Confidentiality and community risk management: Challenges and Opportunities for information sharing

Research report and recommendations

The views expressed in the publication are the views of the Centre for Research & Education on Violence against Women & Children and do not necessarily reflect those of the Province.

Funded by

September 2011

Introduction

In cases of violence against women where the risk of ongoing and future harm, including but not limited to lethal harm, the safety of women and their children can be significantly enhanced by a collaborative approach to risk management at the community level. Including representatives from health, social services and education sectors as partners in this process can help to ensure that vital information is included in assessing threats, managing risks and ensuring safety.

It is acknowledged that there are at times competing interests and mandates among the various professionals and organizations involved with the survivors or perpetrators of abusive relationships. These professionals need to work together in a respectful way to overcome these challenges in order to maintain their focus on the safety and well-being of women and their children.

The purpose of this research paper is to examine a critical issue that impedes collaboration: that of confidentiality. Inevitably, any discussion of this issue touches on the issue of what information can/should be shared and how.

Outlining the issue

Most community partners, in particular violence against women organizations, believe that for the threat assessment/risk management process to have integrity, community-based experts must be at the table. However, this raises challenges if a woman being supported by one of these agencies does not wish to engage in the process even though the "professionals" have deemed her to be at high risk.

This research paper examines past recommendations, legislation, case law, rules of professional conduct and practice for various professions, recent literature on the topic, challenges and current practices in Ontario communities. It then analyses that information and presents recommendations for possible next steps in addressing this issue.

The research is premised on a belief that appropriate information sharing among all those who work with both survivors and perpetrators of violence against women is beneficial in a number of ways. It can:

- help generate new insights and strategies for prevention and intervention;
- increase coherence and effectiveness of service delivery;
- provide assurances for both the victim/survivor and the perpetrator that their situations are understood and will be managed effectively, and
- maintain safety of vulnerable women and children[1]

---

[1] *Reducing the risk for lethal violence: collaboration in threat assessment and risk management.* Presentation by the Centre for Research and Education on Violence Against Women and Children to the Kenora Rainy River Domestic Violence Coordinating Committee District Forum, March 2011.

Past recommendations

The work of Ontario's Domestic Violence Death Review Committee, in reviewing all domestic violence related homicides in the province, has identified clearly the importance of threat assessment and risk management in preventing lethal violence.

One repeated theme across many of the Committee's reports has been the need for community-based and government agencies that work with victims/survivors and perpetrators of domestic violence to collaborate on threat assessment and to communicate effectively in developing risk management strategies for abusers and conducting safety planning with victim/survivors. One of the many references to this approach in the reports of the DVDRC is:

> An effective response to domestic violence requires not only well-intentioned individual interventions, but also coordination of services by different professionals involved with family members.[2]

The Domestic Violence Advisory Council also spoke about the importance of coordinated community responses in its 2009 report:

> An effective way to deal with domestic violence cases is through a highly coordinated response mechanism that ensures consistency and communication among the various service providers, including: police, VAW workers and health professionals. The result is a comprehensive, holistic community response to address the needs of both the men and the women.
>
> High-risk teams offer the opportunity to integrate the system's response to a man's probability of violent behaviour and the woman's safety. When police and community services work collaboratively, it allows them to address all aspects of the situation in an integrated manner. This integrated plan would include actions and programs to address the man's violent behaviour, supports and programs to assist the woman and ensure her safety, and family responses to address the situation, such as ensuring the safety of children and potentially involving extended family members and friends in the safety plan.[3]

---

[2] *Annual Report to the Chief Coroner of Ontario, 2005.* Domestic Violence Death Review Committee. p. 21

[3] *Transforming Our Communities: Report from the Domestic Violence Advisory Council.* May 2009. p. 85

The Research

i. Relevant legislation

The *Freedom of Information and Protection of Privacy Act (FIPPA), Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)* and *Police Services Act* all speak to various aspects of confidentiality as it relates to this issue.

