

**THE LEGISLATIVE ASSEMBLY FOR THE  
AUSTRALIAN CAPITAL TERRITORY**

**DOMESTIC VIOLENCE AGENCIES (INFORMATION SHARING) AMENDMENT  
BILL 2023**

**EXPLANATORY STATEMENT  
and  
HUMAN RIGHTS COMPATIBILITY STATEMENT  
(*Human Rights Act 2004, s 37*)**

**Presented by  
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# **DOMESTIC VIOLENCE AGENCIES (INFORMATION SHARING) AMENDMENT BILL 2023**

The Bill is a Significant Bill. Significant Bills are bills that have been assessed as likely to have significant engagement of human rights and require more detailed reasoning in relation to compatibility with the *Human Rights Act 2004*.

## **OVERVIEW OF THE BILL**

The Bill amends the *Domestic Violence Agencies Act 1986* (DVA Act) to introduce a domestic and family violence information sharing scheme in the Territory. This Bill will create a legislative framework that clearly authorises information sharing between prescribed information sharing entities (ISEs) where necessary to establish, assess, prevent, reduce and manage to risk of domestic and family violence.

The overarching objectives of the Bill are to improve service responses to domestic and family violence to promote the safety, protection and wellbeing of victim-survivors, prevent the occurrence and escalation of violence, and hold persons of concern to account. At all times, the Bill centres the safety and protection of victim-survivors.

It is clear that effective and trauma-informed responses to domestic and family violence, which place victim-survivors at the centre, rely on collaboration, coordination and integration across the service system. Information sharing to assess and manage risk is a vital element of such coordination to ensure services can obtain the ‘full picture’ of a person’s risk of domestic and family violence in context. Providing a clear legislative framework for ISEs to deal with information as necessary for a protection purpose will facilitate this and break down existing barriers to information sharing, collaboration and integration which have hampered agencies’ informed and effective responses to domestic and family violence. This reform is critical to enacting necessary cultural and structural changes, to improve the system response to domestic and family violence and ultimately to reduce the prevalence of domestic and family violence in the community.

The vast majority of Australian states and territories already have legislative domestic and family violence information sharing schemes. This reform brings the ACT in-step with these jurisdictions.

The Bill provides that prescribed ISEs must only deal with information to the extent necessary for a protection purpose, meaning to establish, assess, prevent, reduce and manage a risk of domestic and family violence. ISEs may proactively disclose information to other ISEs for a protection purpose and request information held by other ISEs.

Recognising the vital importance of supporting the agency, autonomy and dignity of victim-survivors, the Bill is clear that sensitive information about victim-survivors and

connected persons should only be shared with their consent, unless specific circumstances apply and dealing with the information is necessary for the safety and protection of the victim-survivor. This recognises that while dealing with information with consent is best practice and the views of the victim-survivor should always be sought and valued where safe, there will be exceptional circumstances which require information to be shared without consent. This ensures that the safety of victim-survivors is to be the primary consideration for ISEs exercising functions under the Bill.

To support this, the Bill provides that at no time is the consent of the person of concern required to deal with information. The safety and protection of the victim-survivor is to be prioritised as far as possible, as necessary to ensure victim-survivors can be supported and persons of concern can be held accountable.

Additionally, the Bill establishes the role of the Information Sharing Coordinator (ISC) to facilitate dealings with information within the new scheme. In particular, the Bill enables the Minister to declare an entity to be the ISC. The ISC will provide important oversight to the operation of the scheme broadly, and can compel ISEs to disclose information in certain circumstances.

Under the Bill, the Minister must make Ministerial Protocols and declare a risk assessment and management framework to inform the implementation and operation of the scheme and set out best practice approaches which ISEs should comply with. ISEs must comply with the requirements of the Ministerial Protocol and a risk assessment and management framework in dealing with information under the Bill.

## **TERMINOLOGY**

This document refers to *victim-survivors* in recognition of these terms being widely used in the community. The term *victim-survivor* has the same meaning as *at-risk person* in Part 3 of the Bill. A person is a victim-survivor if an ISE reasonably believes the person has been, is being or is at risk of being subjected to domestic and family violence. The term victim-survivor incorporates all stages of domestic and family violence. Any person who has experienced, is currently experiencing or is at risk of experiencing domestic and family violence is considered a victim-survivor for the purpose of this Bill. The term victim-survivor refers to victim-survivors of all ages, including adults, children and young people.

## **CONSULTATION ON THE PROPOSED APPROACH**

Although the current DVA Act and other pieces of legislation broadly address the sharing and privacy of personal information, the present authority for entities to share information in circumstances involving domestic and family violence is unclear. The interaction of various laws allowing public bodies to share information is complex and complicated. In the 2016 inquiry, Glanfield referred to this complexity as an ‘impenetrable labyrinth’ and an obstacle to an ‘information sharing culture’. Critically,

this confusion can directly delay or stop entities sharing relevant information with each other, which in turn harms the service response to domestic and family violence victim-survivors and has significant, and sometimes lethal, consequences for victim-survivors and their families.

In recent years, several ACT-based reports have identified the need for information sharing reform in the domestic and family violence context. In particular, Glanfield's *Report of the Inquiry: Review into the system level responses to family violence in the ACT* (Glanfield Inquiry), the findings and recommendations from the *Review of Domestic and Family Violence Deaths in the ACT* by the Domestic Violence Prevention Council (DVPC Death Review), the Final report of the Review of the Family Violence Act 2016 (the *Review of the Family Violence Act 2016*) and the *ACT Domestic Violence Service System Final Gap Analysis Report* (Gap Analysis) each highlight significant barriers to information sharing in the ACT. This includes a lack of clarity about when and how agencies can share information, and institutional cultures which emphasise privacy and secrecy protections.

The Gap Analysis also importantly identified the specific need for effective information sharing in relation to responding to domestic and family violence, '[P]roper and appropriate sharing of information is particularly critical for domestic and family violence, not only because of the stark reality of risk and homicide, but because it is a complex issue involving many agencies, which often alone do not have the information needed to make accurate assessments of risk'.

In response, in June 2016, the ACT Government committed to authorising information sharing in legislation within domestic and family violence matters in the *ACT Government Response to Family Violence* (commitment 3.2). The ACT Government committed to this legislative reform on the condition that stakeholders would be further consulted.

Since 2016, reports including the *Domestic Violence Prevention Council (DVPC) Report from the Extraordinary Meeting* (DVPC Extraordinary Meeting Report), the *Review of the Family Violence Act 2016* and Coroner Hunter's 2021 Coronial Inquest into the death of Bradyn Stuart Dillon have reiterated the need for this reform.

In addition, similar information sharing schemes directly addressing domestic and family violence exist across all Australian jurisdictions and nationally in New Zealand. Most jurisdictions have had legislative domestic and family violence information sharing schemes in place for a number of years. For example, in 2016, Queensland authorised information sharing in response to the Special Taskforce's recommendations in their 2015 report: *Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland*.<sup>1</sup> Similarly, in response to the State's Royal Commission into Family Violence (2016), Victoria introduced a family violence information sharing scheme in 2017.<sup>2</sup> The 5-year legislative review of the Victorian

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<sup>1</sup> *Domestic and Family Violence Protection and Other Legislation Amendment Act 2016* (Qld), Part 5A.

<sup>2</sup> *Family Violence Protection Act 2008* (Vic), Part 5A.

scheme found that the legislation is helping to remove barriers to information sharing, which has had a positive impact in supporting ISEs to make better informed decisions about family violence risk.<sup>3</sup> It is also supporting a positive cultural shift away from maintaining the privacy of persons of concern towards sharing information to keep victim survivors safe and holding persons of concern accountable.<sup>4</sup>

The development of the Bill has been informed by extensive consultation with community and government stakeholders. Between September and October 2022, the Domestic, Family and Sexual Violence Office (DFSVO) within the Community Services Directorate (CSD) conducted a public consultation through the ACT Government's YourSay consultation process. In preparation for this process, CSD published a Discussion Paper and Draft Bill for exposure. The Discussion Paper raised several issues, including the proposed approach, human rights considerations, barriers within the current system and cross-jurisdictional observations.

Prior and throughout the YourSay consultation process, CSD hosted online and in person information sessions, and invited organisations to participate in Q and A sessions and one-on-one meetings. CSD also operated an online survey and accepted written submissions from members of the community. Altogether, the DFSVO engaged 28 community organisations throughout the consultation period and received 30 survey responses.

In July 2023, the ACT Government published a Listening Report reflecting on the feedback received from stakeholders. Overall, this report highlighted that community stakeholders expressed strong support for the overall purpose of the reforms to promote the safety, protection and wellbeing of people at risk of domestic and family violence, and to hold people using violence to account. All comments received during this community consultation process have been carefully considered and have informed the development of this Bill.

The DFSVO also chaired a working group that brought together representatives from various ACT Government directorates that are prescribed ISEs under the Bill. This working group provided strategic oversight to the development and intended implementation of the information sharing scheme. The working group met throughout 2022 and 2023.

DFSVO has consulted with the following stakeholders in developing the Bill:

*ACT Government stakeholders*

- Aboriginal and Torres Strait Islander Children and Families Advocate;
- ACT Corrective Services;

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<sup>3</sup> Legislative review of family violence information sharing and risk management: reviewing the effectiveness of Parts 5A and 11 of the Family Violence Protection Act 2008 (Vic). Family Violence Reform Implementation Monitor. May 2023. P.2.

<sup>4</sup> Ibid.

- ACT Courts and Tribunal;
- ACT Health Directorate;
- ACT Human Rights Commission;
- ACT Insurance Authority;
- ACT Policing;
- Canberra Health Services;
- Chief Minister, Treasury and Economic Development Directorate;
- Community Services Directorate;
- Education Directorate;
- Justice and Community Safety Directorate;
- Legal Aid ACT;
- Victim Support ACT

#### *Non ACT Government stakeholders*

- Aboriginal and Torres Strait Islander Elected Body;
- ACT Council of Social Services;
- ACT Disability, Aged and Carer Advocacy Service;
- ACT Domestic and Family Violence Roundtable;
- ACT Law Society;
- Advocacy for Inclusion;
- A Gender Agenda;
- Beryl Women;
- Canberra Rape Crisis Centre;
- Diversity ACT;
- Domestic Violence Crisis Service;
- Domestic Violence Prevention Council Aboriginal and Torres Strait Islander Reference Group;
- EveryMan;
- Family Safety Victoria;
- Northside Community Service;
- Relationships Australia;
- The Salvation Army;
- Women with Disabilities ACT;
- Women's Legal Centre.

## **CONSISTENCY WITH HUMAN RIGHTS**

Domestic and family violence is a significant issue with devastating impacts on the lives, health, wellbeing, and safety of people, families and communities in the ACT and across Australia. While domestic and family violence can happen to anyone, it is a gendered phenomenon, and overwhelmingly men perpetrate violence against women. In Australia, one in 3 women has experienced gender-based violence in

their lifetime.<sup>5</sup> One in 5 women since the age of 15 has experienced sexual violence.<sup>6</sup>

The prevalence of domestic and family violence in our community is not inevitable and can be prevented. An effective government response to domestic and family violence prevention must be multifaceted, but necessarily include a legislative response. This Bill assists the service system to assess and respond to the risk of domestic and family violence efficiently and effectively. Overall, this Bill aims to promote the safety of women and children in the ACT community and to prevent domestic and family violence from occurring and escalating more generally.

### **Rights engaged**

The Bill is a Significant Bill. It engages and limits a number of human rights protected by the *Human Rights Act 2004* (ACT) (HRA). The rights engaged by the Bill are: the right to recognition and equality before the law (section 8 of the HRA); the right to life (section 9 of the HRA); protection from torture and cruel, inhuman or degrading treatment (section 10 of the HRA); protection of family and children (section 11 of the HRA); the right to privacy (section 12 of the HRA); the right to freedom of expression (section 16 of the HRA); the right to liberty and security of person (section 18 of the HRA); and the right to a fair trial (section 21 of the HRA).

### **Rights Promoted**

The Bill promotes the following rights in the HRA:

- Section 8 – recognition and equality before the law
- Section 9 – right to life
- Section 10 – protection from torture and cruel, inhuman or degrading treatment
- Section 11 – protection of family and children
- Section 18 – liberty and security of person
- Section 21 – rights to a fair trial
- Section 22 – rights in criminal proceedings

The primary objective of the information sharing scheme introduced under the Bill is to improve systemic responses to domestic and family violence to centre the safety needs of victim-survivors. The Bill will facilitate greater integration and coordination of system and service responses to domestic and family violence, by embedding consistent approaches to information sharing to assess and respond to risk. This is critical to ensure services can work together and access relevant information necessary to prevent and respond to domestic and family violence, support victim-survivors to live in safety and to hold persons of concern to account appropriately.

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<sup>5</sup> ABS, Personal Safety Survey 2016.

<sup>6</sup> ABS, Personal Safety Survey 2021-22.

The Bill prioritises the safety of victim-survivors throughout the whole process and is a mechanism of human rights promotion.

### Section 8 – right to recognition and equality before the law

Section 8 of the HRA entitles everyone to equal protection of the law and enjoyment of their human rights without discrimination, which is defined to include sex. Domestic and family violence is a gendered phenomenon and women are overwhelmingly more likely to experience domestic and family violence, with one in four women reporting experiencing violence from an intimate partner or family member since age 15.<sup>7</sup> The State has a responsibility to take active steps to protect women against domestic and family violence in order for them to enjoy equal enjoyment of their human rights.<sup>8</sup> This Bill enables prescribed agencies to share relevant information more effectively and efficiently, to support and improve the safety of people at risk of or experiencing domestic and family violence.

In addition, the Aboriginal and Torres Strait Islander community is more vulnerable to experiencing domestic and family violence as well as people with disability, LGBTQIA+ people, people from culturally and linguistically diverse backgrounds and women on temporary visas.<sup>9</sup> Intersectionality also has a compounding impact.<sup>10</sup> Implementing measures to prevent and reduce domestic and family violence through improving service responses therefore promotes the right to equality for these groups, by supporting women and other people vulnerable to experiencing domestic and family violence to live free of violence and enjoy their human rights in safety.

### Section 9 – right to life

Section 9(1) of the HRA protects the right to life for all people. This right places a positive obligation on public authorities to take reasonable steps to safeguard and protect an individual's life.<sup>11</sup> The right to life is a fundamental and non-derogable right, which is recognised as a prerequisite for the enjoyment of all other human rights.<sup>12</sup>

The duty to protect the right to life requires States to take special measures of protection for people whose lives have been placed at particular risk because of specific threats, including domestic and gender-based violence.<sup>13</sup>

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<sup>7</sup> ABS, Personal Safety Survey 2021-22.

<sup>8</sup> *Tkheldze v Georgia* (Application no. 33056/17).

<sup>9</sup> Commonwealth of Australia, *National Plan to End Violence against Women and Children 2022-2032* (2022). P. 41-46.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Opuz v Turkey* [2009] ECHR 33401/02 (9 June 2009).

<sup>12</sup> UN Human Rights Committee, *General Comment No. 36: Article 6: Right to life* (2019), [2].

<sup>13</sup> *Ibid.*, [23].



The purpose of the information sharing scheme introduced through the Bill is to improve systemic responses to domestic and family violence to ensure they are collaborated, informed and integrated. This legislative reform will support services to establish and assess threats to life to prevent, reduce and respond to domestic and family violence. This Bill therefore directly promotes and supports the right to life of victim-survivors and their families.

