KEEPING CHILDREN IN MIND AND IN VIEW

Practice Guide 8:

Understanding consent

The Centre

Acknowledgement of Country

The Centre acknowledges the past and present traditional custodians of the land on which we work. We pay respect to Elders past and present. We acknowledge that sovereignty was never ceded and that this was and always will be Aboriginal land.

Contents

Acronyms

CISS	Child Information Sharing Scheme
CYFA	Children, Youth and Families Act 2005
FVISS	Family Violence Information Sharing Scheme
ISE	Information Sharing Entity
LBGTIQA+	lesbian, gay, bisexual, transgender, intersex, queer, asexual
MARAM	Multi Agency Risk Assessment Framework
OVIC	Office of the Victorian Information Commissioner

Foreword

This guide is one in a series of practice guides written by the Centre for Excellence in Child and Family Welfare to enable practitioners to keep children first and foremost in service system responses. Funding for these guides has been provided by Family Safety Victoria.

The aim of the guides is to support key workforces involved in maintaining child safety and wellbeing to:

- use a child rights lens
- identify and prioritise what is in the child's best interests
- work in ways that promote children's participation in the decision making and processes that affect them
- document what happens to children so that they are kept in mind and in view.

The guides are intended to make sure that children and young people are at the centre of our thinking and our practice. They are not intended to replace leader or manager practice guidance or to replace existing agency protocols; rather, they are aimed at providing practical, simple and accessible information that will increase practitioner understanding of how to work with children and young people and enhance confidence in their ability to do so.

In engaging with children, particular attention needs to be paid to the safety and wellbeing of children who are non-verbal or very young, who have developmental challenges, who have a disability, who are from a non-English speaking background, who are Aboriginal or Torres Strait Islander, who have a parent with a disability or mental ill-health, who identify as LGBTIQA+ or who experience (and/or use) violence in the home.

The guides aim to address confidence and knowledge gaps for practitioners across the sector and promote the importance of effective and meaningful observation, communication and empowerment of children and young people. They are intended to be an easy to understand, practical reference tool for new practitioners, or for practitioners who have not had significant experience in working with children or young people.

Consent – What to consider

This Practice Guide looks at the issue of consent, its legislative requirements and practice complexities, and some examples of application. It considers consent in the context of direct engagement with children and young people without having obtained prior authorisation from their parent/and or guardian. It also considers obtaining consent from children and young people for the purpose of sharing important information with other professionals and/or parents/guardians and family members.

Understanding consent to engage directly with children and young people

In practice, consent can be uncertain and nuanced and depend on a range of variables. It can be challenging to understand what consent looks like, if this is able to be provided by children and young people, and in what circumstances it is required, or if and when it should be obtained from parents or caregivers.

When possible, professionals should obtain consent to engage with children and young people from a parent or caregiver when safe to do so. If consent is refused, the professional should make reasonable attempts to understand why the parent is withholding consent. If this refusal raises concerns, the professional should consider if reporting or information sharing is necessary.

Legal perspectives and requirements

The *Child Wellbeing and Safety Act 2005* authorises organisations and services, prescribed through regulations, to share relevant information to assess and manage family violence risk, which allows for provision of consent.[1] However, there is little documented guidance regarding legislative principles for obtaining consent to engage with children and young people.

The Child Information Sharing Scheme, enabled through Part 5A of the *Family Violence Protection Act 2008*, permits professionals to share information regarding the safety and wellbeing of children and young people. Prescribed practitioners may share information with children and young people for the purpose of managing risk and maintaining safety and wellbeing. In doing so, they should consider:

- the nature and significance of the risk to the child/young person
- how receiving this information will help the professional to manage and maintain safety
- possible limitations regarding the types of information which can be shared.

The guidelines stipulate the importance of informing children and young people and those who hold parental responsibilities for them (who are not known to be perpetrators of abuse) of their obligations to seek and share information, if it is safe and appropriate to do so. Information which is required to be provided includes:

- the threshold of risk involved in further sharing of information
- who information may be shared with.

