



Reforming Victoria's privacy legislation

Consultation questions

A Submission from the Community Housing Federation of Victoria

31 August 2016

The Community Housing Federation of Victoria (CHFV) welcomes this opportunity to make a submission in response to the *Reforming Victoria's privacy legislation: Consultation questions*.

CHFV is the peak body that represents the not-for-profit community housing sector in Victoria. CHFV's member community housing organisations (CHOs) are committed to providing secure, affordable and decent housing for people on low to middle incomes.

Members include the CHOs registered as housing associations or housing providers under the Victorian regulatory framework for non-profit housing providers plus other organisations and individuals interested in housing. These registered CHOs manage more than 19,000 units of rental property, over 9,000 of which are owned by CHOs themselves.

Executive Summary

CHOs, as "first to know" organisations, have an important role to play in a community-wide response to family violence. Part of this response involves the appropriate sharing of information to minimise risks to individuals and families.

Exceptions in privacy law allow information to be collected and disclosed without the consent of the individual involved to prevent threats to an individual's life, health, safety or welfare. These exceptions provide important protection to CHOs and their staff who in good faith share information for this purpose and without consent.

We support the recommendation of the Royal Commission into Family Violence to permit such disclosures where the risk is either serious *or* imminent, rather than the current wording of "serious *and* imminent". This would:

- enable CHOs to respond to all serious threats without those threats having to be imminent; and
- protect CHOs who respond to an imminent threat where it may be difficult to assess its seriousness.

While these changes may have an impact on the privacy rights of individuals, we think that these changes are justified in terms of community safety.

Background

The role of community housing in responding to family violence

CHOs play an important role in a community wide-response to family violence. This is because:

- Many women and families use housing provided by CHOs – crisis, transitional and long-term housing – to be safely housed after a threat or occurrence of family violence.
- Family violence can occur in homes owned or managed by CHOs. In this case, CHOs play a role as a social landlord who:
 - is a “first to know” agency who can recognise signs and risks of family violence, make referrals to appropriate services and alert law enforcement when appropriate;
 - while not providing support themselves, are able to working in collaboration with with specialist family violence and other services to support tenants and households who are the victims of family violence; and
 - works closely with services and law enforcement to establish and maintain safe tenancies for women and families at risk.
- Perpetrators of family violence may be living in or seek to access housing owned or managed by CHOs after being excluded from other housing as a result of family violence intervention orders or other legal means.

Data collected by CHOs and privacy implications of this role

CHOs in their role as tenancy managers collect personal information of applicants for housing, tenants and household members of applicants and tenants. This includes:

- Identifying information such as names, addresses and ages of all household members;
- Contact details including phone numbers and email addresses of the tenant and (in some circumstances) household members;
- Documents used to verify the eligibility of applicants for community housing, including:
 - Identity documents which establish that the applicant is an Australian citizen or permanent resident;
 - Information establishing the applicant’s income (Centrelink statements, copies of income tax assessments, payslips or letters from employers) and assets;
- Documents submitted by tenants as part of regular rental reviews evidencing household income;
- Tenancy file, including property condition report, letters and notices sent to the tenant, file notes of conversations between CHO staff and the tenant; records of regular property inspections, photos taken as evidence of the condition of the property.

This information can be kept either in a hard copy file or on a tenancy management database or database recording details of applicants for housing.

For many CHO tenancies where a tenant is supported by other people to maintain their tenancy (such as support workers, family members or other natural supports), CHOs may also have consent to communicate with those people providing support to the tenant. This is what is known as a “supported tenancy”. It is model of partnership between services and CHOs that has a strong track record of sustaining tenancies for people with support needs.

CHOs and supports must have the written consent of the mutual tenant/client to share information. CHOs and funded support providers usually have written protocols for successful communication and information sharing to manage risks and ensure timely sharing of information (where permitted). Of course, tenants with support needs may choose not to provide consent or later withdraw their consent.

In these supported tenancies, CHOs may also maintain personal information or health records in the nature of:

- contact details of those supports;
- information of a general nature of the tenant’s disability, mental health condition or other support need, such as risk factors and communication needs so that CHO staff can most effectively manage the tenancy and notify supports of any issues that arise with the tenancy; and
- records of conversations or communication with supporters about resolution of issues where a tenancy is at risk owing to the actions of the tenant (such as rental arrears, failure to care for the property or nuisance behavior).

CHOs take their privacy obligations seriously. The Privacy and Data Protection Act 2014 (PDP Act) applies to most CHOs as contracted service providers under the PDP Act.

The Health Records Act 2001 (HR Act) may apply to some records described above to the extent that it is personal information and information or an opinion about:

- the physical, mental or psychological health (at any time) of an individual; or
- a disability (at any time) of an individual.