Both FIPPA and MFIPPA use virtually identical language with respect to this, so for the sake of brevity, only the relevant sections of FIPPA are presented here:

Section 43(1) An institution shall not disclose personal information in its custody or under its control except, . . .

(b) where the person to whom the information relates has identified that information in particular and consented to its disclosure;
(c) for the purpose for which it was obtained or compiled or for a consistent purpose; . . .
(h) in compelling circumstances affecting the health or safety of an individual if upon disclosure notification thereof is mailed to the last known address of the individual to whom the information relates; . . .

Regulation 265/98 of the *Police Services Act* addresses the disclosure of personal information.

Section 2 permits the police to disclose personal information about anyone who has been convicted or found guilty of an offence under the *Criminal Code* or other federal or provincial Acts, if the chief of police or designate:

"reasonably believes that the individual poses a significant risk of harm to other persons or property; and . . . . that the disclosure will reduce that risk."

Regulation 4 permits a chief of police or his or her designate to disclose certain information to victims, who are defined to include anyone who has suffered emotional or physical harm, loss of or damage to property or economic harm as well as certain family members if the victim was killed.

The information that can be shared includes:

1. The progress of investigations that relate to the office.
2. The charges laid with respect to the offence and, if no charges, are laid, the reasons why no charges are laid.
3. The dates and places of all significant proceedings that relate to the prosecution.

4. The outcome of all significant proceedings, including any proceedings on appeal.
5. Any pretrial arrangements that are made that relate to a plea that may be entered by the accused at trial.
6. The interim release and, in the event of conviction, the sentencing of an accused.
7. Any disposition made under section 672.54 or 672.58 of the *Criminal Code* (Canada) in respect of an accused who is found unfit to stand trial or who is found not criminally responsible on account of mental disorder.
8. Any application for release or any impending release of the individual convicted of the offence, including release in accordance with a program of temporary absence, on parole or on an unescorted temporary absence pass.
9. Any escape from custody of the individual convicted of the offence . . . .

Section 5 of the Regulations allows the sharing of information about anyone who is under investigation or charged with a criminal offence if such disclosure is warranted for the protection of the public or the administration of justice. In these cases, information may be shared with other police forces, correctional or parole authorities in Canada and anyone engaged in the protection of the public[4], the administration of justice or the enforcement of or compliance with any federal or provincial Act, regulation or government program.

When information is shared pursuant to this section to an agency[5] that is not engaged in the protection of the public or the administration of justice, a memorandum of understanding is to be signed between the chief of police and the agency.

Section 6 of the Regulations stipulates the following:

"In deciding whether or not to disclose personal information under this Regulation, the chief of police or his or her designate shall consider the availability of resources and information, what is reasonable in the circumstances of the case, what is consistent with the law and the public interest and what is necessary to ensure that the resolution of criminal proceedings is not delayed."

ii. Case law

There is no Canadian case law directly on this point and very little dealing with the issue of confidentiality more generally.

[4] "the public" is not defined in the Regulation. For the purposes of this paper, we interpret thephrase to mean ordinary people in general.
[5] The Regulation does not specify whether it includes individuals in its understanding of "agency."

The most relevant case law, in both Canada and the United States, deals with the duty to warn or, as it is sometimes called, the duty to protect. These are cases in which a professional (usually a physician or a psychiatrist) has received information from a client or patient which is protected by a professional confidentiality obligation[6]. The information is such that the professional has reason to be concerned the client or patient may cause harm to someone else. Does the professional, in this circumstance, have a right or an obligation to breach his own client's confidentiality in order to warn or protect a possible victim?

Tarasoff v Regents of the University of California[7] is probably the best known case addressing this question. The court in this case ruled that psychologists have a duty to exercise reasonable care to protect the potential victims of their clients' violent behaviour. This case involved a psychologist who had treated a university student, Mr. Podder, who had become obsessed with another student, Ms Tarasoff. Mr. Podder shared with the psychologist his obsession and his fantasies about harming Ms Tarasoff. He told the psychologist that, in fact, he had a plan to kill her when she returned from vacation. When the psychologist told his client that he would have to take steps to prevent him from following through on his plans, Mr. Podder stopped coming to see him.