The guidelines also make clear:

- that consent is not required if the sharing of information is intended to maintain safety and wellbeing
- that the views of children and young people will be obtained whenever safe, appropriate, or reasonable to do so, and

[1] Authorised Version No. 041 Child Wellbeing and Safety Act 2005 No. 83 of 2005, Part 6A.

- the benefits and purpose of such information sharing.

The guidelines recommend that children and young people are advised of professional obligations at the start of service and at each instance of possible sharing of information, given that their understanding and views may change throughout their involvement.

Children and young people may offer additional insights into their own wellbeing and safety and possible preferences for decisions made. Seeking their views provides them with an opportunity for empowerment and a sense of agency. However, it is important that professionals avoid unintended outcomes or risks.

Consideration should be given to the child or young person's age, maturity and circumstances to help determine if it is safe to engage with that child or young person and the best possible way to seek out their wishes (i.e., considering engagement strategies, possible language and environmental factors).

When assessing whether it is appropriate, safe or reasonable to seek the views of parents or caregivers (who are not alleged or considered to perpetrators of harm) of children and young people, consider the following.

- It is inappropriate to seek parental views when a child or young person does not reside in the care of their parents, lives independently, or is a parent themselves.
- It is unsafe to seek parental views if this puts the child or young person's safety in jeopardy or at risk of harm, or if the parent or caregiver is a perpetrator of violence.
- It is unreasonable to seek parental views if reasonable attempts have been made to contact them without success, or if an organisation already has direct engagement with the child or young person.

Additionally, the framework suggests that in instances when parents and children or young people disagree the provision of consent, professional judgement should apply, with careful consideration being given to the child or young person's safety and wellbeing.[2]

Practical considerations

Consent should be applied on an individualised or case-by-case basis depending on factors such as:

- the purpose of engagement with the child or young person
- the nature of the professional's role and whether they are involved with the child or young person and the family on a statutory or non-statutory basis
- the nature of the referral the professional is investigating and the level of risk they are assessing, considering safety implications for inclusion of the child or young person in safety planning
- the age and (importantly) stage of development of the child or young person involved, understanding their capacity to make an informed decision to participate in conversations
- ethical considerations regarding informing parents about speaking to the child or young person and whether this could potentially compromise the child's immediate safety and wellbeing
- ability to uphold the child or young person's wishes relating to confidentiality and applying judgement when parents may be notified without the consent of the child or young person

[2] Family Safety Victoria, 2018, Family Violence Information Sharing Guidelines – Guidance for Information Sharing Entities, Victorian Government.

- when a parent is not consenting to having professionals speak with a child or young person who has the capacity to make an informed decision and is willing to engage.

Gillick Principle

Given the lack of legal principle or model specific to professionals working with children and families, professionals often use the Gillick Principle as a guide to assess if a child or young person has the capacity to provide consent. The Gillick Competence comes from a principle for assessing capacity for children and young people under the age of 16 years to provide consent for medical treatment and intervention, but has since been applied to children and young people in a clinical and social work setting.[3]

The following considerations can be applied to assess capacity to provide consent:

- the child or young person's age, maturity and cognitive capacity
- the child or young person's understanding of the professional's role and nature of their involvement, the issue and what it involves
- the child or young person's understanding of the risks, implications and consequences that might arise from their decision to participate or provide consent
- how the child or young person is able to understand any information or advice that they have been given relating to participation
- the child or young person's understanding of any alternative options, if available to them
- the child or young person's ability to provide an explanation for their reasoning and decisions.[4]

The principle also suggests that:

- consent is not valid if a young person is being influenced or pressured
- a child or young person's capacity to provide consent could be affected by factors including mental health conditions, stress, health conditions and the complexities of the decisions being made.[5]

[3] National Society for the Prevention of Cruelty to Children, 2022, 'Gillick competent' refers to the decision of the House of Lords (UK) in *Gillick v West Norfolk and Wisbech Area Health Authority* which effectively found that the authority of parents to make decisions for their minor children is not absolute but diminishes with the child's evolving maturity. https://www.publicadvocate.vic.gov.au/medical-treatment/children-under-18-years

[4] Ibid.

[5] Ibid.

Managing consent – some practical examples

Below are some examples of how consent might be managed in particular situations.