#### Section 10 – protection from torture and cruel, inhuman or degrading treatment

Section 10 of the HRA protects an individual from torture, or being treated in a cruel, inhuman or degrading way. This absolute right seeks to protect individuals from behaviour that causes bodily injury, mental or physical suffering, or that shocks the community conscience. Domestic and family violence takes many forms, and according to the International Committee on the Elimination of Discrimination against Women, ‘Gender-based violence against women may amount to torture or cruel, inhuman or degrading treatment in certain circumstances, including in cases of rape, domestic violence or harmful practices.’<sup>14</sup> Similarly, the Special Rapporteur on torture considered the threat and risk of domestic and family violence also amounts to a breach of human rights, because ‘fear of further assaults can be sufficiently severe as to cause suffering and anxiety amounting to inhuman treatment’.<sup>15</sup>

The State plays an important role in preventing torture and cruel, inhuman or degrading treatment, which includes protecting women and other people from domestic and family violence.<sup>16</sup> By ensuring that ISEs including public agencies can disclose and use information for the purpose of protecting a person at risk of violent or emotionally abusive behaviour, the Bill promotes this important right.

#### Section 11 – protection of family and children

Section 11 of the HRA recognises that families are entitled to be protected by society and that every child has the right to the protection needed by the child because of being a child, without distinction or discrimination of any kind. Domestic and family violence can seriously harm a child or a young person’s emotional, psychological and physical wellbeing. Exposure to domestic and family violence can lead to homelessness, poor mental and psychological wellbeing, poorer educational outcomes, behavioural issues, physical health problems, and significant trauma symptoms. This may have long lasting effects on children and young people’s development, behaviour and wellbeing.<sup>17</sup>

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<sup>14</sup> Committee on the Elimination of Discrimination against Women, General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19 (2017, CEDAW/C/GC/35).

<sup>15</sup> Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (2016, A/HRC/31/57).

<sup>16</sup> *Opuz v Turkey* [2009] ECHR 33401/02 (9 June 2009).

<sup>17</sup> Children’s exposure to domestic and family violence: Key issues and responses. Monica Ocampo, December 2015.

Children and young people are recognised as victim-survivors in their own right within the definition of ‘at-risk persons’ in the Bill (s 13). As the scheme addresses domestic and family violence in family situations, the Bill supports families to live free from violence and works to improve the safety and wellbeing of children and young people.

Furthermore, the Bill does not affect the operation of mandatory reporting and reportable conduct schemes, thereby preserving an ISE’s ability to use information if required under child protection legislation. This ensures the Bill does not limit existing legislative protections for children and supports their rights.

#### Section 18 – liberty and security of person

Sections 18(1) and 18(2) of the HRA recognise that all persons have a right to liberty and security of person, and this liberty cannot be deprived (except in accordance with the law). This right protects all people from the deliberate infliction of injury, whether physical or psychological. A victim-survivor’s right to liberty and security of person is often limited by violence through domestic and family violence. In seeking to respond to and prevent domestic and family violence incidents, the Bill promotes the victim-survivor’s agency, liberty and security of person.

#### Section 21 – rights to fair trial

Section 21 of the HRA recognises that everyone has the right to have criminal charges and rights and obligations recognised by law decided by a competent, independent and impartial court or tribunal after a fair and public hearing. This includes rights to procedural fairness and equality in proceedings.

The Bill promotes the right to a fair trial by limiting the disclosure of information which could reasonably be expected to limit or undermine this right. An ISE must not disclose information, either voluntarily under s 16AB or on request of another ISE under s 16AC, and the ISC cannot require an ISE to disclose information under s 16AD if the disclosure could reasonably be expected to prejudice the effectiveness of a lawful method for preventing, detecting, investigating or dealing with a contravention of a law or prejudice a proceeding in a court or tribunal (ss 16AA(b)(v), (vi)). This ensures information is not shared if this would undermine or unduly limit the right to a fair trial.

Furthermore, although the Bill makes it an offence for an information holder to recklessly disclose and use shared information about a protected person (s 16AX), it provides a number of defences under s 16AX(3) which persons can rely on. The Bill also provides protections from civil or criminal liability for persons exercising functions under the Bill honestly and without recklessness (s 16AZA, s 16AZB). This promotes rights to a fair trial by providing rights and obligations under law which must be decided through a fair hearing.

## Section 22 – rights in criminal proceedings

Section 22(2)(i) of the HRA protects the right against self-incrimination, providing that a person charged with a criminal offence should not be compelled to give evidence that may result in a confession of guilt. Laws which compel a person to give evidence or provide information which may incriminate them engage and limit this right. Use and derivative use immunities under relevant legislation and the common law right against self-incrimination prevent such evidence from being admitted in a civil or criminal proceeding to be used against the person. Some of the agencies prescribed as ISEs under s 14 have powers under other laws to compel information, which may engage this right. Nothing in this Bill is intended to impact or displace the common law right against self-incrimination, meaning under the *Legislation Act 2001* section 170(1), the common law privileges against self-incrimination continue to apply. Additionally, s 16AY of the Bill clarifies that nothing in this part affects a use or derivative use immunity that applies to information obtained because of the operation of a law applying in the ACT. This clarifies that any use or derivative use immunities which would otherwise attach to this information continue to apply to the information if it is subsequently disclosed under this Bill such that it cannot be used against the person in any subsequent proceedings. This protects the right against self-incrimination, promoting section 22 of the HRA.

## **Rights Limited**

Broadly, the Bill may engage and limit the following rights in the HRA:

- Section 8 – recognition and equality before the law
- Section 11 – protection of family and children
- Section 12 – privacy and reputation
- Section 16 – freedom of expression
- Section 21 – a fair trial

## **Detailed human rights discussion**

### **Scope and operation of the information sharing scheme**

#### *1. Nature of the right and the limitation (s 28(2)(a) and (c))*

The scope and operation of the Bill engages and limits the right to privacy and reputation.

The right to privacy and reputation in section 12 of the HRA protects people from unlawful or arbitrary interference with their privacy, family, home, or correspondence. This means no interference can take place except in circumstances authorised by law. Further, any interference must be reasonable, necessary and proportionate in the circumstances.

The scope and operation of the Bill limits this right by:

- providing that prescribed ISEs must only deal with information, including sensitive information about victim-survivors, persons of concern and connected persons, to the extent necessary for a protection purpose (ss 16AB-16AD);
- enabling an ISE to voluntarily disclose information it holds to another ISE if it reasonably believes the information is relevant to the exercise of the receiving ISE's functions and the disclosure is necessary for a protection purpose (s 16AB);
- requiring that ISEs must disclose information it holds if requested by another ISE if the responding ISE reasonably believes the information is relevant to the exercise of the receiving ISE's functions and the disclosure is necessary for a protection purpose (s 16AC);
- providing that the ISC may require an ISE to disclose information it has previously refused to disclose if the ISC reasonably believes that the information is relevant to the exercise of the receiving ISE's functions and the disclosure is necessary for a protection purpose (s 16AD);
- enabling an ISE to voluntarily disclose information about a person of concern to a victim-survivor if it reasonably believes the disclosure is necessary for a protection purpose (s 16AE);
- defining information to include true or untrue information in any form (dictionary).

## 2. *Legitimate purposes (s 28(2)(b))*

The legitimate purpose of the Bill is to improve service responses to domestic and family violence to support the safety of victim-survivors, prevent the occurrence and escalation of violence, and hold persons of concern accountable, through enabling ISEs to deal with information as necessary for a protection purpose.

## 3. *Rational connection between the limitation and the purpose (s 28(2)(d))*

There is a clear rational connection between the limitations on the right to and privacy and the legitimate purpose.

At all times, ISEs must only deal with information to the extent necessary for a protection purpose or another specific purpose provided for under division 3.5 (s 15). The Bill's framing of *protection purpose*, *information*, *information sharing entities*, *at-risk persons* (victim-survivors) and *persons of concern* directly connects to the purpose of preventing and responding to the occurrence and escalation of violence, by ensuring relevant ISEs across the service system can deal with information if they reasonably believe domestic and family violence has been or is being perpetrated, or the ISE reasonably believes there is risk domestic and family violence will be perpetrated (even if this cannot be verified beyond doubt). Critically, this authorises and supports ISEs to:

- request further information based on some information or an incomplete picture;
- establish and assess risk in a timely and accurate way;
- conduct holistic and informed risk assessment and safety planning;
- intervene early to stop violence escalating to crisis point;
- reduce the risk of lethality and serious harm;
- prevent crisis, rather than merely responding to crisis; and
- develop integrated and collaborative responses to domestic and family violence risk across critical points of engagement with victim-survivors and persons of concern.

Providing that ISEs may proactively share information with another ISE(s 16AB) or with a victim-survivor (s 16AE), or be required to share information, either at the request of another ISE (s 16AC) or as required by the ISC (s 16AD) is directly connected to the legitimate purpose. These provisions adopt similar requirements to domestic and family violence information sharing schemes in other States and Territories, including Part 5A of the *Family Violence Protection Act (Vic)*. This clear authority for agencies to share information if necessary for a protection purpose promotes positive structural and cultural changes within and between ISEs, which will improve service responses to domestic and family violence and enhance community safety. The ISC’s ability to require an ISE to disclose information is an important oversight and safeguarding mechanism to ensure information is dealt with as appropriate and authorised under the Bill for a protection purpose, which will support systemic improvements to service responses to domestic and family violence.

Importantly, the 5-year legislative review of Victoria’s domestic and family violence information sharing scheme found that increased information sharing (by request and voluntarily) has had a positive impact in supporting ISEs to make better informed decisions about family violence risk, and particularly noted the importance of proactive voluntary information sharing in managing a victim-survivor’s safety.<sup>18</sup> This demonstrates the importance of these provisions to achieve the legitimate purpose of the information sharing framework.

#### 4. *Proportionality (s 28(2))*

The scope and operation of the Bill is reasonable and proportionate and there are no less restrictive means reasonably available to achieve the legitimate purpose.

Prioritising the safety and protection of victim-survivors as far as possible to reduce barriers to information sharing across the service system is vital to preventing,

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<sup>18</sup> Legislative review of family violence information sharing and risk management: reviewing the effectiveness of Parts 5A and 11 of the Family Violence Protection Act 2008 (Vic). Family Violence Reform Implementation Monitor. May 2023. P.33

reducing and managing risks of domestic and family violence. It is reasonable these provisions engage and limit the right to privacy to the extent necessary to enable ISEs to deal with information for a protection purpose to improve systemic responses to domestic and family violence. Similar domestic and family violence information sharing schemes also exist across Australian jurisdictions and nationally in New Zealand.

### *Scope of the Scheme*

The definition of protection purpose under s 15(a) is specifically framed to encompass a range of activities for establishing, assessing preventing, reducing and managing domestic and family violence risk. The Ministerial Protocol and a risk assessment and management framework to be declared by the Minister provide further guidance for ISEs to assess whether a protection purpose applies in a specific circumstance. ISEs are required to comply with this guidance.

The broad scope of information which can be dealt with under the scheme, as defined in the dictionary, is necessary to ensure pieces of information that may seem insignificant in isolation can be shared to build a full picture of a person's domestic and family violence risk. Despite this broad coverage of information types, information must only be dealt with where necessary for a protection purpose. This limit applies to all information about victim-survivors, persons of concern and connected persons, and to both consensual and non-consensual disclosure. This means while the definition of information is broad, the circumstances in which ISEs can lawfully share information are specific and confined. For example, while a patient's health records may constitute *information* under the Bill, an ISE cannot share a person of concern's or victim-survivor's health diagnosis if it has no relevance to a protection purpose. In this way, the Bill's focus on protection purposes will operate as a key safeguard, ensuring information which is not relevant to risk assessment or management cannot be disclosed by ISEs.

The list of ISEs included in s 14 expands to service providers across government and is not confined to specialist domestic and family violence service providers, as the ACT Domestic and Family Violence Risk Assessment and Management Framework indicates that people affected by domestic and family violence often first disclose their experiences of violence to people or agencies outside the mainstream domestic and family violence sector.<sup>19</sup> The prescribed entities are critical points of engagement between the service system and victim-survivors and persons of concern. The broad range of bodies covered by this information sharing scheme aims to ensure all pieces of information that is relevant to domestic and family violence risk and safety planning can be shared where appropriate and necessary for the safety of victim-survivors.

The Minister may declare additional entities to be ISEs under s 14(2), to ensure further entities can be brought into the scheme to deal with information for a

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<sup>19</sup> ACT Domestic and Family Violence Risk Assessment and Management Framework (2022). P. 31.

protection purpose. This may include non-government community-based services, such as frontline and specialist services. Under s 14(3), this declaration may specify which protection purposes an entity may have information disclosed to it or use information for, and ISEs are required to comply with this under ss 16(c) and (d). For example, an entity may only be declared an ISE to manage domestic and family violence or suspected domestic and family violence under s 15(a)(iv), meaning they could deal with information for this purpose, but not to establish, assess, prevent or reduce a risk of domestic and family violence. This is necessary to tailor ISEs' obligations and responsibilities within the information sharing scheme to their specific capabilities and level of engagement with persons of concern and victim-survivors. This safeguard will further ensure information is only dealt with by capable and competent entities who will be able to deal with it appropriately for a protection purpose.

### *Requirements to Deal with Information*

The authorisation that ISEs may voluntarily share information with another ISE (s 16AB) or be required to share information, either at the request of another ISE (s 16AC) or as required by the ISC (s 16AD) is strictly limited to where the ISE reasonably believes disclosure is necessary for a protection purpose and the information is relevant to the requesting ISE's functions. An ISE may only disclose information about a person of concern to a victim-survivor if it reasonably believes this is necessary for a protection purpose (s 16AE(1)), to support them to establish, assess, prevent, reduce or manage any risks to their safety. Additionally, an ISE must not disclose information, either voluntarily to an ISE or a victim-survivor or by request of an ISE or the ISC, if it reasonably believes the disclosure would contravene a requirement for information sharing under s 16 (s 16AA(a)), or if it reasonably believes the disclosure could reasonably be expected to lead to one of the grounds listed in s 16AA(b). These grounds are related to protecting life and physical safety, supporting the integrity of court proceedings, laws and investigations, and upholding the public interest. This ensures information sharing under the Bill is directly related to a protection purpose and limits the interference with the right to privacy and the right to recognition and equality before the law.

If these thresholds are not satisfied, an ISE must not disclose the information. The ISC operates as an important safeguard to oversee all refusals to disclose information and may require an ISE to disclose information if it reasonably believes the disclosure is necessary for a protection purpose and the information is relevant to the functions of the requesting ISE (s 16AD(1)). However, the ISC must not require the ISE to disclose information if it is satisfied a relevant ground for not disclosing the information exists (s 16AD(3)). Such reasons may include, for example, that the disclosure would contravene the requirements of s 16 (s 16AA(a)) or the disclosure would lead to circumstances listed in s 16AA(b). This ensures ISEs are fulfilling their legislative obligations and limits the risk of unauthorised dealings

with information, while ensuring the legitimate purpose of the Bill can be achieved and victim-survivor's rights to life are prioritised as far as possible.

Additionally, in exercising a function under Part 3, a person must prioritise the safety and protection of people experiencing, or at risk of, domestic and family violence as far as possible (s 12). This ensures all dealings with information under the Bill consider and prioritise the safety and protection of the victim-survivor as a core principle. In this context 'as far as possible' means the safety and protection of the at-risk person must be prioritised in a way that is consistent with the provisions and requirements of the rest of Part 3 and other applicable laws, including the HRA. This provides flexibility for persons exercising a function under Part 3 to fully consider any other relevant rights which may be impacted and balance these rights to ensure any limitations are reasonable and proportionate, consistent with the HRA.