The psychologist notified the campus police that it was his professional opinion that Mr. Podder was dangerous and should be involuntarily committed. After the police conducted an interview with the student, they concluded he was rational and noted that he had promised to stay away from Ms Tarasoff.

At no time was Ms Tarasoff notified by the police or the psychologist of any potential danger posed by Mr. Podder. However, a few weeks after she returned from vacation, he murdered her.

In making its decision, the Court said:

> Where a therapist determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger. The discharge of this duty

[6] Health care and other professionals (eg clergy) are subject to professional codes of conduct that require them to keep identifying information about their clients/patients confidential. The precise details of the level of privacy that is required and the consequences to the professional of failing to meet the required standard vary from profession to profession and from jurisdiction to jurisdiction.

[7] *Tarasoff v Regents of the University of California,* (1976), 17 Cal. 3d 425, 551 P.2d 334.

> may require the therapist to take one or more of various steps, depending upon the nature of the case. Thus, it may call for him to warn the intended victim or others likely to apprise the victim of danger, to notify the police or to take whatever steps are necessary under the circumstances.[8]

There have been a number of other American cases dealing with similar issues, all of which generally uphold, refine, apply or expand on the decision in the *Tarasoff* case. None has made significant changes to the standard of care or duty to warn/protect as set out in this decision.

As noted above, there is a lack of case law in Canada on this point, with the result that the legal duty to warn/protect in this country is somewhat unclear. Nonetheless:

> Despite the dearth of Canadian case-law, it seems likely that, faced with a true Tarasoff issue, a Canadian court would endorse the general principles underlying the California Supreme Court decision. At some point, the need to protect the public from imminent danger becomes paramount, and at that point the doctor's duty of confidentiality ends and is replaced by a duty to warn the person or persons at risk.[9]

One Canadian case, *Smith v Jones*[10], explores this issue in the context of a sexual assault case. Mr. Jones was charged with aggravated sexual assault on a prostitute. In the course of preparing his defence, his lawyer referred him to a psychiatrist on the understanding that the consultation was protected by the lawyer/client privilege. In the course of his consultations with the psychiatrist, Mr. Jones revealed in considerable detail his plans to kidnap, rape and kill prostitutes.

The psychiatrist was concerned that the accused posed a risk to public safety based on the information he had so began an action for a declaration that he was entitled to disclose it.

The case eventually made its way to the Supreme Court of Canada, which ruled that even the privilege afforded the solicitor-client relationship, which in this case extended to the psychiatrist, was not absolute and was subject to limited exceptions, including the public safety exception. The Court set out the factors to be considered in determining whether public safety should outweigh solicitor-client privilege:

---

[8] *Ibid.*

[9] *Legal Liability of Doctors and Hospitals in Canada*. Justice Ellen L. Picard and Gerald B. Robinson. Carswell Publishing, 1996, p. 34

[10] *Smith v Jones,* [1999] 1 S.C.C. 455

1. Is there a clear risk to an identifiable person or group of persons?
2. Is there a risk of serious bodily harm or death?
3. Is the danger imminent?

iii. Relevant literature and rules of professional conduct

The issue of when confidentiality can be breached in the interests of public safety has been explored in the context of a number of professions in Canada. The literature generally takes the Supreme Court position in *Smith v Jones* as its starting point and examines the meaning and appropriate application of the three criteria set out in that decision.

Margaret Isabel Hall, Thompson Rivers University Faculty of Law, concludes in her 2003 article that the mere possibility of harm is not enough to warrant a breach of confidentiality[11]. She says that, generally, there needs to be a pre-existing relationship of control (between the person who knows of the risk and the person who creates the risk) combined with a high foreseeability of events and a foreseeable class of victims to create a legal duty to warn/protect.

However, she acknowledges that there may be cases where there does not have to be a relationship of control and refers to the case in which a woman sued the Toronto police for failing to warn women of a rapist in their neighbourhood[12]. Here, she says, even though the victim was not an identified individual and there was no special relationship of reliance because the perpetrator was at large and not under the control of the authorities, there was a sufficiently identifiable class of victims to warrant a warning.

