence: Paper 2: Current Issues in Understanding and Responding to Violence Against Women with Disabilities*, Melbourne, Women with Disabilities Victoria, Office of the Public Advocate and Domestic Violence Resource Centre Victoria, p.52; Carter, B. (2013). *Whatever happened to the village? The removal of children from parents with a disability Report 1: Family law – the hidden issues*, Melbourne, Office of the Public Advocate.

- align more clearly with the information sharing purpose already established in the [Family Violence Protection Amendment \(Information Sharing\) Act 2017](#), that is, to assess and manage risk where it pertains to family violence.

For further development of the legislation and subsequent guidelines, we suggest that DHHS analyse the following frameworks to assist with defining safety for children within a risk management and rights-based framework:

- [Family Law Act 1975, Part VII, Subdivision BA - Best interests of the child](#)
- [Children, Youth and Families Act 2005, Part 1.2 Principles – 10. Best interests principles](#)
- [Protecting Children is Everyone’s Business: National Framework for Protecting Australia’s Children 2009-2020](#)
- [United Nations, Convention on the Rights of the Child 1990](#)

Create a four-part test to include informed consent

In addition to refining the purpose of information sharing, which is described in part (a) of the proposed three-part test, we recommend that part (b) removes the term ‘wellbeing’ and reflects instead a framework of risk assessment and risk management in regard to children’s safety. Part (c) regarding excluded information should remain as stated.

Furthermore, we recommend the addition of a fourth part to the test as follows:

(d) provide information about client privacy and information sharing obligations and seek consent from the child and/or protective parent/carer where developmentally appropriate, and safe and reasonable to do so.

This should be similarly reflected in the Legislative Principles as recommended on page 11 and in future guidelines and training.

We propose this amendment because reforms for information sharing should enhance best practices, not undermine them. Consent is an essential human rights first principle. Overturning consent requires evidence that there will be demonstrable benefits to the safety and protection of children as well as adults who are at risk of violence and harm.

Fundamentally, consent-seeking best practices: 1) ensure that people’s rights and agency are respected; 2) allow those who are reluctant about information sharing to have an opportunity to voice their concerns; 3) enable a conversation about the purpose and benefits of information sharing as a matter of managing risk; 4) manage unforeseen risks to safety or other adverse consequences as a result of information sharing; and 5) place the onus on the practitioner to communicate openly and transparently with clients, including children where appropriate to do so, as a matter of retaining positive working relationships.

Children are able to give consent, refuse consent, give instructions and express views in a wide range of legal and social service contexts.³ It is appropriate that children’s informed consent is sought when children reach an age where they are able to give that consent, for the same reasons that consent from

³ Australian Association of Social Workers (2015). *Working with Child Clients: consent, confidentiality and child-centred practices*; Commission for Children and Young People (2016). *Empowerment and Participation of Children*.

any victim of harm is important. This is also consistent with children’s internationally recognised human rights.⁴

In the family violence context, which is a significant source of harm to children in our society⁵, balancing privacy and information sharing through consent-seeking practices are critical to ensuring the safety of women and children. Our experience and training in the family violence sector teaches us that victim survivors who are given information, options and opportunities to decide their course of action are typically the best judges of the risk to themselves and their children. Victim survivors of family violence live with the disempowering experience of having their rights disregarded by the perpetrator. Therefore, it is important that practitioners work from the model of informed consent as a mechanism to prioritise victim survivors’ agency and capacity to make decisions about their own lives, giving them the best chance of living free from violence and moving forward with their children toward recovery.

As risk is dynamic in family violence contexts, consent-seeking should be ongoing and tailored to the risks within individual circumstances to ensure that assumptions about information sharing without consent do not produce unintended consequences that actually exacerbate risk. Skilled practitioners should negotiate such matters with their clients, when it is reasonable and safe to do so, as a matter of respecting their agency even if the result is to act without consent in order to prioritise children’s safety. This practice should also be applied equitably to ensure that people are provided with interpreters when necessary or [supported decision making processes](#) where there are issues of cognitive functioning.

We know that sometimes it is not safe or reasonable to seek consent, especially where children’s safety is concerned. The age at which a child can give informed consent is not the same for every child, and consideration should be given to allowing for application of professional judgement as to a child’s ability to consent or give a view. Children should also not bear the onus of critical decisions about their safety where agencies should take responsibility to protect them from harm. As a matter of protecting the best interests of children, it is necessary that professional judgement determines that for some children it is not in their best interests to seek consent even though they would be developmentally able to give or refuse consent. However, even in such circumstances, working from a *default position* of consent forces the practitioner to think from a risk management framework to appropriately override consent and take action when it is necessary to prioritise children’s safety. This is part of the everyday, nuanced practice of skilled specialist family violence practitioners in legal and support service settings. For the proposed CIS, this sort of professional judgement should be exercised by qualified and trained practitioners in relevant roles.

