

29 May 2024

Ms Ella George MP
Chair - Legislative Assembly, Legal and Social Issues Committee
Parliament of Victoria
Parliament House, Spring St
EAST MELBOURNE, VIC 3002

By email only: fvpdata@parliament.vic.gov.au

Dear Chair,

Inquiry into capturing data on family violence perpetrators in Victoria

Thank you for the opportunity to provide a submission in response to the Inquiry into capturing data on family violence perpetrators in Victoria (**the Inquiry**).

The Office of the Victorian Information Commissioner (**OVIC**) has combined oversight of freedom of information, privacy and information security, administering both the *Freedom of Information Act 1982* (Vic) (**FOI Act**) and the *Privacy and Data Protection Act 2014* (Vic) (**PDP Act**).

The Family Violence Information Sharing Scheme (**FVISS**) established under Part 5A of the *Family Violence Protection Act 2008* (Vic) (**FVP Act**) was created to support the effective assessment and management of family violence risk through enhanced information sharing. The FVISS was designed to operate alongside existing privacy obligations under the PDP Act and the *Health Records Act 2001* (Vic) (**HR Act**).

This submission provides a broad overview of how the FVISS interacts with privacy obligations¹, and discusses OVIC's expectations for organisations when handling perpetrator or alleged perpetrator information. The submission also touches on provisions in the *Freedom of Information Act 1982* (Vic) (**FOI Act**) related to family violence.

¹ For detailed guidance on the interaction between the FVISS and privacy obligations, see OVIC's resource *Family Violence Information Sharing Scheme and Privacy* available here: <https://ovic.vic.gov.au/privacy/resources-for-organisations/family-violence-information-sharing-scheme-and-privacy/>.

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Note that while this submission mentions the Health Privacy Principles (**HPPs**) in the HR Act, OVIC does not have oversight over the handling of health information. The HR Act is administered by the Health Complaints Commissioner.

Interaction between the FVISS and privacy obligations

To facilitate information sharing under the FVISS, modifications were made to the application of the Information Privacy Principles (**IPPs**) and the HPPs. When sharing information under the FVISS, Information Sharing Entities (**ISEs**) and the Central Information Point (**CIP**) are exempt from complying with IPPs 1.4 and 1.5.² There is a similar exemption in the HR Act.³ Consequently, ISEs and the CIP are not required to collect personal information directly from a perpetrator or alleged perpetrator, nor provide notice of collection where information about a perpetrator or alleged perpetrator has been collected from a third party.

Among other things, these exemptions recognise that collecting information directly from perpetrators or notifying them of the collection of their information from a third party may pose a safety risk to victim survivors of family violence. However, where an ISE collects personal information directly from a perpetrator or alleged perpetrator, the individual should be informed of how their information may be used or disclosed under the FVISS at the time of collection or as soon as practicable after the collection.⁴

With regard to sensitive information, the *Victorian Data Sharing Act 2017* amended IPP 10.1(b) to permit the collection of sensitive information where authorised or required by law.⁵ Consequently, ISEs can collect sensitive information, such as criminal record information, about a perpetrator or alleged perpetrator, without having to obtain their consent.

The CIP is exempt from IPP 6 and HPP 6, meaning it is not required to provide access to, or correct, personal information and health information about an individual that the CIP has collected for the purposes of the FVISS.⁶ An ISE may refuse access to information under IPP 6 or HPP 6 where a family violence risk is established, if the individual making the request is a perpetrator or alleged perpetrator.⁷

Support and Safety Hubs

Support and Safety Hubs (**Hubs**), known as the 'The Orange Door', are not required to comply with IPPs 1.3, 1.4 and 1.5 when collecting personal information.⁸ A similar exception exists in the HR Act in relation to HPP 1.3, 1.4 and 1.5. In practice, this means Hubs are not required to provide notice of

² PDP Act, s.15A(1) and s.15A(4).

³ HR Act, s.14B.

⁴ PDP Act, s.15A(1A); Family Safety Victoria (2021), *Family Violence Information Sharing Guidelines*, p.48.

⁵ *Victorian Data Sharing Act 2017*, s.34(2). Previously, sensitive information could only be collected under IPP 10.1(b) where 'required' by law.

⁶ PDP Act, s.15A(5).

⁷ FVP Act, s.144QA.

⁸ For detailed guidance on the interaction between the FVISS and privacy obligations, see OVIC's resource on the *Family Violence Information Sharing Scheme and Privacy* available here: <https://ovic.vic.gov.au/privacy/resources-for-organisations/family-violence-information-sharing-scheme-and-privacy/>.

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collection to an individual when collecting personal or health information about them either directly or from a third party.⁹

As with ISE's, the Hubs may also refuse access to personal information under IPP6, or HPP 6, where the information is about a perpetrator or alleged perpetrator and giving access to the information would increase the risk to a victim survivor's safety from family violence.