In their book, *Ethics for the Practice of Psychology in Canada,*[13] Derek Truscott and Kenneth Crook state:

> The duty to protect generally exists where a client has been (or reasonably should have been) assessed to be a serious threat of physical violence to a reasonably identifiable victim or victims and the chain of causation that results in harm is clear.

---

[11] *Duty to protect, duty to control and the duty to warn.* Margaret Isabel Hall. The Canadian Bar Review Vol. 82, pp. 645 – 680.

[12] *Doe v Metropolitan Toronto (Municipality) Commissioners of Police*, 1998. Can LII 14826 (ON SC)

[13] *Ethics for the Practice of Psychology in Canada.* Derek Truscott and Kenneth Crook. University of Alberta Press, 2004

They suggest that the following information should be considered in determining whether someone may act on a threat to a third party:

- The person's history of violence, noting similarities with the current situation
- The person's relationship to the threatened person
- The person's opportunity to act on the threat (availability of weapons, access to the victim)
- Whether any factors provoked the threat and whether those factors are likely to continue
- The person's response to any intervention already taken or attempted.

According to the Ontario College of Social Workers and Social Service Workers, a social work professional does not need client consent to use personal health information to comply with a legal requirement or to manage risks.[14] More specifically, the College tells its membership that client consent is not needed if the professional:

> "believes on reasonable grounds that the information is needed to eliminate or reduce a significant risk of serious bodily harm to the client, another individual or a group of persons."[15]

The Canadian Medical Protective Association, basing its position on the Supreme Court of Canada decision in *Smith v Jones,* tells its members:

> "There are occasions when a physician's duty to society may outweigh the obligation of doctor-patient confidentiality, thereby justifying the voluntary disclosure of information about a patient to the appropriate authority."[16]

The Canadian Medical Association Journal considered this issue through an expert panel on the duty to inform. Among its recommendations were:

> There should be a duty to inform when a patient reveals that he or she intends to do serious harm to another person or persons and it is more likely than not that the threat will be carried out. . .
>
> Taking all the circumstances into account, physicians will want to consider very carefully whether they should report threats and will, if there is any doubt, err on the side of informing

---

[14] *Privacy Toolkit for Social Workers and Social Service Workers: Guide to the Personal Health Information Protection Act 2004.* Ontario College of Social Workers and Social Service Workers. 2005.

[15] *Ibid.* p. 30

[16] *A Medico-Legal Handbook for Physicians in Canada,* 5th edition. Kenneth G. Evans. The Canadian Medical Protective Association, 2002. p. 19

> the police because of the potential seriousness of the consequences in the event they decide not to inform.[17]

Rule 2 of the Law Society of Upper Canada Rules of Professional Conduct deals with lawyers' relationships with their clients. Subrule 2.03 addresses the issue of confidentiality and states, in part:

> (3) Where a lawyer believes upon reasonable grounds that there is an imminent risk to an identifiable person or group of death or serious bodily harm, including serious psychological harm that substantially interferes with health or well-being, the lawyer may disclose, pursuant to judicial order where practicable, confidential information where it is necessary to do so in order to prevent the death or harm, but shall not disclose more information than is required.

A Quebec guide to preventing the domestic homicide of women takes the position that information must be shared where not doing so could result in harm to a third party. In 1996, a woman and her son were killed by her ex-partner who had "clearly and repeatedly made his homicidal intentions known beforehand."[18] The Coroner investigating this murder/suicide made the following recommendation:

> In a situation of reasonable doubt as to whether a person's security or life is in danger, the social, medical, or legal professional possessing this information [should not hesitate] to breach professional confidentiality to contact other resources, in order to ensure the safety of the person in danger, knowing that the safety and protection of victimized women and children are the top priority in any intervention.[19]

Quebec legislation was changed as a direct result of this event, with Article 60.4 of Bill 180 on professional confidentiality now reading:

> The professional may, in addition, communicate information that is protected by professional secrecy in order to prevent an act of violence, including a suicide, where he has reasonable cause to believe that there is an imminent danger of death or serious bodily injury to a person or an identifiable group of persons.[20]

---

[17] *Defining the physician's duty to warn: Consensus Statement of Ontario's Medical Expert Panel on Duty to Inform.* Lorraine E. Ferris, Harvey Barkum, John Carlisle, Brian Hoffman, Cheryl Katz, Marvin Silverman. CMAJ. June 2, 1998; 158 (11) 1477.