### *Safeguards*

The Bill incorporates several overarching safeguards to ensure the scheme does not unduly infringe upon an individual's human rights, including:

- in exercising a function under Part 3, meaning in any and all dealings with information, a person must prioritise the safety and protection of people experiencing or at risk of domestic and family violence as far as possible, to ensure their rights are protected and centred, while balancing other rights consistently with the HRA (s 12);
- information must only be dealt with by ISEs to the extent necessary for a protection purpose and ISEs may only disclose information to another ISE if it reasonably believes disclosure is necessary for a protection purpose and the information is relevant to the exercise of the other ISEs' functions (ss 15(a), 16AB(1), 16AC(2));
- an ISE may only disclose information about a person of concern to a victim-survivor if it reasonably believes the disclosure is necessary for a protection purpose, to support the victim-survivor proactively plan for the safety of themselves and their families (s 16AE);
- that ISEs must not share information if the disclosure would contravene the requirements of s 16 (s 16AA(a)) or lead to one of the listed grounds in s 16AA(b), including if it would endanger a person's life or physical safety, prejudice and investigation or proceeding, or be contrary of the public interest (ss 16AB(2), 16AC(3), 16AD(3));
- the requirement for ISEs to take into account particular considerations before dealing with information, such as the right to self-determination for victim-survivors who identify as Aboriginal or Torres Strait Islander and the cultural, sexual and gender identity of the victim-survivor, and the provision that an ISE must not disclose information if it would contravene this requirement (ss 16(2), 16AA(a));
- the requirement that ISEs only deal with sensitive information about victim-survivors and connected persons with their consent, unless a specific



exception applies (ss 16(1)(a), 16AL, 16AM, 16AN, 16AO). Detailed analysis of these provisions is below.

- the establishment of a new position of the ISC to provide oversight and facilitate the operation of the scheme (ss 16AF, 16AG and 16AH);
- the provision that the Minister must make a Protocol to state requirements for dealing with information and provide guidance on complying with requirements under the scheme (s 16AV). All ISEs must comply with the requirements of the Ministerial Protocol (s 16(1)(b)(ii));
- the provision that the Minister must declare a risk assessment and management framework under s 16AU and the requirement for ISEs to comply with best practice as detailed in a risk assessment and management framework (s 16(1)(b)(i));
- the incorporation of offences for the inappropriate and reckless disclosure and use of information, including information about victim-survivors (s 16AX);
- the requirement of a statutory review of the information sharing scheme by the Minister after 2 years of the scheme's operation (s 16AZC). This review will be conducted by an independent entity, given the significant number of government agencies participating in the scheme as ISEs under s 14; and
- the delay to the Bill's automatic commencement of up to 12 months to provide sufficient time to support the necessary training and capability building for ISEs to understand and enact their obligations under the Bill (cl 2).

These safeguards ensure the scheme's limitations on the rights to privacy and equality are appropriate and proportionate, and establish strict conditions on when ISEs can lawfully deal with information. This ensures information is only shared as necessary to support victim-survivors' safety and hold persons of concern accountable.

While less rights-restrictive measures are available, including developing a wholly voluntary system of information sharing, where ISEs have no requirement to disclose information or limiting the scheme to only authorise information sharing among specialist domestic and family violence services where domestic and family violence is proven to be occurring, these measures would not be effective to achieve the Bill's legitimate purpose. This would not enable critical points of engagement across the service system to share information, including victim-survivor's opinions, to assess and manage risk to intervene earlier and prevent an escalation to crisis. This would also not support the development of integrated and coordinated systemic responses to domestic and family violence.

## **Sharing information about adult victim-survivors**

### *1. Nature of the right and the limitation (s 28(2)(a) and (c))*

The right to recognition and equality before the law in section 8 of the HRA entitles everyone to equality before the law and to the enjoyment of their human rights

without discrimination. The *Discrimination Act 1991* (ACT) specifically lists 'subjection to domestic or family violence' as a protected attribute, meaning it is unlawful to directly or indirectly discriminate against a person due to their experience of domestic and family violence. The Bill engages the right to equality because it introduces specific requirements for people with experiences of domestic and family violence, which provide for differential treatment.

By providing that ISEs may deal with information about victim-survivors, defined as someone who an ISE reasonably believes is, has been, or at risk of being subjected to domestic and family violence (s 13), the Bill limits the right to recognition and equality before the law.

Section 12 of the HRA protects people from unlawful or arbitrary interference with their privacy, family, home, or correspondence. Sections 16AL(1), 16AM(1), and 16AN(1) of the Bill specify that sharing information about a victim-survivor with consent is best practice and is required to deal with their information. However, there are specific circumstances where ISEs may deal with information without consent, as necessary for a protection purpose (s 16AL)). These are:

- If the ISE reasonably believes that seeking consent from the victim-survivor may cause a risk to the life, health or safety of the victim-survivor or a connected person and dealing with the information is necessary for the safety and protection of the victim-survivor (ss 16AL(3)(a), (3)(b)(i));
- If, despite taking reasonable steps, the ISE is unable to contact or locate the victim-survivor and dealing with the information is necessary for the safety and protection of the victim-survivor (ss 16AL(3)(a), (3)(b)(ii)); or
- If the ISE reasonably believes that dealing with the information is necessary for the victim-survivor's safety and protection and failing to deal with the information may cause a serious risk to the life, health or safety of the victim-survivor or a connected person (ss 16AL(3)(a), (3)(b)(iii)).

This disclosure of sensitive information about victim-survivors limits an individual's right to privacy under section 12 of the HRA and right to recognition and equality before the law under section 8 of the HRA.

## *2. Legitimate purposes (s 28(2)(b))*

The legitimate purpose of the Bill is to improve service responses to domestic and family violence to support the safety of victim-survivors, prevent the occurrence and escalation of violence, and hold persons of concern accountable, through enabling ISEs to deal with information as necessary for a protection purpose.

## *3. Rational connection between the limitation and the purpose (s 28(2)(d))*

The limitation on a victim-survivor's right to recognition and equality before the law is directly connected to the Bill's purpose. This Bill recognises domestic and family violence as a significant and unique issue that requires a specialised and targeted response. Information sharing is a necessary preventative tool to respond to this complex and widespread issue, yet there continue to be barriers and obstacles to

information sharing, as found by the Glanfield Inquiry, DVPC Death Review, Gap Analysis, the Review of the Family Violence Act 2016 and the Coronial Inquest into the death of Bradyn Stuart Dillon. The scheme's specific application to the information of victim-survivors, persons of concern and connected persons is appropriate and necessary for safety, to protect people at risk of domestic and family violence from violence occurring or escalating. They require specific and targeted approaches which necessitate their information being shared. Therefore, although the Bill introduces a scheme which differentiates the rights of victim-survivors from others before the law, the limitation is necessary for safety and to prevent domestic and family violence. This differential treatment is therefore proportionate and lawful.

These limitations to a victim-survivor's right to privacy in certain circumstances are critical to reducing barriers to information sharing and improving system responses to domestic and family violence and are clearly connected to the Bill's purpose. As noted, ACT inquiries and reviews have consistently found that due to actual and perceived barriers in the legislative framework agencies remain reticent to share information and prioritise privacy over safety and the right to life. This hampers agencies' ability to effectively assess and manage risk by having access to all relevant information.

One of the barriers to information sharing is agencies' unwillingness to share information without consent of the person, even if sharing information is critical and necessary to support that person's safety and protection. This is due to the limitations of current legislative frameworks in recognising and responding to domestic and family violence risk, and high legislative thresholds for sharing information without consent which do not align with the realities of coercive control and domestic and family violence. The process evaluation of the Family Violence Safety Action Pilot (2021) found that different legislative frameworks and agency practices regarding information sharing, particularly what level of risk justifies sharing information without consent, was negatively affecting outcomes for victim-survivors.<sup>20</sup> The evaluation therefore recommended consideration be given to identifying and addressing barriers to information sharing resulting from constraints in current ACT information sharing legislation.<sup>21</sup> Under some current legislative frameworks, agencies can disclose information without consent where necessary to prevent or reduce a serious and imminent risk. Stakeholders have identified the threshold of 'imminent risk' as unreasonably high, unclear, and difficult to establish in a domestic and family violence dynamic, despite a victim-survivor experiencing serious and real risk.<sup>22</sup> While coercive control, being a pattern of behaviour used by a person to dominate and control another, is one of the key indicators of serious injury and lethality in a domestic and family violence context, these risks are not necessarily

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<sup>20</sup> Stopping Family Violence (2021). *Process Evaluation of the ACT Family Violence Safety Action Pilot (2021)*. P. 34-35.

<sup>21</sup> *Ibid*, Recommendation 31.

<sup>22</sup> Royal Commission into Family Violence (2016). Volume 1, Report and Recommendations. (Victorian Government, March 2016). P. 173-174

imminent.<sup>23</sup> This pattern emerges over time and cannot be reduced to singular incidents, and when physical violence is used, it is often routine and frequent, rather than isolated violent attacks.<sup>24</sup> Yet while the risk of harm is not necessarily imminent or urgent, in that the risk is likely to eventuate soon, this does not lessen the extreme seriousness of the risk, nor the potential of serious harm or death.

The requirement that threat be imminent has led to overcautious information sharing practices, which prioritise privacy over safety and limit information sharing to facilitate early intervention, ultimately putting victim-survivors at greater risk.<sup>25</sup> Legislative reform is therefore required to amend this threshold and remove the requirement that threat be both serious and imminent or urgent.

The Bill therefore provides that while dealing with sensitive information with the victim-survivor's consent is best practice and should always be sought and obtained where safe and reasonable to do so, information may be dealt with without consent, in specific circumstances where necessary for the safety and protection of the victim-survivor (ss 16AL(3), 16AM(4), and 16AN(4)). This approach is similar to provisions adopted in other Australian jurisdictions which allow for non-consensual disclosure of information about victim-survivors in specific circumstances where necessary to respond to serious risk.

The recent review of the Victorian Scheme found that this approach is appropriate and acknowledged and supported this approach to give precedence to the right to be safe from domestic and family violence over the right to privacy.<sup>26</sup>

#### *4. Proportionality (s 28(2)(e))*

The disclosure of information about victim-survivors within this scheme is necessary for safety and is the least restrictive means available to achieve the legitimate purpose. The Bill includes safeguards so that limitations on right to privacy for victim-survivors are not arbitrary, and are always targeted at addressing risks of domestic and family violence.

#### *Interference with rights to recognition and equality before the law*

While the Bill enables information about victim-survivors to be dealt with, this scope is confined to where the ISE reasonably believes domestic and family violence has occurred or is occurring, or there is a risk it will occur. This is based on an assessment of risk, to be undertaken in accordance with the Ministerial Protocol and a risk assessment and management framework declared by the Minister. This safeguard ensures information is only dealt with if the ISE has a reasonable belief as

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<sup>23</sup> Australia's National Research Organisation for Women's Safety. (2021). Defining and responding to coercive control: Policy brief (ANROWS Insights, 01/2021). ANROWS. P.1.

<sup>24</sup> Ibid.

<sup>25</sup> Ibid, 173-174, 181, 182

<sup>26</sup> Page 47 of the Legislative review of family violence information sharing and risk management: reviewing the effectiveness of Parts 5A and 11 of the Family Violence Protection Act 2008 (Vic)

to the identity of a victim-survivor and person of concern, which reduces the Bill's interference with the right to privacy and reputation and the right to recognition and equality before the law. This is a proportionate and the most reasonably available means to achieve the Bill's legitimate purpose and aligns with the definition in equivalent schemes across Australia.

Additionally, the interference on the right to recognition and equality before the law is limited by the requirements in s 16(2) that in exercising a function under Part 3 in relation to a victim-survivor, the ISE must take certain factors into account. The ISE must take into account their cultural, sexual and gender identity and any religious or spiritual beliefs (if known). If the victim-survivor identifies as Aboriginal or Torres Strait Islander, the ISE must also promote their right to self-determination and cultural sensitivities and consider their family and community connections. Under s 16AA(a), an ISE must not disclose information either voluntarily or upon the request of another ISE if the disclosure would contravene this requirement under s 16. This will ensure ISEs' responses and dealings with information are tailored to the individual victim-survivor and take their specific and intersectional experiences into account, so any interference on their right to recognition and equality before the law is proportionate and not arbitrary.

### *Consent*

In all cases where safe and reasonable, ISEs must seek and obtain victim-survivor consent before disclosing sensitive information to another entity (s 16AL(1)) and must provide all necessary, reasonable supports to victim-survivors to enable them to make this decision (s 16AL(2)). This ensures the decision-making process is tailored to the needs of each individual victim-survivor.

In addition, the Ministerial Protocol (which the Minister must make under s 16AV) will provide further detail about the requirements in the Bill for informed and voluntary consent and guidance for how ISEs must engage with victim-survivors to support their agency in this process. This requirement for consent and associated guidance are key safeguards to limit when an ISE may be required to deal with information without consent. ISEs must comply with the requirements in the Ministerial Protocol.

### *Exceptions to Consent*

There are only limited circumstances under s 16AL(3) where the consent requirements are displaced and these are targeted and appropriately limited to protect the safety of victim-survivors. Critically, in all cases an ISE may only deal with sensitive information without consent if necessary for the victim-survivor's safety and protection (s 16AL(3)(a)), providing these circumstances are directly linked to the Bill's legitimate purpose. The Ministerial Protocol provides further guidance for ISEs to assess whether such circumstances exist and how to deal with information safely for a protection purpose as required.

Section 16AL(3)(b)(i) applies where an ISE reasonably believes seeking consent may cause a risk to the life, health or safety of the victim-survivor or a connected

person and dealing with the information is necessary for the victim-survivor's safety and protection. For example, it might be reasonable to believe seeking consent would cause risk where there is a history of the person of concern extracting information from the victim-survivor about what they have done and who they have talked to. This could jeopardise the victim-survivor's safety and result in an escalation of violence. To rely on this exception, the ISE will use their professional judgment to assess the circumstances and must have a belief on reasonable grounds based on facts, beyond a mere suspicion. Accordingly, this exception recognises that a different approach may be necessary to protect the safety of victim-survivors and their families in certain circumstances.

Section 16AL(3)(b)(ii) allows disclosure of sensitive information by an ISE without consent where, despite taking reasonable steps, the ISE is unable to contact or locate the victim-survivor, and the ISE reasonably believes that dealing with their information is necessary for their safety and protection. This promotes safety by ensuring that an ISE's inability to locate or contact a victim-survivor, despite taking reasonable steps, does not prevent it from dealing with relevant information if necessary for a protection purpose. To remove this exception would unduly inhibit ISEs' ability to act in the safety interests of victim-survivors who cannot be located or contacted.

Section 16AL(3)(b)(iii) provides the ISE may deal with sensitive information without consent if it reasonably believes that dealing with the information is necessary for the victim-survivor's safety and protection and failing to deal with the information may cause a serious risk to the life, health or safety of the victim-survivor or a connected person. This recognises that even in circumstances where the victim-survivor refuses consent, information sharing may still be necessary to support the safety and protection of a victim-survivor. This would apply in circumstances where there is a serious risk that failing to deal with information would contribute to the occurrence or exacerbation of abuse and imperil the safety and protection of the victim-survivor or a connected person. This is a high threshold. The circumstances may be urgent, but they need not be. ISEs must adhere to the guidance in the Ministerial Protocol (which the Minister must make under s 16AV) and a risk assessment and management framework (which the Minister must declare under s 16AU) to determine whether dealing with information is necessary to protect the safety and protection of a victim-survivor in the circumstances. This exception is necessary to ensure the scheme can operate in particularly serious situations, where safety must be prioritised.