In addition, registered CHOs are required under the Performance Standards made under the Housing Act 1983 (Vic) to establish a privacy policy.¹

Tenants and applicants for housing who believe that their legal right to privacy has not been complied with by a registered CHO may, in addition to rights under the privacy legislation, make a

¹ See *Performance Standards for Registered Agencies*, Performance Standard 6 which states that: “The registered agency has privacy policies that comply with the Information Privacy Principles contained in the *Information Privacy Act 2000* and has strategies to ensure that tenants privacy is maintained with respect to disclosure within the registered agency and to third parties.”

complaint under the CHO's internal complaints process that a registered CHO is required to establish under the Housing Act. A tenant or applicant for housing who is not satisfied with the outcome may appeal the matter to the Housing Registrar for investigation and determination.²

Response to consultation questions

1. Do the differences in the exceptions under the PDP Act and the HR Act cause difficulties for your organisation? If so, please provide any practical examples.

CHFV believes that most CHOs are cautious before collecting and providing health information and they are aware of its sensitivity. As stated above it is generally only collected in supported tenancies and then only for the purposes of background information and not to treat a tenant's health condition or provide support for person's disability. For this reason, the difference in the PDP Act and HR Act may not be causing material difficulty to CHOs.

However, the difference between the two Acts is a fine one, and probably not well understood by CHO management and staff. The distinction is also difficult to incorporate into a plain English privacy policy. Accordingly, we would be in favour of harmonizing the exceptions to privacy protections (on collection, use and disclosure of and access to personal and health information) on the basis of serious or serious and imminent threat.

2. Does your organisation ever need to collect, use or disclose personal information or health information without an individual's consent due to a serious and imminent threat?

3. Does the current wording of any of the exceptions listed in Table 1 – particularly where the term 'imminent' appears - cause difficulties for your organisation?

4. Should the term 'imminent' be removed as an element of existing exceptions under the PDP Act and HR Act? In all instances, or only some? Why or why not?

Wherever possible and where supports are in place, the consent of the tenant/client/household member is obtained to the sharing of personal information or health information.

In some circumstances a CHO may need to disclose personal information or health information without consent. We understand from our CHO members that this often comes in the context of requests from law enforcement officials. This is dealt with in separate exceptions in the PDP Act and the HR Act.³

However, unexpected situations will arise. A CHO should legitimately be able to provide personal information or health information to service providers, law enforcement officials or other relevant individuals as part of its role as a responsible social landlord where this is necessary to protect the safety of tenants and of others. It would be impossible to categorise the circumstances, however we believe that this exception to privacy principles is an important one.

² See the Housing Registrar publication, *The Housing Registrar's role with complaints by tenants or prospective tenants*

³ Health Privacy Principle 2.2(j) and Information Privacy Principle 2.2(g)

It is important that CHOs are able to be pro-active if a risk to a person's safety is identified without having to be unnecessarily cautious on the basis of not wanting to be in breach of privacy laws.

Accordingly, we think that a threshold of "serious and imminent" is too high to apply to such disclosures.

5. Which of the options for amending the exception set out in Table 2 does your organisation consider the most effective and appropriate?

We support Option 3: amend the exception to require that a threat be serious *or* imminent, based on the recommendation of the Royal Commission.

We think it should be enough that a threat is serious without it needing to be imminent. In instances of family violence in particular, the very nature of it is that threats may have been building over a period of time yet there is no particular imminence to the threat.

We also think an exception should exist if a threat is imminent, even if its seriousness is unclear. When there is an imminent risk to a person's safety, a CHO may not be in a position to ascertain whether that risk is also "serious". CHOs are not experts on assessing risk and rely largely on the assessment of specialist agencies. In time-critical situations this may put CHO staff in a difficult position in not being able to properly ascertain whether a risk is serious or not. It is important that CHOs and staff and CHOs are protected from liability under privacy laws where they believe in good faith that a risk is imminent.

If Option 3 is not adopted then Option 2 (remove the requirement that a threat be 'imminent') is preferable to Option 1. We think it would be difficult for agencies to determine when it is unreasonable or impracticable to obtain consent.

6. Are there any other options for reforming the exception that should be considered?

We have no other proposals.

7. What negative or unintended consequences (if any) might arise if any of the options are implemented?

We appreciate that broadening this exception will have implications for the privacy protections of individuals. As a peak body representing the community housing sector, we are not experts in information privacy and do not purport to understand the implications for the privacy rights of individuals.

However, we would point out that CHOs would only be able to make disclosure when they have a reasonable belief and then to the extent necessary. This would typically be only communicating with either the specific individual at risk or (more likely) other organisations or government agencies with a similar privacy obligation. Therefore the impact on the privacy rights of individuals would appear to be quite limited.