[18] *Preventing Domestic Homicide of Women: An Intervention Guide.* Christine Drouin and Julie Drolet. Federation de ressources d'hebergement pour femmes volentees et en difficulte du Quebec. March 2004. p. 39.

[19] *Ibid.* p. 40

[20] *Ibid.* p. 40

Staff in shelters and transition homes for women who have left abusive relationships are generally not members of professional colleges or subject to rules of professional conduct. Through the use of policies and procedures that vary to some extent from organization to organization, all offer women high levels of privacy and confidentiality with respect to their personal information and files, subject to legal limitations (in particular, the duty to report suspected child abuse).

Challenges to collaboration

The Centre for Research &Education on Violence Against Women and Children has identified a number of challenges with respect to collaborative approaches to collaborative risk management in domestic violence cases.[21]

Women may be concerned that sharing information about their abuse will increase the risk of harm, reduce their level of control over their situation or lead to child protection involvement. Offenders may object to having negative personal information shared with others. Professionals may be concerned that sharing too much information about a client violates the client's right to privacy without contributing substantially to the risk management and/or safety plan.[22]

With respect to membership on domestic violence high risk management teams:

> Potential stakeholders in collaborative risk management processes do not always trust each other or fully understand or concur with the motives and philosophy of each other's organizations. Since organizations have different mandates and work primarily with different individuals within a family or an intimate relationship there are concerns that some representatives may try to prioritize their own or their client's perspective and, in the process, lose sight of the safety of the woman and her children. [23]

In addition, many communities have experienced a historic lack of collaboration between the justice sector representatives such as police and Crowns and the community representatives such as shelters.

The violence against women sector has also identified a number of challenges:[24]

- Lack of trust between the systems and individuals

---

[21] *Threat Assessment and Risk Management in Domestic Violence Cases: An overview of Ontario justice and community collaboration for 2010 and future directions.* Marcie Campbell. Centre for Research and Education on Violence Against Women and Children. 2010.

[22] *Ibid.* p. 5

[23] *Ibid.* p. 6

[24] Information in this section was gathered by this researcher, who sent the following questions to more than 100 women's shelters in Ontario in June 2010:

i. How can the violence against women sector become involved as equal partners in [high risk management teams] despite the concerns often expressed by those in the criminal system that to do so breaches their confidentiality obligations with respect to the accused?

ii. What key challenges might arise for women if the VAW sector becomes equal partners?

Shelters were told their responses would be used in an anonymous manner.

- Violence against women sector often feels there is a lack of professional respect towards it on the part of the justice sector
- Different focuses of the two sectors: "VAW seeks to keep a woman safe, empowered, at the centre of our work. Justice partners focus on arrests, convictions and legal outcomes. It's not to say individuals don't care, but the larger systemic goals take over the process."
- Lack of effective succession planning with the result that the work often stops or moves backwards when individual players change
- No common definitions of high risk and risk management
- Leadership of the teams, as the way the team approaches the work will depend on which sector holds this role
- Missed cases where there is no police/criminal system involvement but there are high risk factors that require a response
- Different opinions by the two sectors about the amount of information to be shared
- Lack of protocols for situations where a woman does not want to participate in a formal risk management model
- Mistrust in the VAW sector by women if they see it as too closely tied in with the formal criminal systems
- Because VAW services are not mandated, representatives from that sector will never be equal partners with justice sector representatives
- Power imbalance between the VAW and justice partners because justice partners are mandated and VAW sector is not
- Potential loss of an independent voice for the VAW sector

Despite the challenges, many in the violence against women sector are committed to finding ways to work collaboratively with non-VAW partners in order to enhance women's safety and increase the accountability of abusers.