#### *Use and Derivative Use Immunities*

As noted above, s 16AY clarifies that any use or derivative use immunities which apply to any information which has been compelled under another law continue to apply to the information when dealt with under Part 3. This means the information and any further information obtained as a result of the initial information cannot be used in a civil or criminal proceeding against the individual, given it has been

compelled and may be incriminating. This is a key safeguard which protects individual's rights against self-incrimination under the HRA s 22.

### *Safeguards*

The overarching safeguards identified above also apply to ensure the limitations on the right to privacy and right recognition and equality before the law are proportionate. Additional safeguards also apply:

- ISEs must have a reasonable belief a person is experiencing, has experienced or is at risk of experiencing domestic and family violence, meaning such a belief needs to be based on fact, beyond mere suspicion (s 13);
- an ISE cannot be required to share information by another ISE or the ISC if this does not comply with Division 3.6, meaning if a victim-survivor does not consent and no exception applies an ISE cannot share information (s 16(1)(a), s 16AA(a));
- ISEs must, as far as practicable, provide the victim-survivor with all reasonable support necessary to make and communicate their decision (s 16AL(2));
- ISEs must take reasonable steps to tell the victim-survivor of the disclosure of information in relation to them, as soon as possible after the disclosure occurs where safe and practicable to do so (s 16AQ);
- If the ISE proposes to take action as a result of the information and reasonably believes the action may cause a risk to the life, health or safety of the victim-survivor or connected person, the ISE must tell the victim-survivor as soon as possible, if safe and practicable (s 16AR); and
- restricting access to information an ISE holds only because it was disclosed under Part 3 from being subsequently disclosed under the *Freedom of Information Act 2016* (FOI Act) (s 16AZ).

## **Sharing information about victim-survivors under the age of 18**

### *1. Nature of the right and the limitation (s 28(2)(a) and (c))*

The provisions for how ISEs may deal with sensitive information about victim-survivors under the age of 18 in the Bill engage and limit the protection of the family and children, right to recognition and equality before the law, and the right to privacy. Section 11 of the HRA recognises that families are entitled to be protected by society, and that every child has the right to the protection needed by the child because of being a child, without distinction or discrimination of any kind. Article 12 of the *Convention on the Rights of the Child* requires that for children who are capable of forming their own views, the State ensures their right to express those

views freely in all matters affecting the child and the views of the child are given due weight in accordance with the age and maturity of the child.

Section 12 of the HRA protects individuals from unlawful or arbitrary interference with their privacy, family, home, or correspondence.

The right to recognition and equality before the law in section 8 of the HRA entitles everyone to equality before the law and to the enjoyment of their human rights without discrimination.

The Bill limits these rights in the same way as it limits the rights of adult victim-survivors, discussed above, by:

- defining an at-risk person to explicitly include children and young people and enabling ISEs to deal with their information to the extent necessary for a protection purpose (s 13);
- enabling ISEs to deal with sensitive information about victim-survivor who is a young person aged 14-17 without their consent in specific circumstances, as necessary for their safety and protection (s 16AM); and
- enabling ISEs to deal with sensitive information about a child aged under 14 without their consent in all circumstances and without the consent of the person with parental responsibility over that child in some specific circumstances, as necessary for their safety and protection (s 16AN);

These provisions enabling ISEs to share information about victim-survivors under the age of 18 infringes on the right to privacy of children and young people, especially in cases of non-consensual disclosure of information.

## *2. Legitimate purposes (s 28(2)(b))*

The legitimate purpose of the Bill is to improve service responses to domestic and family violence to support the safety of victim-survivors, prevent the occurrence and escalation of violence, and hold persons of concern accountable, through enabling ISEs to deal with information as necessary for a protection purpose. These provisions specifically recognise that children and young people victim-survivors require specific supports and considerations and seeks to ensure the voices of children and young people can be heard in decisions which affect them, while also enabling their sensitive information to be shared in specific circumstances as necessary for their safety and protection.

## *3. Rational connection between the limitation and the purpose (s 28(2)(d))*

The limitations to the right of privacy, right to recognition and equality before the law, and protection of the family and children are directly linked to the legitimate purpose of improving service responses to domestic and family violence to support the safety of victim-survivors.

Throughout consultation, stakeholders strongly advocated for the importance of the Bill explicitly recognising and addressing children and young people as victim-



survivors in their own right, requiring targeted and specific supports and consideration. These provisions respond to these significant concerns, ensuring ISEs can deal with sensitive information about children and young people to the extent necessary for a protection purpose.

While ss 16AM(2) and 16AN(2) of the Bill provide that ISEs are required to deal with sensitive information about children and young people victim-survivors with consent, information may be dealt with in specific circumstances where necessary for their safety and protection. These circumstances are strictly limited and the safety and protection of the child or young person should always be prioritised as far as possible (s 12). These limitations are critical to ensure ISEs can deal with information in circumstances of serious risk to establish, assess, prevent, reduce and manage the threat of domestic and family violence.

#### *4. Proportionality (s 28(2)(e))*

These targeted provisions for children and young people victim-survivors are necessary to address and recognise the different experiences, developmental capacities and needs of victim-survivors aged under 18 years. The limitations on their rights to recognition and equality before the law are therefore targeted and proportionate, recognising the need for unique and targeted responses to support children and young people at risk of domestic and family violence.

The proportionality analysis set out above in relation to sharing information about adult victim-survivors, specifically the definition of ‘at-risk person’ and the exceptions to consent and the various safeguards, is also relevant to the sharing of information about victim-survivors who are children and young people.

#### *Distinction between children and young people*

Defining at-risk persons as explicitly including children and young people (s 13) is important to acknowledge their personal experiences of domestic and family violence, beyond being children of adults experiencing or engaging in violence. This definition ensures that ISEs can share information about children and young people as victim-survivors in their own right, where necessary for a protection purpose.

The differential treatment between children and young people due to their age recognises the comparatively higher maturity and developmental capacity of victim-survivors aged between 14 and 17, relative to children under the age of 14. The distinction between children (aged 0-13) and young people (14-17) reflects research that cognitive ability to make independent decisions is generally in place by the age of 14 to 16.<sup>27</sup> This also aligns with the age a young person can create their own myGov account and a My Health Record and manage it independently, meaning their parent or guardian will no longer have access to the information unless the young person invites them as a nominated representative.

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<sup>27</sup> Australian Law Reform Commission (2010). For Your Information: Australian Privacy Law and Practice (ALRC Report 108). 68.29-68.30.

This distinction is necessary to ensure young persons who have decision-making capacity can be heard and participate in important decisions which impact them, which promotes their agency and gives effect to article 12 of the *Convention on the Rights of the Child*. This also ensures children who lack such maturity and capacity are not asked to make complex and challenging decisions in situations which are already likely to be highly traumatic.

#### *Dealing with information about an at-risk child*

Children are entitled to particular protections by virtue of their age. Given children, being those aged 0-13, are more likely to lack age, maturity and decision-making capacity to engage in decisions about their sensitive information, ISEs must seek consent from the person with parental responsibility of the child, as long as they are not a person of concern in relation to the child (s 16AN(2)). This is directly linked to supporting and promoting the family unit and is necessary to enable non-abusive parents to engage in decisions affecting their children. Generally, people with parental responsibility will be more able and equipped to understand the information sharing process and what they are considering consenting to.

However, this does not limit an ISE's ability to engage with and seek the views of a child in relation to information sharing, provided the ISE takes their age, maturity and decision-making ability into account under s 16(2)(c). Under s 16AA(a), an ISE must not share information voluntarily or by request and cannot be required to disclose information by the ISC if the disclosure would contravene this requirement. The Ministerial Protocol which must be made by the Minister under s 16AV sets out further guidance on how an ISE may engage with children safely and appropriately, to inform this decision, ensuring the voices of children can still be heard in these decisions where reasonable and practicable. It is reasonable and balanced that the Bill does not adopt a legislative requirement for ISEs to seek consent from children of all ages to deal with their information, as this would expect children of all ages to engage in complex and difficult decisions which they may lack maturity, age and decision-making ability to engage in.

In relation to dealing with information about children, an important additional safeguard provides that an ISE must not contact or seek the consent of a person of concern in relation to the child, even if they are a person with parental responsibility (s 16AN(5)). This ensures that while the Bill promotes the family unit, this consent requirement itself should not jeopardise the safety of the child by requiring ISEs to engage with a person of concern. The exceptions to this requirement are vital to ensure information can be dealt with for the safety and protection of children victim-survivors.

#### *Dealing with information about an at-risk young person*

Recognising the greater age, maturity and decision-making ability of young persons, the Bill therefore provides that an ISE must not deal with sensitive information about a young person without their consent (s 16AM(1), (2)). Additionally, the ISE must, as

far as practicable, provide the young person with access to all reasonable supports to make and communicate their decision (s 16AM(3)). The same exceptions to this requirement as outlined above in relation to adult victim-survivors apply (s 16AM(4)). This ensures any interferences with the right to privacy are reasonable and proportionate, to reduce any arbitrary limits on rights.

An additional exception provides that an ISE may deal with sensitive information about a young person without their consent if the ISE reasonably believes the young person does not have sufficient decision-making ability to give consent, taking into account their age and maturity and dealing with the information is necessary for their safety and protection (s 16AN(1)(b)). In this circumstance, the ISE must seek the consent of the person with parental responsibility for the young person, applying the same requirements and exceptions as section 16AN. This specific limitation on a young person's right to privacy is necessary to ensure that young persons who lack sufficient decision-making capacity are not pressured or burdened to make decisions about their information which they do not understand, and ensure the age range identified for a young person as someone aged 14-17 does not operate arbitrarily to assume all persons of that age have decision-making ability. This is critical to ensure ISEs can deal with information as necessary to support the safety of a victim-survivor who is a young person, without risking re-traumatising individuals who lack decision-making capacity to consent. The requirement that an ISE seek consent from the person with parental responsibility in this circumstance also promotes the family unit, and the analysis above regarding s 16AN applies here.

These additional protections by virtue of the victim-survivor's age ensures that the Bill is proportionate, as it appropriately balances the need to incorporate the young person's perspectives, while protecting them as people under the age of 18.

### *Safeguards*

The overarching safeguards identified above, as well as the specific safeguards regarding the rights of victim-survivors, also apply here to ensure the limitations on rights are proportionate. Additional safeguards also apply:

- Due to the definition of at-risk person, ISEs must have a reasonable belief a child or young person is experiencing, has experienced or is at risk of experiencing domestic and family violence, meaning such a belief needs to be based on fact, beyond mere suspicion (s 13);
- in exercising its functions in relation to a child or young person victim-survivor, ISEs must take into account their age, maturity and developmental capacity and must not disclose information if the disclosure would not comply with this requirement (ss 16(2)(c), 16AA(a)); and
- ISEs must, as far as practicable, provide the young person or person with parental responsibility with all reasonable support necessary to make and communicate their decision, ensuring their engagements are tailored and age-appropriate to support young persons (ss 16AM(3), 16AN(3)).

## Sharing information about connected persons

### 1. *Nature of the right and the limitation (s 28(2)(a) and (c))*

Section 12 of the HRA protects people from unlawful or arbitrary interference with their privacy, family, home, or correspondence. Section 16AO(1) of the Bill states that the consent of a connected person is required to deal with their sensitive information. However, there are specific circumstances where ISEs may deal with information without consent, as necessary for a protection purpose (s 16AO(3)). These are broadly the same exceptions which apply to dealing with sensitive information about victim-survivors without their consent.

This disclosure of sensitive information about connected persons limits an individual's right to privacy under section 12 of the HRA.

### 1. *Legitimate purposes (s 28(2)(b))*

The legitimate purpose of the Bill is to improve service responses to domestic and family violence to support the safety of victim-survivors, prevent the occurrence and escalation of violence, and hold persons of concern accountable, through enabling ISEs to deal with information as necessary for a protection purpose.

### 2. *Rational connection between the limitation and the purpose (s 28(2)(d))*

These limitations to a connected person's right to privacy in certain circumstances are critical to reducing barriers to information sharing and improving system responses to domestic and family violence and are clearly connected to the Bill's purpose.

A connected person is an individual who is not a victim-survivor or person of concern but a person whose information is relevant to a protection purpose (s 13). This may include the connected person's information that is relevant to establishing, assessing, preventing or managing the risk of domestic and family violence to a victim survivor.

Where sensitive information about a connected person is relevant for a protection purpose (of an at-risk person), it is critical that ISEs are able to deal with this information. The Bill provides that while dealing with a connected person's sensitive information with their consent is required in most circumstances, information may be dealt with without consent in specific circumstances where necessary for the safety and protection of the victim-survivor (s 16AO(3)). This supports the Bill's safety-first approach, which prioritises the safety of the victim-survivor. This approach is similar to provisions adopted in other Australian jurisdictions which allow for non-consensual disclosure of information about victim-survivors in specific circumstances where necessary to respond to serious risk.

### 3. *Proportionality (s 28(2)(e))*

The disclosure of sensitive information about connected persons within this scheme is necessary for safety and is the least restrictive means available to achieve the legitimate purpose.

The proportionality analysis set out above in relation to sharing information about adult victim-survivors, and the analysis of the exceptions which authorise ISEs to deal with information without consent, is also relevant to the sharing of information about connected persons.

In the same way as they would engage with victim-survivor, in all cases where safe and reasonable, ISEs must seek and obtain the connected persons consent before disclosing sensitive information to another entity (s 16AO(1)) and must provide all necessary, reasonable supports to connected persons to enable them to make this decision (s 16AO(2)). This standard requirement for consent and associated guidance are key safeguards to limit when an ISE may be required to deal with information without consent.

There are only limited circumstances under s 16AO(3) where the consent requirements are displaced and these are targeted and appropriately limited to protect the safety of victim-survivors. The Ministerial Protocol provides further guidance for ISEs to assess whether such circumstances exist and how to deal with information safely for a protection purpose as required. If ISEs were only able to deal with sensitive information about a connected person with their consent, they may be unable to deal with information where necessary for the safety and protection of victim-survivors. This fundamentally departs from the Bill's purpose to promote the right to life and safety for victim-survivors of domestic and family violence.

The overarching safeguards identified above, as well as the specific safeguards regarding the rights of victim-survivors, also apply here to ensure the limitations on rights are proportionate. Specific safeguards also apply to protect the rights of connected persons:

- ISEs must, as far as practicable, provide the connected person with all reasonable support necessary to make and communicate their decision (s 16AO(2));
- ISEs must take reasonable steps to notify connected persons of the disclosure of information in relation to them, as soon as possible after the disclosure occurs where safe, possible and practicable to do so (s 16AQ); and
- If the ISE proposes to take action as a result of the information and reasonably believes the action may cause a risk to the life, health or safety of the victim-survivor or connected person, the ISE must tell the connected person if safe and practicable (s 16AR).

## **Sharing information about persons of concern**

### *1. Nature of the right and the limitation (s 28(2)(a) and (c))*

Section 12 of the HRA protects people from unlawful or arbitrary interference with their privacy, family, home, or correspondence. Any interference must be reasonable, necessary and proportionate in the circumstances. This right also protects a person from having their reputation unlawfully attacked and provides that individuals must be able to protect themselves against such attacks.