Importantly, fears that information will not be confidential and that consent will be disregarded can deter people from accessing support and consequently impact on actually addressing the safety needs of children. It is critical that information sharing legislation does not deter people from accessing services, undermine best practices within human rights and social justice frameworks, or disregard the ethical codes of practice that pertain to the suggested prescribed workforces, which typically advise a practice of informed consent (for example, the [Australian Association of Social Workers Code of Ethics](#)).

⁴ United Nations (1990). *Convention on the Rights of the Child, Article 12*.

⁵ Victorian Government (2016). *Roadmap for Reform: Strong Families, Safe Children*, Melbourne, p. 3.

Consent-based sharing under the current information sharing laws can promote safety for children by working with protective parents to get the best information and to share it in a way that encourages the parent to be involved in keeping the child safe. Consider the following case studies as examples:⁶

VLA's Family Dispute Resolution Service was assessing a matter for a family law mediation conference. The parents had one child who at various times had resided with the mother and with the father.

During the father's assessment interview with a VLA case manager, he disclosed that he had recently had a significant seizure at home while his child – a ten year old diagnosed with autism – was in his care. The father's time with the child each weekend had been occurring unsupervised. After some prompting by the case manager, the father suggested in rather vague terms that the seizure may have been drug induced.

The father fell as a result of the seizure and significantly injured his head. This was more serious given that he had undergone a recent operation. The parents provided mixed reports as to the effect and the impact on the father's cognitive function.

When the case manager spoke to the mother it became clear the father had a history of substance abuse and had started using heroin again.

The case manager was concerned that the father may be drug affected during the child's visits given his history and also the recent fall. The mother had significant concerns and yet these concerns were not reflected in her proposal for care arrangements going forward.

The case manager told the mother that a notification may need to be made to Child Protection and encouraged her to contact Child Protection herself to make them aware of her concerns. In doing so, the case manager sought to support the mother to act protectively. The mother agreed to do so and made contact with Child Protection.

Consent-seeking practices that respect confidentiality can also elicit disclosures which would not otherwise be made. In this case, a mother's confidential disclosures helped VLA's Family Dispute Resolution Service to avoid conducting an inappropriate family law mediation:

During the screening interview conducted by the VLA Family Dispute Resolution Service case manager, the mother disclosed severe family violence. After spending some time on the phone talking about the history of family violence with the case manager, the mother again asked whether the conversation was confidential.

After she was reassured about the confidentiality of the process, the mother disclosed that in addition to the physical, verbal and emotional abuse (which was to be included in her family law affidavit), she had been sexually assaulted by the father of the children. The mother stated she

⁶ These case studies are adapted from those first published at pages 8-11 of VLA's October 2015 submission to the Family Law Council's Terms of Reference relating to Families with Complex Needs <http://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla-submission-to-the-family-law-councils-terms-of-reference-number-2.docx>.

was receiving assistance from the Centre Against Sexual Assault but was not ready to report the sexual assault to the police.

The matter was assessed as not suitable for mediation. The mother's disclosure, which confidentiality allowed her to make, helped to prevent an inappropriate mediation from taking place.

Intersection with the Family Violence Information Sharing Regime

Are there any particular concerns or questions your sector has in relation to the intersection of family violence and child information sharing reforms?

We welcome the fact that the proposed CIS regime and Family Violence Information Sharing (FVIS) regime, described through the *Family Violence Protection (Information Sharing) Act 2017* and its associated draft regulations and Ministerial guidelines, are aligned on several matters. We believe this will assist practitioners to operate under both regimes and we have made suggestions throughout this submission to strengthen congruence in key areas. However, we are concerned that an additional regime with a much broader purpose could potentially undermine the FVIS regime by causing confusion among practitioners and the broader community, particularly given the expanding role of universal services in sharing information relevant to family violence risk.

Refine purpose to align with the Family Violence Information Sharing regime

As discussed above, the main area of concern is the proposed purpose for information sharing in the CIS regime. We believe that our recommendation to refine the purpose under the CIS regime will provide better alignment with the purpose of the FVIS regime within a risk management and rights-based framework. Without making this refinement, the currently broad and undefined purpose of the CIS regime trumps the FVIS regime which directs organisations and practitioners to only share information about children for a risk assessment and risk management purpose.