As one Executive Director put it:

> I think that when all the critical partners are not talking then it is a disaster waiting to happen. We have no clue right now which of our clients are on the high risk roster. I don't see how this is remotely good practice.

Many of those who responded to the questions pointed out that shelter representatives to high risk teams bring expertise that might not otherwise be available.

In the words of one shelter director:

> My role would be to help the systems pick up on the overall complexities of his violence and abuse, both criminal and non-criminal ways of power and control; for example, using the family courts to get back at her, using CAS to create fear, etc. It would also be to try to reduce systems giving competing or conflicting messages/orders and to ensure that the shelter system would not miss women who have emergency needs.

Another pointed out that participation on high risk teams gives shelters the opportunity to assist others

> in understanding why the woman would make a choice not to participate. This is an excellent opportunity to help others better understand the psychology of abuse and to see that her decisions/choices may very well keep her safer than anything the criminal justice system can offer her. . . [Sometimes] our participation may not mean that we share any of the individual information that we know but rather participate as women advocates, in a teaching, supportive, mentoring role regarding the realities and consequences of abuse in the lives of victims.

A shelter director from northern Ontario pointed out that the value of collaborative community teams is important not just for case specific issues but also for:

> Framing and reframing discussions to include a gendered analysis as well as for the purpose of advocacy in a generalized way for system based issues: [challenging] long held assumptions, myths, misinformation.

What people are doing

As noted earlier in this report, the approach to membership on domestic violence high risk management teams varies from community to community.

In Nova Scotia, for example, high risk protocol groups include police, victim services, corrections, child welfare, transition houses and men's intervention programs as partners and use a community development model to develop their information sharing protocols.[25]

Most Ontario communities have been more cautious, although a few have established teams that include both justice and community partners.

One shelter director[26] noted that, while for a number of years the high risk team in her community had consisted of only justice sector partners, a new Crown Attorney has worked to invite others to the table, taking the position that, with respect to confidentiality and safety conflicts, it is better to err on the side of safety.

The Kawartha Lakes/Haliburton County Domestic Violence Committee offers women a "safety net" process, in which women who are at high risk select from a list of community partners (including police, CAS, VAW, probation and parole, social services and victim services) those she thinks can provide her with support to help keep her and her children safe. The DVC coordinator arranges for all those partners the woman has identified and the woman to meet together to discuss her safety concerns and what role the partners can play.[27]

In Hamilton[28], high risk cases are managed under the direction of a high-risk domestic violence operation team within the police force. This team has a mandate to assess, identify and classify cases as high risk. To do so, it relies on the expertise of its

---

[25] *Keeping Victims Safe in Halifax: A Coordinated Approach.* Verona Singer, Coordinator HRP Victim Services. Presented at "Moving Forward: Reducing the risk of lethal domestic violence through collaborative threat assessment and risk management" conference. Centre for Research & Education on Violence Against Women and Children, London, Ontario. October 2010.

[26] Comments from shelters in this section are taken from the responses to the questions noted in footnote 23 above, and so are provided without identifying information.

[27] For more information about this initiative, visit http://klhdvcc.ca/safetynet-process/

[28] This information is taken from *High-Risk Domestic Violence Initiative*, presented by Marco Visentini, Legal Counsel, at "Reducing the Risk of Lethal Violence: Collaboration in Threat Assessment and Risk Management from Theory to Practice" conference. Centre for Research & Education on Violence Against Women and Children, Hamilton, Ontario. February 2010.

members to conduct an analysis of the history and significant elements of a case. Cases may be identified internally or referred from the community.

The team works closely with a High Risk Advisory Team that includes as members representatives from probation and parole, women's shelters, sexual assault centres, corrections, children's aid agencies, mental health services, V/WAP, victim services and the police. There is also a community citizen representative on the advisory team.