The Bill engages and limits a person's right to privacy and reputation by:

- Providing that an ISE must not seek the consent of a person of concern to deal with their sensitive information and not having the person of concern's consent does not limit the ISE's ability to deal with the sensitive information (s 16AP);
- broadly defining information to include information which may or may not be true (dictionary);
- preventing ISEs from telling persons of concern of disclosure or use of information (s 16AT); and
- protecting persons from incurring liability for exercising a function under Part 3 honestly and without recklessness (s 16AZA and 16AZB).

### *2. Legitimate purposes (s 28(2)(b))*

The legitimate purpose of the Bill is to improve service responses to domestic and family violence to support the safety of victim-survivors, prevent the occurrence and escalation of violence, and hold persons of concern accountable, through enabling ISEs to deal with information as necessary for a protection purpose.

### *3. Rational connection between the limitation and the purpose (s 28(2)(d))*

Limiting the right to privacy and reputation of persons of concern is necessary to achieve the purpose of improving the safety of victim-survivors, to ensure services can deal with information as required for a protection purpose and that persons of concern are not able to manipulate these processes as a further mechanism of abuse.

The ability of ISEs to prudently and safely share information about persons of concern is a vital preventive tool and crucial to effectively assessing and responding to the risk of domestic and family violence, safety planning, tracking their engagement with services, and ultimately holding them to account. It is also critical that ISEs can inform victim-survivors of any risks to their safety by sharing information for a protection purpose and to support them to manage these risks proactively. However, to require ISEs to engage with a person of concern about dealing with their information (whether to seek their consent or to notify them after disclosure) is highly likely to increase the risk to the victim-survivor, especially when the information also relates to a victim-survivor. Evidence to the Victorian Royal Commission into Family Violence highlighted this, 'in most cases seeking consent from the person of concern is either unsafe or unfeasible, given that it may result in

the escalation of risk to the victim'.<sup>28</sup> Accordingly, providing that an ISE must not seek consent from a person of concern to deal with their sensitive information or tell them that information has been dealt with is rationally connected to improving the system response to domestic and family violence risk and to protecting the safety of victim-survivors.

#### 4. *Proportionality (s 28(2)(e))*

The limitations on a person of concern's right to privacy and reputation are necessary and proportionate to protect the safety of victim-survivors and improve the culture of information sharing within prescribed ISEs.

While the Bill provides that an ISE must not seek the consent of a person of concern to deal with their sensitive information and not having their consent does not limit the ISE's ability to deal with sensitive information (s 16AP), this scope is confined to where the ISE reasonably believes domestic and family violence has occurred or is occurring, or there is a risk it will occur (s 13). This is based on an assessment of risk, to be undertaken in accordance with the Ministerial Protocol and a risk assessment and management framework declared by the Minister. This safeguard ensures information is only dealt with if the ISE has a reasonable belief as to the identity of a victim-survivor and person of concern, which reduces the Bill's interference with the right to privacy and reputation. This is a proportionate and the most reasonably available means to achieve the Bill's legitimate purpose and aligns with the definition in equivalent schemes across Australia. This also ensures the limitations to rights are not arbitrary.

The Bill provides that an ISE must not seek consent from a person of concern to deal with sensitive information (s 16AP) and must not tell a person of concern that information has been dealt with under Part 3 (s 16AT) due to the heightened domestic and family violence and safety risks this could cause to victim-survivors. Relevantly, the *Convention on the Elimination of All Forms of Discrimination Against Women* Committee in relation to perpetrators of violence stated, 'Women's human rights to life and to physical and mental integrity cannot be superseded by other rights, including the [perpetrator's]... right to privacy'.<sup>29</sup> It is therefore reasonable and proportionate that ISEs must not seek the consent of the person of concern to deal with sensitive information under s 16AP or notify them of any dealing under s 16AT.

Providing explicit protection against persons incurring civil or criminal liability for exercising a function under Part 3 honestly and without recklessness under ss 16AZA and 16AZB is necessary for the effective operation of the information sharing scheme under Part 3. This will ensure persons who deal with information can exercise their functions as lawfully authorised, honestly and without recklessness. This will support greater compliance with the Bill and a safeguard against reckless

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<sup>28</sup> Page 166 of Volume 1, VIC FV Royal Commission, [Royal Commission into Family Violence: Report and Recommendations Volume 1 \(rcfv.com.au\)](https://www.rcfv.com.au).

<sup>29</sup> CEDAW Committee, Views: Communication No 2/2003, 32nd sess, UN Doc. CEDAW/C/32/D/2/2003 (26 January 2005) (A. T. v Hungary') para 9.3

dealings with information. Where a person exercises a function dishonestly or recklessly, they may be held liable. This is a safeguard against reckless and dishonest dealings with information and preserves an individual's right to defend their reputation if ISEs act dishonestly or recklessly.

Important safeguards to ensure the limitations on a person of concern's right to privacy are proportionate include:

- requiring ISEs to only share their information to the extent necessary for a protection purpose or another purpose provided under Division 3.5 (s 15);
- providing ISEs can only share information voluntarily or at the request of another ISEs if it reasonably believes the disclosure is necessary for a protection purpose and the information is relevant to the exercise of the receiving ISE's functions (ss 16AB, 16AC, 16AD); and
- providing ISEs must refuse to disclose information if it reasonably believes the disclosure could be reasonably expected to lead to one of the grounds in s 16AA, including if it would prejudice an investigation, coronial inquest or inquiry, or a proceeding in a court or tribunal.

## **Information Sharing Coordinator**

### *1. Nature of the right and the limitation (s 28(2)(a) and (c))*

Section 12 of the HRA protects individuals from unlawful or arbitrary interference with their privacy, family, home, or correspondence. The establishment of the ISC under Division 3.4, the ability of the ISC to require an ISE to disclose information under s 16AD, and the ISC's ability to use information and take action which the ISC reasonably considers appropriate for a protection purpose under s 16AH may limit this right by facilitating the disclosure and use of information about individuals for a protection purpose. This may be with the consent of the victim-survivor, connected person, or person with parental responsibility, or without their consent if an exception under s 16AL(3), s 16AM(4), s 16AN(4) or s 16AO(3) applies. In all cases, this must be without the consent of the person of concern under s 16AP.

### *2. Legitimate purposes (s 28(2)(b))*

The legitimate purpose of the Bill is to improve service responses to domestic and family violence to support the safety of victim-survivors, prevent the occurrence and escalation of violence, and hold persons of concern accountable, through enabling ISEs to deal with information as necessary for a protection purpose.

### *3. Rational connection between the limitation and the purpose (s 28(2)(d))*

The role of the ISC is directly linked to the Bill's legitimate purpose to improve service responses to domestic and family violence and facilitate greater information sharing. The ISC's ability to require an ISE to disclose information under s 16AD



ensures information is disclosed where necessary for a protection purpose and relevant to the requesting ISE's functions, which will support ISEs to disclose and use information promptly and safely as provided under the Bill. The ISC is therefore an important safeguard and oversight mechanism for the operation of the information sharing scheme to facilitate the disclosure and use of information and ensure information is disclosed as authorised and required by Part 3.

The ISC's ability to use information under s 16AH is also important to support integrated, collaborated and coordinate service responses to domestic and family violence. The ISC will be able to take action for a protection purpose, which may include coordinating ISEs in taking action, seeking further information to decide the most appropriate action, and given advice to an ISE about appropriate action to take. This will provide oversight and guidance to drive greater coordination among ISEs when dealing with information and responding to domestic and family violence, which is linked to the Bill's purpose.

#### *4. Proportionality (s 28(2)(e))*

The limitations on rights created through the functions and role of the ISC are reasonable and proportionate, and there are a number of safeguards to ensure the interference on rights is not arbitrary.

#### *Appointment of the ISC*

The Minister may only declare an entity to be the ISC if satisfied the entity has suitable expertise and experience to exercise the functions of the ISC (s 16AF). The entity should therefore have suitable expertise and experience in a range of skills such as domestic and family violence risk assessment, prudent and safe management processes to deal with information about persons of concern and victim-survivors to inform domestic and family violence responses, coordinated and integrated service responses to domestic and family violence, specialist and non-specialist service responses to domestic and family violence in the ACT, referral pathways for victim-survivors, and safety planning and perpetrator mapping. This ensures there are sufficient safeguards regarding the Minister's declaration of an entity as the ISC, so the declaration is not arbitrary.

While the Bill does not specifically provide that the ISC must be a government entity, any entity declared to be the ISC would fall within the definition of a public authority, as an entity whose functions (under 16AG) include functions of a public nature under the HRA s 40(1)(g). This is because the functions are conferred under a territory law (HRA s 40A(1)(a)) and are connected to functions of government (HRA s 40A(1)(b)), being to provide oversight and safeguarding for agencies' compliance with legislation in relation to services being provided to the public, facilitate the sharing of information among ISEs by compelling agencies to comply with these requirements to disclose information (under s 16AD and 16AG(a)), and take appropriate action for a protection purpose (under s 16AG(b)). Facilitating the sharing of information under s 16AG(a) is also arguably of a regulatory nature (HRA s 40A(1)(c)), given the ISC regulates and oversees the disclosure of information among ISEs. The entity would

therefore be required to comply with specific obligations within that role under Part 5A of the HRA. The ISC must not act in a way that is incompatible with a human right or, in making a decision, fail to give proper consideration to a relevant human right (HRA s 40B(1)). A person who claims that the ISC has acted in contravention of this requirement and alleges they would be a victim of this contravention may start legal proceedings against the public authority (HRA s 40C). These are key safeguards to ensure the ISC exercises its functions in ways that are compatible with human rights and that there are mechanisms to enable individuals to seek redress for unlawful actions.

### *Facilitating the disclosure and use of information*

Under s 16AG(a), one of the ISC's functions is to facilitate the sharing of information among ISEs.

If an ISE refuses to share information when requested under s 16AC, it must notify the ISC in writing. Under s 16AD(2), the ISC may require the ISE to share information if it reasonably believes:

- the information is relevant to the requesting ISE's functions; and
- the disclosure is necessary for a protection purpose.

Additionally, the ISC must not require the ISE to disclose the information if the ISC is satisfied a relevant ground for not disclosing the information exists (s 16AD(3)). A relevant ground for refusing to disclose information may include, for example, that the disclosure of the information would lead to one of the circumstances listed in s 16AA(b) or that the disclosure would contravene a requirement for information sharing under s 16 (s16AA(a)). The ISC must consider any reason provided and assess whether it is reasonable in the circumstances.

These requirements limit the circumstances where the ISC may require an ISE to disclose information to ensure the ISC's exercise of power is proportionate and balanced, and information is only required to be disclosed to the extent necessary under Part 3. This limits any arbitrary interference on rights to privacy.

Another of the ISE's functions is to identify and take appropriate action for a protection purpose (s 16AG(b)), to support coordinated, informed and integrated responses to domestic and family violence. There are also safeguards to this function under s 16AH. The ISC must take identified considerations into account, including the safety and protection of the victim-survivor, the victim-survivor's views (where safe, reasonable and practicable to seek their views), the seriousness of the circumstances, and the factors listed in s 16(2) to determine if the action would be appropriate. This is critical to enable the ISC to support ISEs to share information in coordinated and informed ways to improve responses to domestic and family violence, while ensuring this does not arbitrarily interfere with rights.

The ISC therefore functions as a key oversight mechanism, safeguard and escalation point to determine whether and how information should or should not be

disclosed to comply with the requirements of Part 3, to ensure information is dealt with safely and as authorised. This is critical to support the effective and prompt disclosure of information among ISEs as necessary for a protection purpose, to support coordinated and capable responses to establish, assess, prevent, reduce and manage domestic and family violence risk. This also ensures ISEs have support and oversight when considering their responsibilities and obligations under Part 3.

Importantly, the ISC does not displace ISEs' obligations under the scheme and in the first instance, ISEs are required to assess whether information sharing is required under Part 3, to meet their obligations.

The safeguards outlined above regarding the scope of the scheme, requirements to disclose information, and limitations on ISE's ability to deal with information without consent also apply to the ISC's exercise of its functions here.

### **Accessing shared information under the other laws**

#### *1. Nature of the right and the limitation (s 28(2)(a) and (c))*

The Bill limits the ability of ISEs to give a person access to information it holds only because the information has been disclosed under the Bill through the *Freedom of Information Act 2016* (the FOI Act) (s 16AZ). This engages and limits an individual's freedom of expression. Section 16(2) of the HRA establishes that everyone has the right to freedom of expression. This right protects an individual's freedom to seek, receive and impart information of all kinds. Importantly, this includes an individual's right to access information and records held by the government.

The Bill limits these rights by:

- Exempting information an ISE holds only because it was disclosed under Part 3 of the Bill from being subject to the FOI Act (s 16AZ).

#### *2. Legitimate purposes (s 28(2)(b))*

The legitimate purpose of the Bill is to improve service responses to domestic and family violence to support the safety of victim-survivors, prevent the occurrence and escalation of violence, and hold persons of concern accountable, through enabling ISEs to deal with information as necessary for a protection purpose in a prudent and safe way.

The purpose of this limitation is to support the safety of victim-survivors and ensure information which an ISE hold only because it was disclosed under Part 3 is not subsequently disclosed, given this may cause a risk to the victim-survivor.

#### *3. Rational connection between the limitation and the purpose (s 28(2)(d))*

The restrictions to accessing information and subsequent limitations on rights are directly connected to protecting the safety of victim-survivors. The increased disclosure of information for a protection purpose under Part 3 will lead to ISEs collecting and holding more information about victim-survivors. Under existing legislative schemes and access mechanisms, including the FOI Act, persons of concern may subsequently gain access to shared information about themselves and victim-survivors. The disclosure of this information is highly likely to elevate risk to the victim-survivor and potentially frustrate the operation of the Act to support victim-survivor safety and hold persons of concern accountable.

Restricting people's access to information shared through Part 3 therefore protects the safety of victim-survivors by preventing persons of concern exploiting existing systems and perpetuating systems abuse which is recognised as a form of coercive control. This seeks to ensure the greater disclosure of information authorised under the Bill does not have an unintended consequence of providing persons of concern with additional ways to seek and gain access to sensitive and confidential information, particularly if it would cause a risk to the victim-survivor and perpetuate domestic and family violence.

#### *4. Proportionality (s 28(2)(e))*

The Bill's restrictions on accessing information are reasonable and necessary to achieve the legitimate purpose and avoid facilitating systems abuse through persons of concern exploiting the new information sharing scheme. Any information may be shared under Part 3 to the extent necessary for a protection purpose. This may include sensitive information about a victim-survivor, such as their location and contact details, information the victim-survivor has disclosed to services including details of the abuse they have experienced and the person of concern's behaviours, and information about the person of concern necessary to establish, assess and manage the risk of domestic and family violence. If persons of concern gained access to this information under another law, it is highly likely to significantly increase risk to a victim-survivor's safety, especially as there would be very limited regulation or oversight over how the person of concern subsequently uses the shared information. The potential severity and lethality of harm necessitates a robust preventative strategy which ensures persons of concern cannot access information under specific identified laws if it would cause a risk to the life, health or safety of the victim-survivor or a connected person.

#### *Disapplication of the FOI Act*

The concern about risk escalation is a legitimate and real consideration. The long-lasting and intrusive consequences of permitting access to personal information was highlighted by anecdotal evidence from a victim-survivor included in the Victorian Review of their family violence information sharing scheme. Through information access schemes, the perpetrator gained access to the victim-survivor's personal contact details and the Medicare records of the victim-survivor and their children. The perpetrator then moved across the road to the victim-survivor. The disclosure of

this information had significant consequences for the victim-survivor and her family and has enabled the perpetrator to perpetuate their abuse. This insightful personal account highlights the real risks of providing persons of concern with additional information about victim-survivors and the ordinary court and FOI processes.