We recommend that the CIS regime is informed by the FVIS regime in this regard, as the latter was the result of extensive cross-sector consultation and collaboration over many months to settle on thresholds which recognise the importance and power of information-sharing to respond to risks to children's safety and to reinforce collaboration and engagement with appropriate support services. We understand the desire for a CIS regime which covers situations where no family violence has been disclosed, but we are concerned that the proposed CIS regime risks undermining the FVIS regime by effectively overriding it in every case where children are involved. The same principles for information sharing within a risk management, rights-based framework are applicable, whether the matter involves family violence or not.

Notification of information sharing

What aspects of best practice in promoting children's agency should be covered in the guidelines to support service providers?

Chapter eight of the FVIS regime draft Ministerial guidelines discusses the obligations under the [Privacy and Data Protection Act 2014](#) and the [Health Records Act 2001](#) that children, protective parents/carers or other relevant third parties are notified when their information is shared. This should be included in the CIS regime and we also recommend that such notification should occur as soon as possible, even

before the information is shared (when safe and reasonable to do so), to ensure that protective parents/carers and where appropriate, children and young people, are able to discuss and plan for any consequences or concerns that may arise from information sharing. As stated in the FVIS regime draft Ministerial guidelines (page 67):

Keeping the client informed is part of best practice case management and helps to maximise client engagement. The child or parent must be supported with safety planning and other necessary services, whether they have consented to information sharing or not.

Consistent notification practices across all information sharing regimes will make compliance much easier for frontline practitioners.

Legislative principles

Are there any 'Legislative principles' you would amend, or add to the proposed list? If so, why?

Create principles based on a refined risk assessment and rights-based purpose

As discussed previously, we recommend that the purpose for information sharing should be further refined and stated as: *'to assess and manage risks to the safety of a child or a group of children.'* This should be reflected throughout all of the proposed principles stated in the consultation paper, removing references to broad terms including 'wellbeing' and 'promote' or 'promoting' and replacing it with language that focuses on safety, rights, risk assessment and risk management.

Add a principle of informed consent

We recommend that a principle of seeking informed consent of the child and/or protective parent/carer (where developmentally appropriate, and safe and reasonable to do so) is added to the proposed CIS legislation. This is to align with our recommendation to add informed consent as a fourth part to the proposed three-part test as discussed on page 7.

Define 'best interests' of children

In reference to the 'best interests' of children, as stated in the first proposed principle, we are concerned that this is also very subjective and susceptible to biased interpretation. The threshold for 'best interests' needs to be clearly set out in the body of the legislation; therefore, we recommend that the CIS regime utilise the definition of best interests outlined in the [Children, Youth and Families Act 2005, Part 1.2 Principles – 10. Best interests principles](#).

Directly reference key family violence guiding documents

To ensure that we continue to strengthen consistent understanding, practice and responses to family violence, especially as it is a significant factor impacting on child safety, we recommend that the sixth proposed principle specifically pertaining to the context of family violence, should direct organisations to work within:

- the definition of family violence in the [Family Violence Protection Act 2008](#);
- the [Family Violence Protection Amendment \(Information Sharing\) Act 2017](#) and the accompanying draft regulations and guidelines; and
- the [Family Violence Risk Assessment and Risk Management Framework](#).

We also recommend that either the legislative principles or future guidelines for the proposed CIS regime should align with other key points found throughout the FVIS regime draft Ministerial guidelines, including that:

- information should be shared in way that avoids victim blaming and focuses on perpetrator accountability (FVIS guidelines, pages 6 and 63); and
- building and maintaining trust between children, non-offending parents/carers and service providers is crucial to being able to provide effective support (FVIS guidelines, page 59).

Also, there is a language discrepancy between the fourth principle in the CIS regime which states, “when sharing information, entities should promote the agency of the child, including by recognising the *wishes of the child and their family* wherever appropriate...” (page 10), and a similar principle in the FVIS regime draft Ministerial guidelines, which states:

The agency of the child victim survivor or non-offending parent should be promoted where possible. This means that, where appropriate, safe and reasonable, the views of the child victim survivor or non-offending parent will be taken into account and inform the risk assessment, the risk management plan and information sharing decisions (page 59).

Alongside our recommendations in regard to informed consent, we recommend changing the principle to reflect the language of “views of” rather than “wishes of” as it is more inclusive of all dimensions of a person’s own considerations about information sharing.

Excluded information

What additions or changes should be made to the list of ‘Excluded information’, if any? Please provide a clear rationale.