If a professional assesses that a child or young person has sufficient capacity to give consent to accept a response from a service (bearing in mind the Gillick Principle), then the service can be provided. The child or young person must be informed that if sufficient concerns for their safety or wellbeing are identified, their parent may need to be informed, provided that doing so is not likely to negatively affect that child or young person's safety.

A referral has been made through statutory intervention, indicating significant risk of family violence and a young person at risk of harm. Both parents are opposed to the young person being spoken with. If the risk assessment suggests that speaking with the young person is likely to reduce the level of risk to them, and they have been deemed capable of providing consent (through the use of questions similar to those defined under the Gillick Principle), then the young person should be spoken with directly.

Understanding and obtaining consent to share information provided by a child or young person

When professionals engage with children and young people to provide support or undertake assessment and planning, they have a responsibility to explain the nature of their profession/role and their responsibility to maintain confidentiality and privacy. They also have a professional responsibility to explain to the child or young person how this commitment to confidentiality may be breached in circumstances where information they provide needs to be shared to keep a child safe and promote their wellbeing.

There are legal frameworks in place that support the sharing of information in circumstances when professionals can, and should, share information in order to promote safety and wellbeing of a child or young person and the immediate safety of others.

Legal perspectives and requirements

Below are three frameworks underpinned by legislation that may enable and may require the sharing of information.

The Office of the Victorian Information Commissioner (OVIC) provides a useful summary of consent in relation to children and Information Sharing Entities (ISEs) based on section 144J(3)(a) of the *Family Violence Protection Act 2008*:

> [Information sharing entities] may share information without the consent of any person where the victim survivor is a child, and the information is relevant to assessing or managing the risk of family violence posed to the child victim survivor. In this instance, the sharing of information must be necessary for a family violence risk assessment or protection purpose concerning a child victim survivor. An ISE must comply with the Guidelines when sharing confidential information about a child, and practitioners should have regard for the agency of the child and other family members at

risk of family violence before sharing information, by ensuring their views are sought and taken into account.

Multi Agency Risk Assessment Framework

The MARAM Framework was established and commissioned under Part 11 of the *Family Violence Protection Act 2008* to increase the safety and wellbeing of Victorians by ensuring relevant services can effectively identify, assess and manage family violence risk. The legislation also has provision to ensure that authorised organisations which provide a funded service to family violence risk assessment and management, align their policies, procedures, practice guidance and tools to the Framework.

Family Violence Information Sharing Scheme

Established under Part 5A of the *Family Violence Protection Act 2008*, the Family Violence Information Sharing Scheme (FVISS) enables authorised organisations and services to share information to facilitate assessment and management of family violence risk to children and adults. The FVISS assists the service system to manage victim survivor safety and hold perpetrators in view and accountable for their actions.

Information sharing requests made under the FVISS must relate to one of the following purposes:

- a family violence assessment purpose
- a family violence protection purpose (to manage risk, including ongoing risk assessment).

Consent is not required from anyone to share information when a child or young person is at risk. However, the child/young person and/or any adult victim survivors should be consulted about the sharing of the information, where it is appropriate, safe and reasonable to do so. Where no children or young people are at risk, consent from the adult victim survivor is required to share their information, unless it is necessary to share that information to lessen or prevent a serious threat.

Under the FVISS, prescribed organisations/workforces can share perpetrator information without consent. If the person is an alleged perpetrator, information may still be shared with Risk Assessment Entities (RAEs) for a family violence risk assessment purpose to determine if they are a perpetrator. This includes information about adolescents who use violence in the home.

The Child Information Sharing Scheme

The Child Information Sharing Scheme (CISS), established under Part 6A of the *Child Wellbeing and Safety Act 2005*, enables prescribed (ISEs) to share information with each other to promote the broader wellbeing and/or safety of a child or a group of children or young people.

Sharing information using the CISS can help provide wraparound support services through integrated service provision to children facing disadvantage, promote early identification of needs and risks, support making prompt and effective interventions, and improve outcomes to children and families.