The Bill therefore exempts information which an ISE holds only because it was disclosed to it under Part 3 from the FOI Act, meaning no information which an ISE has received under Part 3 may be released through an FOI application. This is reasonable and proportionate given the significant harms the disclosure of information could pose to a victim-survivor and any connected person. This harm includes psychological and emotional harms perpetrated through coercive control. Section 35(5)(e)(ii) of the FOI Act, which enables an agency to refuse to confirm or deny the existence of information based on a threat to life or physical safety, does not capture such harms and greater protection is therefore necessary for victim-survivors in these circumstances.

This limitation only applies to information an ISE holds only because it was disclosed to it under Part 3. This means the FOI Act continues to apply to information which an ISE receives, holds or generates outside the operation of Part 3. This ensures victim-survivors and connected persons are not prevented from accessing their own personal information under the FOI Act where the information has been dealt with outside the operation of Part 3. They may apply to the originating agency to seek access to the information, but they cannot apply to the ISE which has received the information only because of Part 3. The existing protections under the FOI Act continue to apply to limit the disclosure of information where it would not be in the public interest and the disclosure could reasonably be expected to endanger a person's life or physical safety, or be an unreasonable limitation on a person's human rights, or significantly prejudice an ongoing criminal investigation (FOI Act s 35). This preserves the operation of the FOI Act as appropriate and ensures the limitation on rights is proportionate and measured.

This is the least restrictive means available to achieve the legitimate objective. Given the significant practical difficulties for an ISE to assess whether a person requesting information is a person of concern in relation to the specific victim-survivor, it would not be safe or workable to adopt a less rights limiting approach to only limit persons of concern from accessing information under the FOI Act.

## **Uses of information under other laws**

### *1. Nature of the right and the limitation (s 28(2)(a) and (c))*

Section 12 of the HRA protects individuals from unlawful or arbitrary interference with their privacy, family, home, or correspondence.

The Bill engages and limits the right to privacy by providing that an ISE must only disclose or use information received under Part 3 for a purpose other than a protection purpose if required or authorised by another identified or prescribed

legislative function or in serious and urgent circumstances under s 16AI. This will enable the disclosure and use of information under other laws, which may impact an individual's right to privacy.

## *2. Legitimate purposes (s 28(2)(b))*

The purpose of this provision is to ensure the Bill does not impede the ability of ISEs to comply with their legislative obligations and requirements, or unnecessarily restrict the lawful, government-authorised powers and functions of ISEs where those functions are necessary to respond to serious and urgent risks to life, health or safety. This recognises that there are legislative functions which support and protect public safety which fall outside the scope of a protection purpose, and ensures ISEs can continue to fulfil these functions as necessary to respond to serious circumstances of high risk.

The provision also ensures that the Bill does not unduly limit an ISE's ability to use and disclose sensitive information under another law with the consent of the victim-survivor or connected person, recognising the autonomy and agency of persons to decide and consent to how an agency should deal with their information.

## *3. Rational connection between the limitation and the purpose (s 28(2)(d))*

The limitation on the right to privacy is directly related to the legitimate purpose of ensuring ISEs can comply with their legislative obligations to respond to serious risks and threats to safety and wellbeing. Under the Bill, ISEs must only use information to the extent necessary for a protection purpose (s 15(a)) or another purpose in Division 3.5 (s 15(b)). This recognises many ISEs are legally required or authorised to disclose or use information for specific purposes which may be outside the scope of the Bill.

This limitation preserves the lawful functions of ISEs to promote and preserve life, safety and health in identified serious and urgent circumstances, including to support the safety, welfare and wellbeing of children and young people and reduce or prevent a serious and urgent threat to the life health or safety of an individual or the public. This is necessary to ensure the operation of the Bill does not inadvertently harm individuals by interfering with and limiting ISEs' existing functions under law to disclose and use information in serious and urgent circumstances, in ways that may stop ISEs from being able to prevent or reduce serious threats to life, health or safety or support the safety of children, staff, and other identified groups.

## *4. Proportionality (s 28(2)(e))*

The limitations on the right to privacy are necessary and reasonable to ensure the Bill does not frustrate or impede the legislative functions of ISEs to disclose and use information in serious and high-risk circumstances to protect the life, health and safety of individuals and the public. To do so may inadvertently limit and infringe further human rights, including the right to life (HRA s 9), right to protection from torture, cruel, inhuman or degrading treatment (HRA s 10), and the protection of the family and children (HRA s 11)

The authorised functions under law for which an ISE may disclose or use information are strictly confined and exhaustive under s 16AI. An ISE must not disclose or use information disclosed to it under Part 3 for a purpose other than a protection purpose except:

- to the extent required or allowed under a law to lessen or prevent a serious and urgent threat to the life, health or safety of an individual or to public health or safety
- to comply with mandatory reporting obligations under the *Children and Young People Act 2008* s 356
- to comply with a reportable conduct requirement under the *Ombudsman Act 1989*, division 2.2A
- with the consent of the at-risk person or connected person who the information is about
- to the extent required or allowed under a territory law prescribed by regulation.

These functions are specifically confined to ensure that any interference with rights arising from a secondary use or disclosure of information received under Part 3 is proportionate and limited, to be the least rights restrictive way of achieving the legitimate purpose.

Sections 16AI(1)(c)(i) and (ii) are necessary to ensure agencies can continue to respond to threats to the life, safety, health and wellbeing of children and young people through mandatory reporting and reportable conduct schemes. The mandatory reporting scheme under the *Children and Young People Act 2008* provides that mandated reporters must report sexual abuse or non-accidental physical injury that they believe on reasonable grounds a child or young person has experienced or is experiencing to the director-general. This recognises the shared responsibility to identify, prevent and respond to child abuse and address early warning signs. The reportable conduct scheme under the *Ombudsman Act 1989* aims to improve child protection within the ACT and requires certain organisations which work with children to report allegations of reportable conduct, including ill treatment or neglect of the child, by an employee or volunteer to the ACT Ombudsman. This is important to provide greater oversight over organisations which work with children, to support early intervention and ensure organisations are child-safe. Providing that an ISE may disclose or use information received under Part 3 to comply with the requirements of these schemes is necessary to promote the safety, welfare and best interests of children. Limiting an ISE's ability to comply with such requirements may inadvertently place children at risk of harm and abuse.

Sections 16AI(1)(b) is directly connected to the promotion and protection of the life, health and safety of individuals and the public in serious and urgent circumstances. Where an ISE receives information under Part 3 which reveals a serious and urgent risk to the life, health or safety is occurring or will occur imminently, it is not

reasonable, proportionate or safe to stop the ISE from using or disclosing that information to reduce or prevent such a risk. Given the circumstances are serious and urgent, it is highly unlikely that there will be sufficient time or resources for the ISE to seek the information through another mechanism which would authorise them to act. This provision is therefore necessary to protect life, health and safety in serious and urgent circumstances which go beyond the scope of a protection purpose.

For example, an ISE may receive information that a person of concern is intending to attend its workplace with a weapon, on the assumption that the victim-survivor is currently at that workplace. If the victim-survivor were actually not at the workplace, the ISE's response would not necessarily be for a protection purpose under s 15(a) and without the operation of s 16AI(1)(b), the ISE would be unable to act to lessen or prevent this serious risk to staff life, health and safety. Through s 16AI(1)(b), the ISE could exercise a function under law to lessen or prevent this risk, given the seriousness and urgency of the circumstances. While this limits the right to privacy, this is reasonable and proportionate to support other rights, particularly given most ISEs are open to the public and therefore must consider issues of public health and safety.

Section 16AI(1)(a) ensures that the agency and autonomy of victim-survivors and connected persons to determine how their information can be used and for what purpose is not unduly limited by the operation of Part 3. While ISEs must only deal with information for a protection purpose under s 15(a), the victim-survivor or connected person who the information is about may consent to and want the ISE to disclose or use the information for another function outside the scope of a protection purpose. Section 16AI(1)(a) is a reasonable and proportionate response to ensure ISEs can still disclose and use information for another purpose with informed consent.

The Minister may also prescribe additional functions under regulation (s 16AI(1)(d)). Given s 16AI(1) is an exhaustive list, this is necessary to ensure any relevant legislative functions introduced after the passage of the Bill or identified through engagement with stakeholders or as part of review processes can also be included, to ensure this provision remains consistent and responsive to legislative reforms over time. It is intended that any additional functions prescribed by regulation would have the same character, purpose and level of urgency and seriousness as those identified in s 16AI(1), and be directly connected to responding to serious risks to life, health or safety. It is also intended that this would be limited to specific identified legislative functions or parts of a law, rather than whole laws. This will ensure the addition of any further functions do not impose arbitrary risks to the right to privacy. Further, any regulations made under s 16AI(1)(d) will be subject to a human rights assessment and will be disallowable by the Legislative Assembly, ensuring they will be transparent, accountable and open to scrutiny. Section 40B of the HRA provides it is unlawful for a public authority to act in a way that is incompatible with human



rights or to fail to give proper consideration to relevant rights when making a decision. This means that the Minister, as a public authority, will need to consider human rights when making any regulation under s 16AI(1)(d) which will ensure any further limitations to human rights are reasonable, proportionate and not arbitrary.

If an ISE discloses or uses information in relation to a victim-survivor or connected person under s 16AI, it must tell the person about the disclosure or use (s 16AS). This ensures victim-survivors and connected persons are informed about how their information has been used and can manage their safety accordingly. The ISE must inform the person unless they have indicated in writing they do not wish to be told, another ISE has already told them, it is not practicable in the circumstances, or the ISE reasonably believes telling the person may cause a risk to their life, health or safety (s 16AS(3)).

Additionally, if an ISE uses information under another law, it is required to notify the ISC and the original ISE that provided the information in writing as soon as possible (s 16AI(2)). This provides important oversight over uses of information under other laws and ensures such uses of information are kept within view. This also contributes to developing a systematic understanding of which ISEs are required to use information under which laws, which may be considered in the 2-year review of the scheme.

In notifying the ISC or original ISE under s 16I(2), or a victim-survivor or connected person under s 16AS, the ISE must ensure that they are complying with any other relevant law which they have dealt with the information under (as authorised through s 16AI(1)). Other laws may restrict dealing with information under Part 3, as recognised by s 16AI Note 2. The Bill does not displace any such requirements and the notification requirements in s 16AI(2) and s 16AS must be read within the context of these laws. For example, if an ISE discloses information received under Part 3 to comply with a mandatory reporting requirement under the *Children and Young People Act 2008* section 356, as authorised by s 16AI(c)(i), the ISE must comply with the relevant requirements and protections for mandatory reporting and information sharing under the *Children and Young People Act 2008*, including restrictions on sharing the identity of the person who makes a report. It must not contravene these protections in notifying the ISC or original ISE under s 16AI(2) or a victim-survivor or connected person under s 16AS. This ensures ISEs are compliant with the strong protections under other laws, which operate as a safeguard to limit arbitrary interferences on the right to privacy.

## **Offence provision**

### *1. Nature of the right and the limitation (s 28(2)(a) and (c))*

The right to liberty and security of person provides that no one may be deprived of liberty, except on the grounds and in accordance with the procedures established by law (HRA s 18(2)). This prohibits the unlawful and arbitrary deprivation of liberty.

Section 16AX of the Bill establishes that it is an offence if an information holder:

- Does something that discloses shared information about someone else and is reckless about whether the information is shared information about the protected person and doing the thing would result in the information being disclosed (s 16AX(1))
- Uses shared information about a protected person and is reckless about whether the information is shared information about the protected person (s 16AX(2)).

The maximum penalty for these offences is 50 penalty units, imprisonment for 6 months, or both.

This limits the right to liberty and security of the person by introducing additional offences which information holders may be held liable for, and potentially imprisoned for.

Section 22(1) of the HRA, provides everyone charged with a criminal offence has the right to be presumed innocent until proven guilty. The presumption of innocence means the prosecution has the burden of proving an offence. Section 16AX(3) sets out defences to the offences at ss 16AX(1) and (2) and provides the defendant has the evidential burden of proof in relation to these defences. This reverses the evidential burden of proof, which limits the right to the presumption of innocence.

#### *2. Legitimate purposes (s 28(2)(b))*

The legitimate purpose of the Bill is to improve service responses to domestic and family violence to support the safety of victim-survivors, prevent the occurrence and escalation of violence, and hold persons of concern accountable, through enabling ISEs to deal with information as necessary for a protection purpose.

#### *3. Rational connection between the limitation and the purpose (s 28(2)(d))*

This limitation is directly connected to the legitimate purpose of the Bill to facilitate safe and prudent information sharing to improve responses to domestic and family violence. It is critical information is dealt with honestly, in good faith and without recklessness to guard against potential misuses of information.

There must therefore be strong protections against reckless use and disclosure of information given the highly sensitive and confidential nature of the information that may be shared under Part 3 and the significant risk the reckless disclosure of information may have for the safety of victim-survivors and connected persons and the privacy and reputation of persons of concern. This is necessary and a key safeguard to promote the safe and prudent sharing of information and to ensure information disclosed under Part 3 is dealt with sensitively, honestly and in good faith. This will support the effective functioning of the scheme.

#### *4. Proportionality (s 28(2)(e))*

These offences only apply where the information holder has been reckless as to certain identified factors regarding the protected nature of the information. If an information holder has acted honestly and in good faith, they will not be held liable for an offence. This limits the scope of the provision and ensures its impact on rights is proportionate.

There are a range of safeguards to ensure the limitations in this provision are reasonable and proportionate. Section 16AX(3) provides a range of defences to the offence provisions, meaning the offences do not apply in those specific circumstances. This includes if the use or disclosure of the protected information was in relation to an exercise of a function under Part 3, was required in relation to a court proceeding, was with the consent of the protected person, or the information holder discloses the information to the chief police officer in connection with a possible domestic and family violence offence. This ensures the limitations are strictly confined to limit any arbitrary interference on rights.

These defences are more limited than similar defences in other ACT legislation, in not providing that it is a defence if the protected information was used or disclosed under another Territory law or in a court proceeding where it is not required. This is because of the interaction between such a defence and s 16AI. Section 16AI enables ISEs to use information for a purpose other than a protection purpose under another law in strictly confined circumstances related to the life, health and safety of children, individuals and the public. As justified above, this is necessary to limit the authorised uses of information beyond a protection purpose while ensuring ISEs can use information to respond to serious and urgent circumstances. It is critical information dealt with under Part 3 is only used for a secondary purpose in identified serious and urgent circumstances, given the sensitive nature of the information and the potential for secondary uses to impact and limit other rights. To broaden the defences under s 16AX(3) to include a protection where the use or disclosure is under another law applying in the ACT or in a court proceeding where it is not required would nullify section 16AI and undermine its legitimate purpose. It is therefore necessary and reasonable that the Bill adopts a narrower defence for reckless uses and disclosures of information.

The reverse evidential burden of proof for the defences in s 16AX(3) is reasonable and proportionate, as the elements of the defence will be uniquely within the knowledge of the information holder. Only the information holder will know whether or not any of those circumstances arise and it would be unreasonable for the prosecution to be required to establish these elements. Importantly, the burden of proof remains of the prosecution to establish the elements of the offence under ss 16AX(1) and (2).

The maximum penalty of 50 penalty units, 6 months imprisonment or both is reflective of other similar provisions in ACT law and is proportionate to the seriousness of the offence. The amendments do not create a mandatory sentencing

regime and judicial sentencing discretion is retained to ensure that justice is done as appropriate in each individual case.