Guidance with examples of excluded information

The excluded information proposed in the CIS regime consultation paper is the same as outlined in the FVIS regime. We have no further amendments or additions in this regard, however we do recommend that the future guidelines for the CIS regime provide examples of the type of information that would fall under the categories of excluded information.

Such examples are provided in the FVIS draft Ministerial guidelines (see Chapter 5, page 40) which may be used as a reference. For example, in the FVIS draft Ministerial guidelines, excluded information that is expected to endanger a person’s life or result in a physical injury includes information about the address of the victim survivor which may alert a person known to pose a threat to their whereabouts. For a child, information that may endanger their life or result in physical injury may include information about where they live, where they attend school or engage in other activities, such as sport or childcare.

Organisations to be prescribed to share information

Would you add or remove any organisations and workforces from the proposed list of ‘Organisations to be prescribed to share information’? Why?

Specificity within prescribed organisations

We understand that the list provided is intended to provide an overview of the types of organisations that may hold information related to children. As it currently stands, however, some of the organisations included, such as public sector bodies, psychologists, and community service agencies are very broad. When it comes to drafting the legislation and regulations for the CIS regime, we recommend much greater specificity in the descriptions of appropriate prescribed organisations. See for example the descriptions of prescribed entities under the *Draft Family Violence Protection (Information Sharing) Regulations 2017*. These descriptions are more specific to roles within organisations, including their information sharing functions, where applicable. This concern is highlighted in the context of the current lack of definition of “safety and wellbeing” where the wide range of professionals in these varied organisations will be required to make judgements about information sharing based on these terms. Please refer to page 5 for further details.

Where organisations may provide a range of services, some of which may not be relevant to children’s safety and wellbeing, please specify the particular roles or functions that should (or should not) be prescribed under the proposed regime within that organisation.

Information sharing by professionals with appropriate training and supervision

As stated above, we recommend greater specificity and assurances around the appropriate information sharing roles and their functions within prescribed organisations. The roles within prescribed organisations that are best suited for information sharing should be at a professional or managerial level where their training and function includes ensuring that children’s rights, safety, privacy, protection and service entitlements are respected and appropriately handled. Therefore, we recommend that persons in administrative or clerical roles, volunteers (including parents in volunteer or school support roles), students or trainees, and other similar non-professional roles are *not prescribed* under the information sharing regime.

Further to this, as per our recommendation to revise the fundamental purpose of the proposed regime, information sharing should occur within a risk management, rights-based framework that includes informed consent and undertaken only by professionals who are trained in this area and receive supervision and approvals from their senior manager. This means that professionals fundamentally understand the importance of undertaking risk assessment (through CRAF training), not only for matters of family violence but for other potential risk and harms to children and their protective parents/carers. Professionals must understand how to share risk relevant information in a way that does not produce adverse consequences for the child and/or parent (for example, conducting risk assessments in family case conferences or sharing information without considering consent).

Lawyers should be excluded, consistent with the family violence regime

We understand that legal services are to be excluded from the child information sharing regime. We support this position and would request further detailed conversations were this to change.

Legal services are not prescribed under the FVIS regime. This decision was the result of extensive consultation with the sector. Reasons for excluding legal services included the limited amount of information that lawyers would be able to share (given that legally privileged information would be “excluded information” under the CIS regime).

The consultation paper suggests that ‘public sector bodies’ would be prescribed. Again, we believe this is too broad, and it is important that this does not result in some legal services being subject to different rules from others. Clients accessing legally-aided services should not have access to any different information sharing regimes – or be subject to any different information sharing regimes – from clients who can pay directly for their legal services. Further, the information of clients who receive legally-aided services directly from VLA should be treated in the same way as the information of clients who receive legally-aided services from a Community Legal Centre or a private practitioner.

Child Link

Do you consider there to be particular opportunities or risks for your sector in implementing a systematic approach to sharing linked information about a child (see description of ‘Child Link’)?

No clear case for Child Link

We recognise the potential benefits of strengthening information sharing platforms to ensure that service system complexity and fragmentation does not obstruct children’s rights to safety and to receive universal service entitlements that support their development. We are also aware that the concept of data linking provides an information sharing opportunity for universal services that wish to ensure that children are receiving their service entitlements. However, similar to the Nous Group consultation paper⁷ released late last year, this current consultation paper raises more questions and concerns rather than providing a clear case for why Child Link is the best proposal for handling information about children in a way that manages risks to their safety and ensures their ongoing welfare and protection.