This team addresses victim support and offender management in the same context and assesses needs on a case by case basis in its monthly meetings. All members of the High Risk Advisory Team sign a Memorandum of Understanding that sets out in detail the terms of information sharing, in particular the requirement that information be held in the strictest confidence.

Those involved in the Hamilton team have found this approach ensures that all services and agencies are on the same page and not working in silos and that communication with the victim/survivor are coordinated. It has led to better inter-agency understanding and working relationships.

Analysis
This research is intended to lead to recommendations about the participation of community members on domestic violence high-risk teams. The reason generally given against such participation is that it would violate privacy and confidentiality legislation and/or protocols and practices. It is therefore necessary to analyse this issue before making recommendations about committee membership.

Legislation, professional codes of conduct and case law all allow for exceptions to the general rule that personal information must be held in confidence. There is no absolute ban on breaching confidentiality.

i. Legislation

According to Ontario's privacy legislation, personal information may be shared if it is for a purpose consistent with the purpose for which it was collected.

In domestic violence cases, information collected by the police and Crown is for the purpose of law enforcement, which includes both offender management and victim assistance and safety. The purpose of domestic violence high risk management teams is to develop strategies to manage risk posed by the offender in order to enhance victim safety.

It seems clear that sharing that information with both justice and non-justice members of domestic violence high-risk management teams is for a consistent purpose and so meets this exception as set out on Ontario's privacy legislation.

According to the disclosure of information regulations of the *Police Services Act*, information can be shared where there is a significant risk of harm and disclosure of the information would reduce that risk.

Again, it seems clear that sharing information about a domestic violence offender with a team which has the purpose of managing the risk created by the offender would meet this requirement.

ii. Professional codes of conduct

The governing colleges of a number of professions – lawyers, physicians, psychologists and social workers – all permit client/patient confidentiality to be breached where the professional believes on reasonable grounds that the information is needed to eliminate or reduce a significant risk of serious bodily harm to the client/patient, another individual or a group of persons.

As noted above with respect to statutory regulation, it seems clear that high risk situations of domestic violence fall within this confidentiality exemption.

iii. <u>Case law</u>

The Supreme Court of Canada decision in *Smith v Jones* sets out three factors to be considered when determining whether or not a breach of confidentiality in sharing information is appropriate. These factors are extremely helpful in the context of high risk domestic violence cases.

1. Is there a clear risk to an identifiable person or group of persons?

By definition, the victim or potential victim is clearly identifiable. There is no uncertainty about the person who is at risk.

2. Is there a risk of serious bodily harm or death?

Information about the extent of the risk should have been gathered through the initial police investigation and/or through whatever threat assessment, including information collected from the victim/survivor, is conducted as part of the bail process.

3. Is the danger imminent?

It is well established that domestic violence often increases when the parties separate and/or when there is an outside intervention (such as police involvement).

The Domestic Violence Death Review Committee has noted in its reports that domestic violence related deaths are perhaps the most predictable and preventable of all homicides, with the vast majority having at least seven well-known risk markers.[29]

In addition, information about whether or not the danger is imminent in a specific case will have been gathered during the police investigation and the threat assessment conducted as part of the bail process.

iv. <u>Other approaches</u>

It may be helpful to apply the approach proposed by Derek Truscott and Kenneth Crook[30] to determine whether an abuser poses a sufficient threat to his partner/former partner to justify sharing what would otherwise be confidential information. They suggest gathering information in five areas.

---

[29] *Annual Report to the Chief Coroner.* Ontario Domestic Violence Death Review Committee. 2008.

[30] Truscott and Crook, <u>Ibid.</u>

1. *The person's history of violence, noting similarities with the current situation*: In domestic violence cases, there is often a strong similarity between the history of violence and the current situation. The abuser is likely to have a history of abuse with his present partner as well as with previous partners. Information about past abuse may be available through police records checks but also can be gathered by speaking with the victim/survivor to collect information about violence that has not been reported to the police.