## **Police ability to disclose information to approved crisis support organisation**

### *1. Nature of the right and the limitation (s 28(2)(a) and (c))*

Section 12 of the HRA protects people from unlawful or arbitrary interference with their privacy, family, home, or correspondence. CI 10 amends s 18, which limits the right to privacy, by providing that a police officer or a staff member of the Australian Federal Police who suspects on reasonable grounds that a family violence offence has been, is being or is likely to be committed in relation to a person may disclose any information to an approved crisis support organisation if it is likely to support the organisation to assist the person or their child.

This disclosure of information about victim-survivors limits an individual's right to privacy under section 12 of the HRA.

### *2. Legitimate purposes (s 28(2)(b))*

The legitimate purpose of the provision is to improve responses to domestic and family violence to support the safety of victim-survivors, prevent the occurrence and escalation of violence, and hold persons of concern accountable, through facilitating information sharing between key agencies.

### *3. Rational connection between the limitation and the purpose (s 28(2)(d))*

These limitations to the right to privacy in certain circumstances are critical to improving system responses to domestic and family violence and are clearly connected to the Bill's purpose.

Enabling police officers to share information about a suspected family violence offence with an approved crisis support organisation will support the crisis organisation to provide informed, effective and proactive support for the victim-survivor and any of their children. This will support the organisation to be informed about a family violence offence which has been, is being or is likely to be committed, so they can establish and assess any risk and take action to prevent, reduce or manage the risk, for the safety of the victim-survivor and any child in their care.

This is critical to enable services to work collaboratively to deliver integrated supports for victim-survivors.

### *4. Proportionality (s 28(2)(e))*

The disclosure of information under s 18 is necessary for safety and is the least restrictive means available to achieve the legitimate purpose. The Bill includes safeguards so that limitations on right to privacy are not arbitrary and are always targeted at addressing risks of domestic and family violence.

While s 18 enables the disclosure of information in relation to a victim-survivor, this scope is confined to circumstances where the police officer or the staff member of

the Australian Federal Police suspects on reasonable grounds that a family violence offence has been, is being, or is likely to be committed in relation to a person. This safeguard ensures information is only disclosed if the suspicion is based on reasonable grounds, which limits the arbitrary impact of any disclosure on rights.

Additionally, the police officer or staff member may only disclose information that is likely to aid the organisation in supporting or assisting the victim-survivor or any child in their care. Information which is not likely to aid the organisation in supporting the victim-survivor cannot be disclosed under s 18. This limits the scope of information which can be provided, and ensures it is directly connected to the legitimate purpose of this provision to support the safety of victim-survivors.

Section 18 is also limited and only authorises the disclosure of information by police to an approved crisis organisation. This limited application ensures the interference on rights is limited and proportionate to achieve the legitimate purpose. This is also a discretionary provision, and does not compel or require a police officer or staff member to disclose information. This limits the impact of s 18 on rights.

Domestic Violence Agencies Amendment (Information Sharing) Bill 2023

*Human Rights Act 2004 – Compatibility Statement*

In accordance with section 37 of the *Human Rights Act 2004* I have examined the **Domestic Violence Agencies Amendment (Information Sharing) Bill 2023**. In my opinion, having regard to the Bill and the outline of the policy considerations and justification of any limitations on rights outlined in this explanatory statement, the Bill as presented to the Legislative Assembly **is** consistent with the *Human Rights Act 2004*.

.....  
Shane Rattenbury MLA  
Attorney-General

## CLAUSE NOTES

### Domestic Violence Agencies Amendment (Information Sharing) Bill 2023

#### Detail

#### Clause 1 — Name of Act

This is a technical clause that names the Act as the *Domestic Violence Agencies (Information Sharing) Amendment Act 2023*.

#### Clause 2 — Commencement

This clause provides that the Minister will fix the date of the Act's commencement by written notice. However, if a date is not fixed by the Minister, the Act will automatically commence within 12 months of the Act's notification date. This disapplies section 79 of the *Legislation Act*.

#### Clause 3 — Legislation Amended

This clause outlines that the Bill will amend the *Domestic Violence Agencies Act 1986*.

#### Clause 4 — Dictionary Section 2, note 1

This clause substitutes a definition of *family member* as the example signpost definition in the dictionary for clarity.

#### Clause 5 — New sections 3A and 3B

This clause makes it clear that the *Criminal Code* and *Legislation Act* apply to offences committed against this Act.

This clause also adds an objects section for the entire *Domestic Violence Agencies Act 1986*. In particular, the Bill provides that the objects of the legislation are to prevent and reduce domestic and family violence, to promote the safety of victim-survivors, to promote the accountability of persons of concern for their actions, and to promote the development of skills and expertise of services to understand, prevent and respond to domestic and family violence.

#### Clause 6 — Sections 5 to 7

This clause removes the words 'domestic violence and family violence' and substitutes it with 'domestic and family violence'.

#### Clause 7 — New Part 3

This clause inserts a new Part 3. This extensive clause contains the core elements of the new information sharing scheme established by this Bill.

## **Part 3 Information sharing between certain entities**

### **Division 3.1 Purpose and Important concepts**

Section 11 sets out the purposes of Part 3. This provides that the purposes of the information sharing scheme in Part 3 are to facilitate information sharing between ISEs and to support their coordination and collaboration to establish, assess, manage, prevent and reduce risk of domestic and family violence. This aligns with the definition of a protection purpose, which must be the basis for all information sharing within this new scheme.

Section 12 sets out the safety principle which applies to all of Part 3. This provides that when a person is undertaking any function provided for under Part 3, they must prioritise the safety and protection of people experiencing, or at risk of, domestic and family violence as far as possible. It is noted that as far as possible in this context is intended to apply consistently with the provisions in Part 3 and extends to other applicable laws, including the HRA.

Section 13 sets out key definitions to apply throughout Part 3. This section defines an *at-risk person* as a person who an ISE reasonably believes has been, is being or is at risk of being subjected to domestic and family violence. This makes it clear that the Bill covers all people with experiences of DFV, whether in the past, present or future. This broad coverage is important to achieve the Bill's policy intention of supporting early intervention opportunities, which is necessary to ensure that support is available prior to violence escalating and reaching a crisis point.

The definition of an *at-risk person* is specifically defined to encompass children and young people, recognising them as victim-survivors in their own right.

Section 13 defines a *person of concern* as a person who an ISE reasonably believes is engaged in, is engaging in or is at risk of engaging in domestic and family violence.

Section 13 defines *connected person* as a person who has information or about whom information is relevant to a protection purpose, other than an at-risk person or a person of concern. This may capture relevant family members or friends of an at-risk person, for example, because information about them is relevant to protecting the safety of the at-risk person. This section provides an example of a connected person as being the aunty of the children of the at-risk person.

This section also defines *deal with information* as meaning the collection, use and disclosure of information. This term is used throughout the Bill to refer to the collection, use and disclosure of information.

Section 13 also defines a restricted entity as an ISE declared by the Minister for which protection purposes are stated.

Section 13 then sets out definitions for the following terms which are provided at other section in the Bill: *entity protocol, information sharing coordinator, information sharing entity, Ministerial protocol, protection purpose, and risk assessment and management framework.*



Section 14 sets out the meaning of *information sharing entity* for Part 3. This includes a list of ISEs being the information sharing coordinator (ISC), an ACT education provider, the approved provider of an education and care service under the *Education and Care Services National Law (ACT)*, the chief police officer, the Aboriginal and Torres Strait Islander Children and Young People Commissioner, a commissioner under the *Human Rights Commission Act 2005*, the Death and Family Violence Review Coordinator, the director-general, any other director-general of an administrative unit allocated responsibility for 1 or more of the listed matters in section 14(i), the licensed proprietor of a childcare service licensed under the *Children and Young People Act 2008*, the public trustee and guardian and the registrar of firearms, and any other entity declared by the Minister.

Section 14(2)-(4) empowers the Minister to declare an entity as an ISE through a disallowable instrument. This declaration may state the protection purpose for which an ISE may have information disclosed to it or use information under this part.

### **Division 3.2 Information sharing requirements**

Section 15 sets out the meaning of a *protection purpose* for Part 3. A protection purpose includes assessing and establishing whether an at-risk person is being subjected or is likely to be subjected to domestic and family violence, assessing and establishing whether a person of concern is engaging or is likely to engage in domestic and family violence, taking action to prevent or reduce the risk of domestic and family violence occurring, and managing known or suspected domestic and family violence. This ensures ISEs can disclose, collect and use information to the extent necessary to establish, assess, prevent, reduce and manage risks of domestic and family violence.

Under section 15, an ISE must not deal with information under this part other than to the extent necessary for a protection purpose or for a purpose provided for under division 3.5. This limits the scope of the scheme to ensure dealings with information are confined to the purposes provided under s 15.

Section 16 sets out the requirements for ISEs when dealing with information under Part 3. These requirements apply to ISEs when exercising any function under Part 3. In dealing with information, an ISE must comply with any requirements under division 3.6 for consent and comply with any requirements for dealing with the information under a risk assessment and management framework, Ministerial protocol and any protocol for that specific ISE. These documents provide detailed and comprehensive guidance about how practitioners in ISEs should deal with information in best practice ways.

Section 16 also sets out additional requirements for disclosing information to a restricted entity or using information as a restricted entity. If an ISE is disclosing information to a restricted entity, they must only do so for a protection purpose stated in the restricted entity's declaration. If the ISE is a restricted entity, they must only use the information for a protection purpose as stated in the restricted entity's declaration.

Section 16(2) also provides specific requirements for an ISE when dealing with information about an at-risk person, to ensure the information sharing process is tailored to the needs of each individual victim-survivor. This includes taking into account the at-risk person's cultural identity, sexual identity, gender identity, religious beliefs and spiritual beliefs, if known.

If the at-risk person identifies as Aboriginal or Torres Strait Islander, the ISE must also deal with the information in a way that promotes the person's right to self-determination and cultural sensitivities, and consider the person's family and community connections. This recognises the specific and unique ways domestic and family violence can manifest for persons who identify as Aboriginal and Torres Strait Islander, noting this can encompass a range of violence and abuse that can occur within extended families, kinship and communities.

If the at-risk person is a child or young person, an ISE must also take into account their age, maturity and decision-making ability. This ensures responses for young victim-survivors recognise and accommodate any particular vulnerabilities of children and young people experiencing or at risk of experiencing domestic and family violence, due to their stage of development.

The Ministerial protocol provides more detailed guidance for practitioners and ISEs about these requirements.

### **Division 3.3 Information sharing for a protection purpose**

Section 16AA sets out the relevant grounds under which an ISE must not disclose information. Under section 16AA(a), an ISE must not disclose information if the disclosure would contravene a requirement for information sharing under section 16. Under section 16AA(b), an ISE must not disclose information if it reasonably believes that the disclosure could reasonably be expected to endanger a person's life or physical safety, prejudice an investigation, prejudice a coronial inquest or inquiry, enable the existence or identity of a confidential source to be revealed, prejudice the effectiveness of a lawful method for dealing with a contravention of a law, prejudice a court or tribunal proceeding, contravene a court or tribunal order, or be contrary to the public interest.

Section 16AB enables an ISE to disclose information to another ISE on its own initiative, if the disclosing ISE reasonably believes the information is relevant to the exercise of the receiving ISE's functions and the disclosure is necessary for a protection purpose. The ISE must not disclose information if it reasonably believes that a *relevant ground* under s 16AA exists. This provision authorises and encourages the proactive disclosure of information between ISEs to establish, assess, prevent, reduce and manage domestic and family violence risk.

Section 16AC provides that an ISE may ask another ISE to disclose information for a protection purpose. The disclosing ISE must disclose the requested information, if it reasonably believes the information is relevant to the exercise of the receiving ISE's functions and the disclosure is necessary for a protection purpose. Again, the ISE must not disclose the information if it reasonably believes that a *relevant ground* under s 16AA exists.

Section 16AC(4) provides that the ISE must advise the ISC in writing if it does not disclose the information subject to the request under section 16AC. This ensures the ISC has oversight over all refusals to disclose information and can provide a safeguard to ensure information is disclosed where necessary and is not disclosed where it would be unauthorised.

Section 16AD enables the ISC to review any refusals to provide information requested under section 16AC. The ISC may require the ISE to disclose information in response to a request if the ISC reasonably believes that the information is relevant to the requesting ISE's functions and the disclosure is necessary for a protection purpose. However, the ISC must not require the ISE to disclose the information if it is satisfied that a *relevant ground* for not disclosing the information under s 16AA exists. An ISE must comply with a requirement by the ISC to disclose information. This safeguard ensures that disclosures of information and refusals to disclose information are reviewable by the ISC.

Section 16AE allows an ISE to disclose information about a person of concern to an at-risk person if they reasonably believe that the disclosure is necessary for a protection purpose and no *relevant ground* under s 16 exists. This is important to support at-risk persons to manage their safety or the safety of their children.

### **Division 3.4 Information sharing coordinator**

Section 16AF gives the Minister authority to declare an entity to be the ISC through a disallowable instrument. The ISC is a key safeguarding and oversight measure of the information sharing scheme. The Minister may declare an entity to be the ISC if satisfied that the entity has suitable expertise and experience to exercise the functions of the ISC.

Section 16AG provides that the functions of the ISC are to facilitate the sharing of information among ISEs under Part 3, to identify and take appropriate action for a protection purpose, and any other function given to the ISC under Part 3. These functions enable the ISC to support the coordination and collaboration between ISEs.

Section 16AH sets out how the ISC may use information provided under Part 3. The ISC may consider any information disclosed to it under Part 3 and take action in relation to it that the ISC reasonably considers appropriate for a protection purpose. In determining the action to take for a protection purpose, the ISC must take into account the safety and protection of the at-risk person, the views of the at-risk person on any action (where safe, reasonable and practicable to seek their views), the seriousness of the circumstances, and anything else as prescribed by regulation. The ISC must also take the matters listed in section 16(2) into account when determining the appropriateness of the proposed action.

Section 16AH(2) provides a non-exhaustive list of indicative examples of actions the ISC may take under section 16AH(1), including seeking further information from an ISE, advising an ISE about appropriate action, coordinating ISEs in taking action, providing assistance to the at-risk person, or referring the at-risk person for advice or support.

### **Division 3.5 Disclosure and use of information other than for a protection purpose**

Section 16AI provides that an ISE must not disclose or use information disclosed to it under Part 3 other than for a protection purpose or an identified purpose under section 16AI. An ISE must not disclose or use information received under Part 3 other than with the consent of the at-risk person or the connected person, or to the extent required or enabled under a territory law to lessen or prevent a serious and urgent threat to the life, health or safety of an individual or to public health or safety, or to comply with a mandatory reporting requirement under the *Children and Young People Act 2008* section 356, to comply with a reportable conduct requirement under the *Ombudsman Act 1989* div 2.2A, or to the extent required or enabled under a territory law prescribed by regulation. This enables ISEs to disclose or use information in limited circumstances as necessary to respond to a serious and urgent threat to life or to public health or safety or to support the safety, welfare and wellbeing of children and young people.