Firstly, numerous questions arise when considering the implications of Child Link that are not answered in the consultation paper. These questions include:

- Is the implementation of Child Link a justifiable solution in terms of balancing potential benefits for children’s safety and protection with the safety risks posed by the broad access to this database as well as the human rights and privacy implications that come with setting up a database that uses an individual indicator to collect and monitor information from birth without parental consent?
- What types of ‘other’ services information, besides universal services, would be contained in Child Link? Will this include information about children’s involvement in family violence services, counselling and therapeutic services and residence in refuges? The inclusion of family violence services information alongside the breadth of agencies that can potentially access Child Link is of particular concern.
- To what extent would information about ‘carers’ be recorded? If Child Link records information about parents and other carers there are great concerns that this would undermine the confidentiality that family violence victims require to manage their own safety.

⁷ Nous Group (30 November 2016). *Consultation Paper: Proposed legislative model for Child Safety and Wellbeing Information Sharing*.

- To what extent would information about orders be contained on Child Link? Would this only include information about Children’s Court orders as suggested in the current consultation paper or would this also include information about family law orders, family violence orders, and youth justice orders?
- What are the legal implications of containing confidential information about children’s access to services in a database where there are family law matters? How would subpoenas of Child Link be addressed?
- Who is responsible for adding information to Child Link and ensuring it is up to date and accurate?
- What happens if information in Child Link is incorrect and how will professionals and/or parents be able to remedy this? For example, see our concerns regarding the misidentification of victim survivors as perpetrators in the family violence context on page 17.
- How long would the information on the database be accessible? Are there age limitations? Is it intended to record information during critical early years only or would the information be contained until a person turns 18?
- What are the methods to evaluate and test whether or not such a repository of information actually does produce greater safety outcomes for children?

While the information collected for Child Link may be useful in some respects, this does not necessarily mean that it will enhance safety or wellbeing. This is not to say that some kind of mechanism for sharing such information is not warranted in order to create a better picture of child welfare and to prevent children from slipping through the cracks in the service and protection system. As we know from the implementation of the Risk Assessment Management Panels (RAMP), information sharing is critical for ensuring that risk is comprehensively assessed and responded to with coordinated action across services and systems. However, greater discussion, consultation and evidence-based options modelling is necessary to ensure that the most effective platform is developed, whether IT based or through coordinated information sharing and risk management programs, to protect and support children in Victoria, within their own right.

The consultation document states that Child Link is a response to inquiries recommending that the Victorian Government needs to take a more proactive and systematic data management approach to information sharing; yet this statement is not backed up with specific reference to recommendations that discuss the necessity for an IT system that tracks children’s personal data. We are aware that such recommendations do exist in a range of reports.⁸ It would have been useful to see this information presented in the consultation paper with a more robust discussion about the existing evidence base associated with these recommendations to ensure that all options have been considered. Children deserve the best evidence-based systems and services that attend to their rights, safety and welfare. At present, there is no clear evidence in this consultation paper to suggest that Child Link is the best model for achieving this. During this period of reform, let this be an opportunity to conduct thorough research and consultation to test evidence-based, best practice policy and service delivery options.

⁸ Commission for Children and Young People (2014). *Ministerial Inquiry regarding ‘Child N’*, Melbourne; Coroners Court of Victoria (2016). *Inquest into the Death of Baby D*, Melbourne; Department of Premier and Cabinet (2012). *Report of the Protecting Victoria’s Vulnerable Children Inquiry*, Melbourne; Victorian Auditor-General’s Report (2015). *Education Transitions*, Melbourne.

Security risks in Child Link

We are particularly concerned about the numerous prescribed agencies proposed to register and access information on Child Link. Even though this is a subset of professionals within services, the range still takes in large workforces who will have access to information that could be exposed to a perpetrator or his associates. Due to the scale of family violence perpetration, some of the people working in these agencies will be perpetrators of family violence themselves.

Determined and self-entitled family violence perpetrators who believe they have a right to control and punish their partners will often do so through surveillance mechanisms including manipulation of systems to seek information about children. As it is proposed, Child Link and the large range of prescribed organisations poses significant risks of security breaches. We do not see how prohibition from unauthorised disclosure is a strong enough safeguard to protect children and their protective parents/carers from information getting into the wrong hands. This is related to another concern that Child Link will not require parental consent to record details about children, and also about themselves as carers; hence, information about children and their mothers who are adult victims of family violence will be exposed to a great number of people, potentially putting their safety at risk.