Information sharing and non-ISEs

A Victorian public sector organisation that is not a prescribed ISE but wishes to share family violence information will need to either rely on provisions in its own enabling legislation that require or permit information sharing, or rely on authorisations under IPP 2.1 and HPP 2.2, to share the information. Organisations receiving the family violence information should ensure they have legal authority to collect it, either under their own enabling legislation, or under the PDP Act or the HR Act.

FOI Act and family violence

While the focus of this Inquiry is the collection of information about perpetrators of family violence, this section of the submission briefly discusses specific family violence provisions in the FOI Act. These provisions are aimed at protecting the safety and privacy of victim survivors.

Section 33(1) of the FOI Act permits an agency to exempt a document from an FOI request where disclosure of the document would involve the unreasonable disclosure of information relating to the personal affairs of any person (including a deceased person). In deciding whether to exempt a document, an agency must consider whether, among other things, disclosure of the information would endanger the life or physical safety of any person.¹⁰ The danger to physical safety does not need to be a certainty but should be reasonably likely to occur.¹¹ A person's perception as to whether they are safe is also considered.¹²

In the context of family violence, where a perpetrator or alleged perpetrator makes an FOI request for a document held by an ISE or a Hub, and the document contains the perpetrators' personal affairs information, the ISE or Hub must consider whether disclosing the document would increase the risk to a primary person's¹³ safety from family violence.¹⁴ An agency can decide the document is exempt from disclosure even though the relevant information may only relate to the personal affairs of the perpetrator or alleged perpetrator.

⁹ PDP Act, s.15A(1A).

¹⁰ FOI Act, s. 33(2A).

¹¹ Department of Agriculture and Rural Affairs v Binnie [1989] VR 836, 844.

¹² O'Sullivan v Victoria Police [2005] VCAT 532 [19]; Huang v Frankston City Council [2021] VCAT 634. [54]-[55].

¹³ Section 144E of the FVP Act defines a 'primary person' as an individual that an ISE reasonably believes is at risk of being subjected to family violence

¹⁴ FOI Act, s. 33(2AB).

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OVIC expectations for organisations handling perpetrator information

OVIC understands the FVISS is intended to promote the safety of victim survivors of family violence and to hold perpetrators to account. To do so, the FVISS aims to create a cultural shift away from maintaining perpetrator privacy towards information sharing to keep perpetrators in view.¹⁵

However, any interference with perpetrators' privacy should not be arbitrary. While ISEs are exempt from complying with some IPPs and HPPs, the other privacy obligations in the PDP Act and HR Act still apply. OVIC expects ISEs to handle perpetrator information consistently with these obligations in a way that respects their right to privacy. Some of OVIC's expectations are listed below.

- ISEs and other relevant bodies, should only collect the minimum amount of perpetrator information necessary for assessing or managing the risk of family violence or holding perpetrators to account.
- Perpetrator information should only be used or disclosed for purposes specified in the FVISS.
- ISEs should implement measures to protect perpetrator information from misuse, loss, unauthorised access, disclosure, or modification. This includes ensuring information is only shared with organisations authorised to receive the information and having robust audit processes, among others.
- ISEs should ensure any perpetrator information they collect, use, and disclose is accurate, complete and up-to-date. Given the gravity of family violence, it is crucial that any decisions made in relation to assessing or managing the risk of family violence are informed by data that is of good quality.

These are only some of the ways in which ISEs should handle perpetrator information in a responsible, appropriate manner. Detailed guidance on complying with the IPPs is available on OVIC's website.¹⁶

Conclusion

OVIC remains supportive of the FVISS and its role in enabling ISEs, and other relevant organisations, to assess and manage family violence risk. OVIC would caution against further carve outs to the PDP Act to support the FVISS. OVIC is of the view that the IPPs are flexible enough to facilitate information sharing for purposes of the FVISS and any further carve outs are likely to add unnecessary complexity to the information sharing framework, making it more difficult for ISEs to understand their information handling obligations. Organisations seeking guidance on the application of the IPPs or the FOI Act are encouraged to contact my office.

I have no objection to the Committee publishing this submission on its website without further reference to me. I also propose to publish a copy of this submission on the OVIC website but would be happy to adjust the timing of publication to allow the Committee to collate and publish submissions proactively.

¹⁵ Family Violence Reform Implementation Monitor (2023), *Legislative Review of family violence information sharing and risk management: reviewing effectiveness of Part 5A and 11 of the Family Violence Protection Act 2008 (Vic)*, p.27.

¹⁶ See OVIC's *Guidelines to the Information Privacy Principles* available here: <https://ovic.vic.gov.au/privacy/resources-for-organisations/guidelines-to-the-information-privacy-principles/>.

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If you have any further questions regarding this submission, please do not hesitate to contact me or my colleague Anita Mugo, Senior Policy Officer, at anita.mugo@ovic.vic.gov.au.

Yours Sincerely

A handwritten signature in black ink, appearing to read 'Rachel Dixon', is placed on a light yellow rectangular background.

Rachel Dixon

Privacy and Data Protection Deputy Commissioner