Section 16AI(2) creates a requirement for ISEs who disclose or use information for a purpose other than a protection purpose to inform the ISC and the ISE which the information originated from about the disclosure or the use of the information as soon as possible to ensure there is oversight over such uses. Note 1 reflects that reportable conduct may be given to certain entities under the *Children and Young People Act 2008* div 25.3.3 despite any territory law to the contrary. Note 2 recognises that other laws may restrict dealing with information under Part 3. This clarifies that s 16AI(2) does not displace any requirements under other laws, specifically the *Children and Young People Act 2008* or the *Ombudsman Act 1989*, in relation to how information should or should not be disclosed and it must be read within the context of these laws. For example, if an ISE discloses information received under Part 3 to comply with a mandatory reporting requirement under the *Children and Young People Act 2008* section 356, as authorised by s 16AH(c)(i), the ISE must comply with the relevant requirements and protections for mandatory reporting and information sharing under the *Children and Young People Act 2008* and must not contravene these protections in notifying the ISC or original ISE under section 16AH(2).

### **Division 3.6 Consent of disclosure and use of information**

Section 16AJ provides that the consent requirements in division 3.6 apply in relation to any proposed dealing with sensitive information about a person.

Section 16AK defines *sensitive information* as information or an opinion about an identified individual or an individual who is reasonably identifiable. This includes information or opinion whether true or not and whether recorded in a material form or not.

Section 16AL contains the specific consent provisions for at-risk adults. Under section 16AL(1) an ISE must not deal with information about an at-risk adult without their consent. This is a vital provision of the Bill to promote the agency, dignity and autonomy of victim-survivors. Under section 16AL(2) in seeking consent the ISE

must, as far as practicable, provide the at-risk person with access to all reasonable support necessary for them to make and communicate their decision about consent. What is necessary will depend on the circumstances in each individual case. This will support them to fully participate in the process.

Section 16AL(3) provides limited exceptions where an ISE may deal with sensitive information without the at-risk person's consent. Under section 16AL(3)(a) and (b)(i) the ISE may deal with information without consent if it reasonably believes dealing with the information is necessary for the at-risk person's safety and protection and reasonably believes that seeking the at-risk person's consent may cause a risk to the life, health or safety of the at-risk person or a connected person.

Under section 16AL(3)(a) and (b)(ii) the ISE may deal with information without consent if despite taking reasonable steps, it is unable to locate or contact the at-risk person and it reasonably believes dealing with the information is necessary for the safety and protection of the at-risk person.

Section 16AL(3)(a) and (b)(iii) provides the ISE may deal with information without consent if it reasonably believes dealing with the information is necessary for the safety and protection of the at-risk person and failing to deal with the information may cause a serious risk to the life, health or safety of the at-risk person or a connected person.

Section 16AM applies where the ISE proposes to deal with sensitive information about a young person (someone aged between 14 and 17) who is an at-risk person, and has the decision-making ability to give consent, taking into account their maturity and age. Under sections 16AM(2) and (3), the ISE must not deal with sensitive information about the young person without their consent and in doing so, the ISE must, as far as practicable, provide them with access to all reasonable support necessary for them to make and communicate their decision about consent.

Section 16AM(4) provides limited exceptions where an ISE may deal with sensitive information without the at-risk young person's consent. Under section 16AM(4)(a) and (b)(i) the ISE may deal with information without consent if it reasonably believes dealing with the information is necessary for the at-risk young person's safety and protection and reasonably believes that seeking their consent may cause a risk to the life, health or safety of the at-risk young person or a connected person.

Under section 16AM(4)(a) and (b)(ii) the ISE may deal with information without consent if despite taking reasonable steps, it is unable to locate or contact the at-risk young person and it reasonably believes dealing with the information is necessary for their safety and protection.

Section 16AM(4)(a) and (b)(iii) provides the ISE may deal with information without consent if it reasonably believes dealing with the information is necessary for the safety and protection of the at-risk young person and failing to deal with the information may cause a serious risk to the life, health or safety of the at-risk young person or a connected person.

Section 16AN applies where the ISE proposes to deal with sensitive information about a child (someone aged under 14) who is an at-risk person or an at-risk young person who the ISE reasonably believes does not have the decision-making ability to give consent under section 16AM, taking into account their age and maturity. Under sections 16AN(2) and (3), the ISE must not deal with sensitive information about the child or young person without the consent of the person with parental responsibility and in seeking their consent, the ISE must, as far as practicable, provide the person with access to all reasonable support necessary for them to make and communicate their decision about consent.

Section 16AN(4) provides limited exceptions where an ISE may deal with sensitive information without the consent of the person with parental responsibility. Under section 16AN(4)(a) and (b)(i) the ISE may deal with information without consent if it reasonably believes dealing with the information is necessary for the at-risk person's safety and protection and reasonably believes that seeking the person with parental responsibility's consent may cause a risk to the life, health or safety of the at-risk person or a connected person.

Under section 16AN(4)(a) and (b)(ii) the ISE may deal with information without consent if despite taking reasonable steps, it is unable to locate or contact the person with parental responsibility and it reasonably believes dealing with the information is necessary for the safety and protection of the at-risk person.

Section 16AN(4)(a) and (b)(iii) provides the ISE may deal with information without consent if it reasonably believes dealing with the information is necessary for the safety and protection of the at-risk person and failing to deal with the information may cause a serious risk to the life, health or safety of the at-risk person or a connected person.

Under section 16AN(5) the ISE must not contact or seek the consent of a person of concern in relation to the child or young person, despite anything else in section 16AN. This means if a person with parental responsibility is a person of concern in relation to the child or young person, the ISE must not seek their consent.

Section 16AO applies where the ISE proposes to deal with sensitive information about a connected person. Under sections 16AO(1) and (2), the ISE must not deal with sensitive information about the connected person without their consent and in doing so, the ISE must, as far as practicable, provide them with access to all reasonable support necessary for them to make and communicate their decision about consent.

Section 16AO(3) provides limited exceptions where an ISE may deal with sensitive information without the connected person's consent. Under section 16AO(3)(a) and (b)(i) the ISE may deal with information without consent if it reasonably believes dealing with the information is necessary for an at-risk person's safety and protection and reasonably believes that seeking the connected person's consent may cause a risk to the life, health or safety of an at-risk person or the connected person.

Under section 16AO(3)(a) and (b)(ii) the ISE may deal with information without consent if despite taking reasonable steps, it is unable to locate or contact the connected person and it reasonably believes dealing with the information is necessary for the safety and protection of an at-risk person.

Section 16AO(3)(a) and (b)(iii) provides the ISE may deal with information without consent if it reasonably believes dealing with the information is necessary for the safety and protection of an at-risk person and failing to deal with the information may cause a serious risk to the life, health or safety of an at-risk person or the connected person.

Section 16AP clearly provides that the consent of a person of concern is not required for an ISE to deal with their sensitive information and an ISE must not seek consent from the person of concern. This provision promotes the safety of at-risk persons, recognising that seeking consent from a person of concern is highly likely to exacerbate risk.

### **Division 3.7 Informing people about disclosure and use of information**

Under section 16AQ, if an ISE has disclosed information in relation to an at-risk person or a connected person for a protection purpose, it must tell the person about the disclosure, including the name of the ISE to which the information was disclosed, the date of disclosure, the nature of the information and any outcomes of the disclosure. This supports keeping the at-risk person or connected person informed of dealings with their information after information has been disclosed.

However, under section 16AQ(3) the ISE is not required to tell the at-risk person or connected person the information was disclosed if they have indicated in writing that they do not wish to be told, another ISE has already told them, it is not practicable in the circumstances, or the ISE reasonably believes telling the person may cause a risk to their life, health or safety.

Under section 16AR, if an ISE proposes to take action for a protection purpose as a result of information dealt with under Part 3 and it reasonably believes this action may cause a risk to the life, health or safety of an at-risk person or connected person, the ISE is required to tell them about the proposed action and the risk. This ensures the at-risk person or connected person is aware of any potential risks that may arise from the ISE's proposed action and can respond before the ISE takes this action.

However, under section 16AR(3) the ISE is not required to tell the at-risk person or connected person if another ISE has already told them, it is not practicable in the circumstances, or the ISE reasonably believes telling the person may cause a risk to their life, health or safety.

Under section 16AS, if an ISE discloses or uses information in relation to an at-risk person or connected person for a purpose other than a protection purpose under section 16AI, it must tell the at-risk or connected person about the disclosure or use. This includes the name of the ISE to which the information was disclosed or which used the information, the date of disclosure, the nature of the information and any

outcomes. However, the ISE does not need to tell the person if they have consented to the disclosure or use, they have indicated in writing that they do not wish to be told, another ISE has already told the person, it is not practicable to tell the person, or the ISE reasonably believes that telling the person may cause a risk to the life, health or safety of the at-risk person or the connected person.

The note recognises that other laws may restrict dealing with information under this part. Section 16AS does not displace any requirements under other laws, specifically the *Children and Young People Act 2008* or the *Ombudsman Act 1989*, in relation to how information should or should not be disclosed and it must be read within the context of these laws. For example, if an ISE discloses information received under Part 3 to comply with a mandatory reporting requirement under the *Children and Young People Act 2008* section 356, as authorised by s 16AH(c)(i), the ISE must comply with the relevant requirements and protections for mandatory reporting and information sharing under the *Children and Young People Act 2008* and must not contravene these protections in notifying the at-risk person or connected person under section 16AS.

Section 16AT makes clear that the ISE must not tell the person of concern that information has been dealt with under this part. This is crucial for safety, due to the likely escalation of risk if persons of concern were informed.

### **Division 3.8 Miscellaneous**

Section 16AU provides the Minister must declare a risk assessment and management framework about dealing with information by an ISE, which will be a notifiable instrument.

Section 16AV provides the Minister must make a Ministerial protocol in relation to the operation of Part 3. Section 16AV(2) provides a non-exhaustive list of what a Ministerial protocol may include. A Ministerial protocol may state requirements for dealing with information, state requirements for storing and managing information dealt with under Part 3, and include information to provide guidance on complying with requirements for dealing with information and storing and managing information. Any Ministerial protocol is a notifiable instrument, also promotes ongoing public oversight and scrutiny of the scheme.

Section 16AW provides an ISE may also make protocols about dealing with information under Part 3. Any protocol must not be inconsistent with any Ministerial protocol or any risk assessment and management framework. Any entity protocol must be either published on a website controlled by the ISE or made available for inspection by anyone and without charge. This assists in making the information sharing scheme transparent and consistent.

Section 16AX establishes offences for the reckless disclosure and use of shared information about a protected person under Part 3.



Section 16AX(1) provides that an information holder commits an offence if they do something that discloses shared information about the protected person and they are reckless about whether the information is shared information about the protected person, and whether doing the thing would result in the information being disclosed to someone else. The maximum penalty for this offence is 50 penalty units and/or imprisonment for 6 months.

Section 16AX(2) provides that an information holder commits an offence if they use shared information about the protected person and they are reckless about whether the information is shared information about the protected person. This offence has a maximum penalty of 50 penalty units and/or imprisonment for 6 months.

Section 16AX(3) provides defences to these offences. An information holder will not commit an offence under sections 16AX(1) or (2) if they disclose or use the information in relation to the exercise of a function as an information holder under Part 3, as required in relation to a court proceeding, or with the protected person's consent. It is also not an offence to disclose information to the chief police officer if the information is in connection with a possible domestic and family violence offence. The defendant has the evidential burden in relation to these matters. The defendant has the evidential burden of proof in relation to these matters.

Section 16AX(4) also provides that an information holder does not need to disclose information shared under Part 3 to a court, or produce a document containing information to a court unless it is necessary to do so for this Act or another law applying in the ACT.

Section 16AY provides that nothing in Part 3 affects a use or derivative use immunity that applies to information obtained directly or indirectly, because of the operation of a law applying in the ACT. To avoid any doubt, information that has been compelled from a person cannot be used against the person in a criminal or civil proceedings. Additionally, information derived from the information that a person has been compelled to provide cannot be used against that person in civil or criminal proceedings.

Section 16AZ provides that the *Freedom of Information Act 2016* does not apply to information to the extent that the information is held by an ISE only because it was disclosed under Part 3. This means ISEs must refuse freedom of information requests regarding information which has been disclosed to it under Part 3. This does not impact the application of the FOI Act to information which an ISE receives, holds or generates outside the operation of Part 3. This means persons can apply to the originating agency under the FOI Act to seek to access information and the existing processes under the FOI Act apply.

Section 16AZA protects public employees from civil liability for conduct engaged in honestly and without recklessness in the exercise of a function under Part 3, or in the reasonable belief that the conduct was in the exercise of a function under Part 3. Any civil liability that would otherwise attach to the public employee attaches to the Territory instead.

Section 16AZB also provides a general protection from liability. Civil or criminal liability is not incurred only because a person deals with information as permitted under Part 3, provided their conduct is honest and without recklessness. This also provides that dealing with information honestly and without recklessness under Part 3 is not a breach of confidence, professional etiquette or ethics, or rules of professional conduct.

Section 16AZC requires the Minister to arrange for an independent entity to review the operation of Part 3 as soon as practicable after the end of its second year of operation. The Minister must present a report of the review to the ACT Legislative Assembly within a year of the review starting.

**Clause 8 - Meaning of *domestic or family violence incident*—pt 3A Section 16C (3), definition of *family member***

This clause omits the meaning of a domestic or family violence incident.

**Clause 9 - Use and disclosure of protected information Section 16U, definitions of *disclose, information and use***

This clause omits the definitions of disclose, information and use.

**Clause 10 Section 18**

Section 18 permits a police officer or staff member of the Australian Federal Police to disclose any information to an approved crisis support organisation, if it is likely to aid the organisation in rendering assistance to the person or to any child or young person. This applies if the police officer or staff member suspects on reasonable grounds that a domestic and family violence offence has been, is being or is likely to be committed. This replicates an existing provision in the Act.

**Clause 11 – Dictionary, note 2**

This clause inserts adult, public employee, public trustee and guardian, registrar of firearms, and working day into note 2 under the Dictionary.

**Clause 12 — Dictionary, new definition of *at-risk person***

This clause inserts a new definition of *at-risk person* for Part 3, with reference to section 13 of the Act.

**Clause 13 — Dictionary, definition of *child***

This clause replaces the existing definition of *child* with a new definition which states a *child* means a person who is under 14 years old.

**Clause 14 — Dictionary, new definitions of *confidential information and deal***

This clause inserts new definitions of *connected person* and *deal* for Part 3, with reference to section 13 of the Act.

**Clause 15 — Dictionary, definition of *DFVR coordinator***

This clause replaces the existing definition of *DFVR coordinator* with a new reference to section 16D(1) of the Act.

**Clause 16 — Dictionary, new definitions**

This clause inserts new definitions into the Dictionary. *Disclose* includes communicate or publish, *domestic and family violence* has the meaning of family violence under the *Family Violence Act 2016* section 8, and *domestic and family violence incident* for Part 3A refers to section 16C.

**Clause 17 — Dictionary, definition of *domestic or family violence incident***

This clause omits the definition of *domestic or family violence incident* from the Dictionary to the Act.

**Clause 18 — Dictionary, new definitions**

This clause inserts a series of new definitions into the Act's dictionary for the terms: *entity protocol*, *family member*, *information*, *information sharing coordinator*, *information sharing entity*, *Ministerial protocol*, *person of concern*, *protection purpose*, *relevant ground*, *restricted entity*, *risk assessment and management framework*, *sensitive information*, *use and young person*.

**Clause 19 — Further amendments, mentions of *domestic or family violence***

This clause omits all references to *domestic or family violence* and replaces them with *domestic and family violence* to ensure consistency throughout the Act.

**Clause 20 — Further amendments, mentions of *family violence***

This clause omits all references to *family violence* and replaces them with *domestic and family violence* to ensure consistency throughout the Act.