The CISS prioritises wellbeing and/or safety over privacy. Consent from a child is not required to share information if it is considered that the sharing of information would promote the wellbeing and/or safety of a child or young person. However, where it is safe, appropriate, and reasonable, a child or young person should be directly engaged with to obtain consent, if possible.

For the purposes of managing risk to a child's safety, the CISS permits sharing with an adult with parental/caring responsibility (who is not the perpetrator).

Information Sharing Entities

An ISE is a service or organisation prescribed under FVISS and/or CISS. Only services and organisations that are prescribed as ISEs can share information under FVISS and CISS.

An ISE sharing information with another ISE needs to verify the person they are sharing with is from the respective ISE. Under the FVISS, an ISE can also share perpetrator information with a victim survivor to assist them manage their risk.

Mandatory reporting

Mandatory reporting refers to the legal requirement of certain groups of people to report a reasonable belief of child physical or sexual abuse to child protection authorities.[6]

Section 182 of the *Child, Youth and Families Act 2005* (CYFA) refers to numerous professions and community organisations which perform the duties of a youth and child welfare worker, being mandatory reporters and responsible for raising concerns with protective intervenors, including Victoria Police and Child Protection.

Section 183 of the CYFA explains that any person who believes on reasonable grounds that a child or young person is at risk of significant harm and is in need of protection from harm, and that their parents have not protected them, or are unlikely to protect them, has a mandatory requirement to report. Some of the harm types relate to:

- physical injury
- sexual abuse
- emotional or intellectual development
- physical development or health
- abandonment or parental incapacity.

Mandatory reporters are required to report in relation to significant harm as a result of physical injury or sexual abuse. They may choose, as can anyone, to report in relation to other types of significant harm.[7]

Section 184 of the CYFA describes a mandatory reporter as a person who, in the course of practising their profession or carrying out their duties, forms the belief on reasonable grounds that a child is in need of protection. These professions include:

- registered medical practitioners
- nurses
- midwives
- registered teachers and early childhood teachers
- school principals
- school counsellors
- police officers

[6] Department of Health and Human Services, 2020, Mandatory reporting to child protection – Generic fact sheet Version 12, February, Victorian Government.
[7] Ibid.

- out of home care workers (excluding voluntary foster and kinship carers)
- early childhood workers
- youth justice workers
- registered psychologists
- people in religious ministry.

Section 189 of the CYFA outlines how those who make a report in good faith under the scheme are not breaching ethics or committing an act that constitutes unprofessional conduct. They are not liable as a result of the act nor are they contravening the *Health Services Act 1988* or the *Mental Health Act 2014*.[8]

Informing children and young people when sharing information

The following practice considerations are useful to keep in mind when practising with children and young people.

- When engaging with a child or young person, professionals need to be transparent about their reporting obligations. They should be intentional and careful in how they communicate their legal responsibilities and how they will uphold the child or young person's right to privacy and confidentiality. Wherever safe and possible to do so, professionals should obtain consent from the young person to undertake information sharing processes.
- Professionals need to take into account the child or young person's age and stage of development, as well as their emotional and cognitive capacity and trauma experience when engaging in conversations with the child or young person about reporting or sharing information.
- Professionals have a responsibility to make sure the child or young person understands their right to provide consent to share information, including who they are happy for the professional to talk to and what they are happy for them to discuss with other people.
- Professionals should regularly check to make sure the child or young person continues to understand the terms of the professional relationship and that their willingness to provide consent is current.
- There may be times when a child or young person does not want a professional to speak to their family members. It is the child or young person's right to have their privacy upheld.
- Professionals should take the time to ask the child or young person for consent before engaging family or significant others in assessment processes. This should include what information to be shared and with whom.
- When safe to do so, it is also important for children and young people to be informed prior to reporting safety and wellbeing concerns to child protection. Professionals should consider any prior conversations about informed consent and ensure the child understands the rationale of the report. This can also assist in assessing risk and providing safety for the child or young person.
- Professionals should also ensure that parents and carers understand the young person's right to confidentiality and privacy.

[8] Authorised Version No. 121 Children, Youth and Families Act 2005, No. 96 of 2005.