2. *The person's relationship to the threatened person*: The closer the relationship, the more seriously the threat needs to be taken. In domestic violence cases, the relationship is very close: the threatened person is almost always the partner of the abuser or, in a smaller number of cases, children of the relationship or children of the partner from a previous relationship.

3. *The person's opportunity to act on the threat (availability of weapons, access to the victim)*: Because, in domestic violence cases, the abuser has ready access to the victim, the opportunity for him to act on the threat is significant. Even if a no-contact order (a family court restraining order, a peace bond, terms of release or probation relating to earlier charges, etc.) is in place, abusers often ignore these restrictions on their activities and continue to harass, intimidate and assault their partners.

4. *Whether any factors provoked the threat and whether those factors are likely to continue*: Reports of the Domestic Violence Death Review Committee have identified a number of high-risk factors in cases of domestic homicide and have noted that many of those factors are present in the vast majority of domestic homicides.

Those factors include:

- A history of domestic violence
- A recent or impending separation
- Depression present in the perpetrator
- Increase in level or severity of violence
- Unemployment or drug/alcohol issues for perpetrator
- Access to or possession of firearms
- Prior threats to kill victim or commit suicide[31]

---

[31] *Annual Report to the Chief Coroner.* Ontario Domestic Violence Death Review Committee. 2007. p. 10

5. *The person's response to any intervention already taken or attempted*: This information should be readily available in domestic violence cases through a review of any breaches of restraining orders or bail conditions as well as of any criminal and family court interventions, including child protection interventions.

A thorough examination of these five areas should provide sufficient information to determine whether risk of ongoing harm is great enough to require a collaborative case management approach (ie; the use of a domestic violence high risk management team) and justifies the sharing of otherwise confidential information. It should also be part of any threat assessment that would be conducted in the process of determining whether or not a particular case meets the high risk mark for referral to a domestic violence high risk team.

Guidelines for health, social service, education and violence against women sectors

1. **Professionals from health, social service, education and violence against women sectors establish cross-sectoral teams with a mandate to develop best practices for the operation of domestic violence high risk management teams, including:**

- Ensuring that the woman's interests are at the centre of the risk management process
- A common understanding of consent[32]
- Standard informed consent forms to be used with perpetrators and victims/survivors
- What information is to be shared, how and with whom
- Protocols for protecting the particular privacy concerns of victims, in particular with respect with the Crown's legal duty to provide disclosure to the defense. As one shelter director commented, there needs to be a protocol that acknowledges:

  > a woman's right to refuse and what actions we could take in lieu of her participation, such as ensuring that a comprehensive safety plan is in place and that the people who might be aware of any danger to her would be obligated to inform her but that there is no reciprocity on her part.

- Identification and management of cases involving high risk where there has been no police involvement
- Consideration about possible unanticipated negative consequences

2. **All professionals from health, social service, education and violence against women sectors participating on domestic violence high risk management teams sign a standard memorandum of understanding similar to the one developed for the Hamilton team[33].**

3. **Professionals from health, social service, education and violence against women sectors should develop a protocol to permit any professional evaluating a high risk case to contact the local police service's case manager or domestic violence coordinator to establish a case conference**

[32] One of the issues to be considered by this team with respect to consent is the advisability of having survivors and perpetrators sign a consent at the beginning of any process acknowledging that working with agency A means working collaboratively with other agencies in the interests of promoting safety

[33] A sample memorandum is attached to this report as Appendix A.

to ensure appropriate tracking and response to the case.

Final thoughts

In cases of violence against women where the risk of ongoing and future harm, including but not limited to lethal harm, the safety of women and their children will be significantly enhanced by a collaborative approach to risk management at the community level. As discussed above, this does not violate any legislation, professional obligations or legal precedents that address privacy or confidentiality.

Information can and should be shared among all the professionals who are involved. This means ensuring that the perspective and expertise of the violence against women sector is included, whether or not a specific case under discussion involves a woman using those services.

It is acknowledged that there are at times competing interests and mandates among the sectors. High risk management teams need to work together in a respectful way to overcome these challenges in order to maintain their focus on the safety and well-being of women and their children.