If government believes that this type of data-linking program is necessary to ensure that children do not miss out on important universal and social services and that information about relevant protective orders should be recorded, does this necessarily require that such a breadth of agencies are able to readily access such information? We recommend that any considerations around such a database following robust research and consultation should include the option that only a central agency with authorised personnel would have direct access to Child Link to ensure that information is appropriately updated and monitored. All other agencies that are working with children and their families to facilitate their rights and service entitlements could request a report about a child from the central agency should they meet security and permission requirements to make such a request. Permission entitlements and criteria for obtaining a report from Child Link would also need to be worked out through further research and consultation.

Child Link needs consultation not legislation

For the reasons provided above, we strongly recommend that Child Link is not included in any legislation until further research and consultation takes place. As such, we also recommend that a comprehensive discussion paper is developed with a fully explicated background, rationale, evidence-base, and options models that includes the proposal for Child Link alongside other service and program options for information sharing for the purpose of assessing and responding to issues of child safety. This discussion paper should be used for consultation with services that work with children, young people and families, as well as for consultation with the general public to ensure that parents and carers have the opportunity to consider the information presented and provide their own input.

Safeguards to ensure appropriate information sharing

What operational concerns might services have about the ‘Safeguards to ensure appropriate information sharing’, and how could these concerns be dealt with through implementation support and in guidelines?

Refining the purpose is a safeguard

As stated above, one of the critical safeguards we recommend for the CIS regime is to provide articulated definitions of safety and to refine the purpose of information sharing within a risk management and rights-based framework. Related to this, the lack of specificity about the prescribed agencies and the proposal for Child Link, could potentially undermine the protective information sharing premise that the CIS regime intends to address. The risk of discrimination based on biased judgements about undefined concepts of safety and wellbeing and the risk of deterrence from services because of broad information sharing permissions that do not include an expectation of seeking informed consent, must be seriously considered.

Informed consent is a safeguard

As stated above on pages 7-9 balancing information sharing, privacy and consent-seeking practices is fundamental to managing risks to the safety of children and their protective parents/carers. Default consent-seeking practices are safeguards in themselves to work within dynamic risk contexts (including family violence as well as other risks within familial, institutional and social settings), as they place the onus on the practitioner to balance safety, risk management and consent; give people confidence in services and systems; and prevent deterrence from accessing services and returning for ongoing support.

We recommend that consent-seeking practices are built as safeguards into the CIS regime so that children and their protective parents/carers have the confidence that systems and services will undertake information sharing in a way that prioritises their safety while respecting their rights and agency.

Safeguards against the misidentification of perpetrators

Safeguards need to be built into the system to address the historic and ongoing trend observed by family violence services and legal services, whereby police are wrongly identifying family violence victims as Respondents on Family Violence Intervention Orders (FVIO). Perpetrators of family violence often present themselves as victims and it is also not uncommon that genuine victims of family violence are misidentified by authorities, including police.

Analysis by No To Violence/Men’s Referral Service shows that police in Victoria are wrongly identifying up to 375 women every month as perpetrators (Respondents) on FVIOs.⁹ This is a particular risk for Aboriginal women, women’s with disabilities as well as culturally and linguistically diverse women, who,

⁹ Nathan de Guara, Policy Consultant, *No to Violence: Male Family Violence Prevention Association*, Interview, 21 August 2017.

in addition, commonly experience racial discrimination and prejudice when engaging with Police and mainstream services.¹⁰

Police accountability processes have struggled to respond to this phenomenon, and officers attending often chaotic family violence incidents appear poorly equipped to make judgments about who the primary aggressor is, despite guidance provided in the [Victoria Police Code of Practice for the Investigation of Family Violence](#). We acknowledge the significant growth and reforms that Victoria Police have gone through over the past few years to improve their responses to family violence, and more recently as a result of the rapidly changing landscape following the Royal Commission into Family Violence. However, misidentification can be the case even when the facts seem to speak for themselves. In one case, a perpetrator of family violence identified to the police that a woman lying unconscious in an ambulance as the aggressor and the attending police standing next to the ambulance named her as the Respondent on the relevant FVIO.¹¹

We note also that FVIOs tend to focus on a particular incident or moment in time. They can therefore fail to capture the ongoing nature of family violence, and the dynamics of control and oppression by the actual perpetrator that are relevant to Child Protection recommendations and court decisions about access to children. While chapter four of the draft FVIS Ministerial Guidelines provide an admirable account of how agencies could respond well and attend to the accuracy of facts outlined in FVIOs, our experience is that the system is too overloaded for the level of cross-checking needed to protect victim survivors from further perpetration and misidentification.