There may be some instances when a child or young person refuses consent for professionals to share information, however professionals are duty bound to share information regardless of their wishes such as when a child or young person:

- discloses that they have experienced or are exposed to physical abuse, harm or neglect
- is at immediate risk of physical or sexual abuse from their caregivers or are unable to be protected from harm by their parents or caregivers
- does not have access to necessary care and protection
- has engaged or is likely to engage in risk taking behaviour such as:
    - Self-harming that may cause injury or risk of significant injury or death
    - Alcohol abuse which places them at risk of harm or jeopardises their health
    - Not adhering to necessary medical precautions, treatments, and medications, placing their physical, mental, and emotional wellbeing at significant risk
    - Disclosing information that a sibling or family member may be in danger or at risk of significant harm.

Managing consent – some practical examples

Below are some examples of how consent might be managed in particular situations.

A child has provided informed consent and, during the course of engagement with the professional, discloses physical abuse by one of their parents, yet does not want the other parent to be made aware of the situation. In this case the child has not given consent for this information to be shared with their parent (who is not alleged to have been responsible for harm). Child Protection may become involved due to disclosure of physical abuse, so it is likely that the parent who is deemed not responsible for harm would be engaged to assist with reducing the risk of harm and in safety planning.

The information provided suggests the young person is at significant risk of harm without some form of intervention. It is therefore advisable that the professional tries to gain the young person's consent to speak with a support parent/caregiver to mitigate any further risk of harm to the young person and to put in place plans to promote their wellbeing. It would also be advisable to speak with the young person about any possible risks of harm or threat to their safety as a result of their parent/s becoming aware of the disclosure. If the professional assesses that there is not likely to be any negative implications of the parent becoming aware, and if the young person is still not consenting, then the professional should take further action to tell the young person's supportive parent. Every effort should be made to achieve safety for them and to reduce the risk of harm.

In summary

Consent needs to be considered on an individualised basis, recognising that all children and young people have their own unique experiences and circumstances. While there is limited legislation that provides assurances of whether it is safe or advisable to speak with children and young people, the *Child Wellbeing*

and Safety Act 2005 and the *Children, Youth and Families Act 2005* allow for direct consultation with children and young people to provide safety and to make sure their wellbeing needs are met.

Children and young people should be afforded the opportunity to make informed decisions and to be aware of how professionals will share the information without placing children's safety or wellbeing at risk.

There is no set age for obtaining consent from a child. Consideration to the child or young person's capacity is based on their level of maturity, cognitive ability and mental state, and stage of development, as opposed to their chronological age. If unsure, professionals should seek further clarification and guidance from their direct manager or senior colleagues.

References to legislation and frameworks

There are many pieces of legislation that underpin practice to guide policy and procedure to maintain the rights of vulnerable members of the community and to keep professionals accountable.

For full details of the legislation and frameworks described above, please see below for quick reference:

- Authorised Version No. 121 Children, Youth and Families Act 2005 No. 96 of 2005 Authorised Version incorporating amendments as at 21 October 2020, https://content.legislation.vic.gov.au/sites/default/files/2023-10/05-96aa136-authorised.pdf
- Authorised Version No. 041 Child Wellbeing and Safety Act 2005 No. 83 of 2005 Authorised Version incorporating amendments, https://content.legislation.vic.gov.au/sites/default/files/2023-08/05-83aa041-authorised.pdf
- Authorised Version No. 060, Family Violence Protection Act 2008, No. 52 of 2008, Version incorporating amendments as at 1 June 2022, https://content.legislation.vic.gov.au/sites/default/files/2023-05/08-52aa061-authorised.pdf
- Authorised Version No. 022 Mental Health Act 2014 No. 26 of 2014 Authorised Version incorporating amendments as at 1 March 2020, https://content.legislation.vic.gov.au/sites/default/files/2020-02/14-26aa022%20authorised.pdf
- The Child Information Sharing Scheme, https://www.vic.gov.au/child-information-sharing-scheme
- Family Violence Information Sharing Scheme, https://www.vic.gov.au/family-violence-information-sharing-scheme
- Multi Agency Risk Assessment Framework, https://www.vic.gov.au/family-violence-multi-agency-risk-assessment-and-management