Police misidentification of victim survivors as the primary aggressor/perpetrator in family violence incidents can heavily influence outcomes in other legal proceedings (including Family Law and Child Protection Matters). The proposed information sharing regime for children may compound these existing issues where incorrect information is disclosed to a range of agencies, with potentially significant adverse consequences.

The following case study from Women's Legal Service Victoria illustrates how the misidentification of a primary aggressor/perpetrator can have devastating impacts on women and their children.

Case study (composite, de-identified)

Amalia, a woman from a CALD background, and primary carer of two children under the age of six, was wrongly identified as the primary aggressor on a FVIO in the following circumstances. Amalia's husband Jim (the children's father) had a history of drug addiction, and had been violent towards her throughout the relationship. On this occasion Jim had assaulted her, and while defending herself, she scratched him on the neck with her nails. She sought safety with a neighbour, who assisted her to call the police. Police attended the home address, where Jim presented a convincing story that Amalia was "crazy" and had attacked him without warning. Police saw the scratch marks, interviewed Amalia without an interpreter, and took out a safety notice excluding her from the property. The safety notice named him and the children as protected persons. They also charged her with assault and causing injury to Jim. Amalia was advised to consent to the Intervention Order by the duty lawyer who was also assisting her with

¹⁰ Vaughan, C., Davis, E., Murdolo, A., Chen, J., Murray, L., Quiazon, R., Block, K., & Warr, D. (2016). *Promoting community-led responses to violence against immigrant and refugee women in metropolitan and regional Australia. The ASPIRE Project: Research report (ANROWS Horizons 07/2016)*. Sydney: Australia's National Research Organisation for Women's Safety, pp.72-81.

¹¹ Helen Matthews, Principal Legal Officer, *Women's Legal Service Victoria*, Interview, 21 August 2017.

the criminal matters. She also pleaded guilty to the lesser criminal charges to avoid risk of conviction for the serious indictable offences.

Amalia was isolated in Australia and unable to find housing with friends or family, so became homeless as a result of the exclusion. Jim moved, with the children, to an undisclosed location, which prevented her from having contact with them for three months. Because the children were present when the family violence took place, police notified Child Protection through an L17 family violence referral. The Department of Human Services didn't intervene because they assessed the father was protective as he supported the police application for a FVIO. There was no forensic attempt by any services involved to identify the actual dynamics of the relationship.

Subsequently Amalia also made her own cross-application for an FVIO with assistance from a community legal service. Because the children were already named on Jim's FVIO, the Magistrate's Court declined to put the children on her order.

Amalia then commenced proceedings in the Family Law Courts seeking reunification with the children. However because the police had wrongly named Amalia as the primary aggressor on the intervention order, both the FVIO and the Department of Human Services files indicated that she was the risk to the children.

In the meantime, Amalia found new accommodation. Jim discovered its location, and repeatedly broke in to her new home to steal and damage her property. In one instance she caught him inside her house. Police failed to act on her calls for assistance because she was identified in their system as the primary aggressor. Ultimately Amalia withdrew from the proceedings, having formed the view that the obstacles placed in her way were insurmountable.

This case study illustrates the experience of many women who become subjected to systemic punishment where the misidentification of a primary aggressor and the sharing of information in regard to children's safety leads to devastating outcomes. Safeguards must be built into the much broader information sharing regime proposed in this consultation paper to ensure that information sharing does not result in the perpetuation of further family violence and systemic harms.

We recommend that:

- the CIS regime direct organisations and practitioners to undertake secondary consultation with specialist family violence services and/or Support and Safety Hubs and Police family violence units where there are any possible concerns about the misidentification of a perpetrator and before any information is shared that could undermine the safety of adult and child victims of family violence;
- guidance on misidentification should account for the fundamental role of gender power imbalances in family violence as well as contexts of intersectionality that particularly impact on Aboriginal people, culturally and linguistically diverse people, and people with disabilities;
- the practice of handling misidentification is added to the safeguard provided on page 11 of the CIS regime consultation paper which states that *"a prescribed organisation may also share information with a child, a person with parental responsibility for a child, or a person with whom the child is living, if the prescribed organisation reasonably believes that the provision of the information to that child or person is necessary to manage a risk to the child's safety"* – this should explicitly state that such information should not be shared where there are unresolved concerns about the misidentification of a family violence perpetrator and in circumstances where a person with parental responsibility is known to be an alleged perpetrator of family violence;

- any records that have misidentified a victim-survivor as a perpetrator (or Respondent) must be corrected wherever that information is held; and
- safeguards to respond to misidentification and manipulation of information by actual perpetrators needs to be addressed in regard to our concerns about Child Link and prescribed organisations (refer to page 17 of this submission);

It is important that such explicit directions are stated as a matter of privileging the safety of victims of family violence, including adults and children, so that information sharing does not further undermine their risk management plans.

Record-keeping and reporting requirements

Are there any additional 'Record keeping and reporting requirements' that should be included in the proposed list?

Recording consent-seeking practices

As stated previously, we recommend that informed consent is added to the current three-part test. Whether that submission is accepted or not, we recommend that consent seeking practices are recorded. This should include information about:

- method for consent seeking (verbal, written);
- details of what was explained to the client about the reasons for sharing information;
- whether it was agreed by the client to share information and what action was taken if they did not agree (information not shared or shared as a matter of managing risk);
- whether information was shared without seeking consent and for what reasons; and
- any safety planning required in the course of information sharing.

Recording notifications that information has been shared

Also, in reference to our recommendation on page 10 regarding notification of information sharing as per the [Privacy and Data Protection Act 2014](#) and the [Health Records Act 2001](#), we recommend that notifications to clients are also recorded.

Further, in reference to our concerns about the misidentification of perpetrators, any cases where this is an issue should also have this information recorded including how it was known that misidentification occurred, what was done to correct this information, and assurances that the victim survivor was made aware of any issues in this regard so that they can manage their safety and children's safety accordingly.

Create consistent and routine record keeping tools

What support and information in the guidelines about these proposed requirements might be needed for your sector to implement these proposed requirements?

Similar record-keeping arrangements are also described in Chapter twelve of the draft FVIS Ministerial guidelines. Once those are settled after consultation, it will be important that record-keeping is consistent so that practitioners are not overburdened with multiple recording responsibilities.

We agree with the suggested items in regard to information sharing as described on pages 12-13 of the consultation paper; however, there must be a consistent and routine mechanism for recording this information that will be applicable in the different client information management systems utilised by the potential range of prescribed organisations.

Within family violence services, many agencies use either SHIP and/or IRIS, however, some agencies use other databases that interface with SHIP/IRIS and there are differing capacities within these systems to document the items suggested. For example, in SHIP this information could be recorded in a case note, however, for the data collection purposes suggested on page 13, it may be difficult to retrieve these details from case notes. This is not to say that it is impossible, but will require extensive work to determine if the information recorded in case notes falls under the categories described (e.g. number of requests, number of responses, number of refusals, etc.). If service providers are expected to undertake this work to provide data about the management of information sharing to government, they will need to be adequately resourced to do so.

Some of DV Vic's member agencies have suggested that a pro-forma for these record keeping obligations that could be uploaded to current databases and stored securely for data collection may make it easier to ensure consistent record keeping across services and handle retrieval of information in the future.

Issues and risks to be addressed through implementation and guidelines

Consistent, mandatory training

Are there any additional likely risks or issues for your sector, in relation to the proposed information sharing regime and/or Child Link?

It is important to acknowledge that during this time of busy reform there is no piece of legislation, database, or guideline that will adequately and effectively ensure the safety, protection and rights of children. Many of the concerns raised in respect to issues with information sharing about children's safety pertain to historically under-resourced and under-trained service systems, leading to inconsistent practices, siloed systems and risk aversion to share information. In some circumstances, legislation that already seeks to protect children from harm has not prevented the wilful ignorance and collusion of individuals and sometimes whole organisations with perpetrators of violence. Proceedings of the Royal Commission into Institutional Responses to Child Sexual Abuse have unearthed multiple examples of these failures.

Therefore, the effectiveness of the CIS regime will be contingent on broad-based, consistent practice development and mandatory, regulated training across all sectors to build capacity in assessing risk and responding to children's safety, rights, and protection. As children's safety is significantly impacted by family violence, such capacity building processes across prescribed organisations (from frontline practitioners through to senior leadership) should be foregrounded by training in family violence risk assessment and risk management. Additional training components should include:

- service integration and professional collaboration to support appropriate information sharing within a risk management and rights-based framework;
- practices of seeking informed consent and promoting agency, including balancing risk and safety around consent-seeking, and communicating appropriately with children and their protective parents/carers about information sharing obligations;

- understanding the misidentification of perpetrators and ensuring that information is shared in ways that actually manages, not undermines, safety risks for children and their protective parents/carers; and
- Information sharing in contexts of intersectionality and diversity to ensure accessible and equitable practices, including working respectfully with Aboriginal rights to self-determination.

Once again, thank you for the opportunity to provide this submission. We look forward to further discussion and collaboration.