INTEGRATED PRACTICE TOOLKIT

A GUIDE TO HELP UNDERSTAND PRIVILEGE AND MANDATORY REPORTING IN INTEGRATED PRACTICES

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BACKGROUND

Integrated models of legal and non-legal services are increasingly being used to address the needs of clients of community legal centres (**CLCs**). Models of integrated service are an innovative response to evidence that legal issues rarely exist in a vacuum and often result in, or arise from, a mixture of problems related to health, housing, finances, mental health, employment, education and family. 'Integration' can take different forms including co-location, multi-disciplinary teams or partnerships with other community services.

Models of integrated service include, but are not limited to:

1. a CLC that also employs one or more social workers;
2. CLCs that are based within a health or other non-legal setting; or
3. social service organisations that employ a lawyer within their service.

The level of integration varies. For example, in some instances social workers may attend initial appointments with the client and the lawyer. File management processes also differ between organisations.

Two issues that are commonly raised when contemplating if and how to integrate services are legal professional privilege and mandatory reporting obligations.

These issues can be particularly important in integrated practices, including when establishing and implementing policies and protocols for:

- communicating with clients about different roles and obligations within integrated practices;
- meetings and correspondence with clients;
- file management practices;
- making decisions about when a non-legal expert within an integrated practice might report child abuse or neglect; and
- responding to requests for information or subpoenas, including in relation to family law, family violence, child protection or criminal proceedings.

The Integrated Legal and Social Support Network[1], a working group of the Federation of Community Legal Centres, has developed this Integrated Practice Toolkit (**Toolkit**) as a framework for understanding and minimising risks related to legal professional privilege and mandatory reporting in the context of integrated service models. The Toolkit is a practical, practice-based guide that supports legal and non-legal staff to understand and navigate these frameworks:

- Part 1 provides information on the application of legal professional privilege when delivering integrated services.
- Part 2 provides information on mandatory reporting and other reporting obligations in Victoria, as they apply to social workers and legal practitioners.

The Toolkit focusses particularly on social workers, however integrated models can include a variety of community and health professionals to whom privilege and mandatory reporting considerations apply. Due to the diversity of professionals working within these practices, the language of non-legal expert or non-legal staff is used throughout this document to describe all professionals, aside from lawyers, who may work in integrated practices. This guide is not intended to cover all aspects of any one particular integrated service model, and individual CLCs will still need to obtain their own independent legal advice in relation to the integrated service models they intend to operate.

Importantly, if, for example, a CLC is subpoenaed in legal proceedings (e.g. family law or child protection) regarding a client or former client, the advice and representation of an experienced lawyer or pro bono counsel should be sought, including in relation to whether a claim of legal professional privilege can be made (see part 1.4). Ultimately, it will be up to the Court to decide whether legal professional privilege applies.

Furthermore, in response to the findings of Victoria's Royal Commission into Family Violence, a family violence information sharing scheme has been created by Part 5A of the *Family Violence Protection Act 2008* (Vic). The scheme began on 26 February 2018, and it authorises a select group of prescribed information sharing entities (**ISEs**) to share information between themselves for family violence risk assessment and risk management. CLCs are not ISEs and are not covered by the scheme (CLCs that are auspiced by an ISE should seek separate advice). Social workers who are funded to deliver specialist family violence services under a State contract (e.g. by the Department of Health and Human

[1] A network of social workers and lawyers working in integrated practice models in community legal centers in Victoria

Services (**DHHS**) and in some cases the Department of Justice and Regulation (**DOJR**)) are subject to the information sharing scheme. This does not affect legal professional privilege or the mandatory reporting obligations discussed in this guide, but it does create an additional regime for information sharing that CLCs need to be aware of.[2]

[2] Detailed information about this regime is available at: State Government of Victoria, *Information Sharing and Risk Management* (https://www.vic.gov.au/familyviolence/family-safety-victoria/information-sharing-and-risk-management.html).

PART 1: LEGAL PROFESSIONAL PRIVILEGE

1. What is legal professional privilege?

Confidential communications between a lawyer and their client for the purpose of providing legal advice or preparing for anticipated litigation are protected by legal professional privilege (sometimes also referred to as client legal privilege). Among other things, legal professional privilege operates as an exception to the otherwise compulsory disclosure of documents in legal proceedings. For example, if subpoenaed material is produced to the Court and the Court accepts a claim of privilege, that material will not be disclosed to the party that issued the subpoena.

For the purpose of legal professional privilege, communications with paralegals or other non-legal staff employed by a legal practice, are covered to the extent that these professionals are acting in the course of a lawyer-client relationship.

The purpose of legal professional privilege is to ensure that a client can give full and frank information to their lawyer for the purpose of enabling an effective lawyer-client relationship, without fear that this information might be used against the client in the future. It must always be kept in mind that legal professional privilege only applies to communications that are fairly referable to that lawyer-client relationship.

There are two distinct limbs of legal professional privilege:

1. advice privilege; and
2. litigation privilege.

It is important to note that legal professional privilege is a complex area of law. This Toolkit is aimed at providing general commentary on the application of legal professional privilege; it is not a comprehensive summary of the law in this area and should not be relied on as a guarantee that a claim of privilege will be successful in Court. It is recommended that you seek legal advice in relation to the particular circumstances you face.

Advice privilege

Advice privilege covers communications between a client and their lawyer that are confidential and made for the dominant purpose of giving or receiving legal advice.

It may not cover communications between a lawyer and some third parties, for instance a lawyer's communications with a case worker. Advice privilege will depend on the particular facts of each case, the dominant purpose of the communication, and particularly, the nature of the function performed by the third party.

EXAMPLES WHERE PRIVILEGE MAY BE ARGUABLE:

- A client asks a lawyer for advice on credit and debt negotiations (where there are no court proceedings initiated or threatened).
- A lawyer gives a client advice on a tenancy matter relating to rent or repairs (where there has not been a Notice to Vacate issued).

Litigation privilege

Litigation privilege is a broader form of legal professional privilege that arises where litigation is reasonably anticipated or already on foot. It covers communications between:

- a lawyer and a client;
- the client's lawyer and third parties; and
- the client and third parties,

that are confidential and where the dominant purpose of the communication is to prepare for litigation or anticipated litigation.

EXAMPLES WHERE PRIVILEGE MAY BE ARGUABLE:

- A lawyer gives a client advice on a tenancy matter at VCAT, for instance where a Notice to Vacate has been issued.

- A lawyer contacts a doctor for a letter of support in an infringements application.
- A client contacts their social worker and asks them to prepare a document for their lawyer to be used for an upcoming Court matter.

Identifying privilege: the "dominant purpose" test

Legal professional privilege only attaches to confidential communications that are made "for the dominant purpose" of providing legal advice or preparing for actual or anticipated litigation.

The dominant purpose has been described as the "ruling, prevailing or most influential" purpose of the communication.

If the communication is made for the purpose of legal advice or preparing for litigation and also for other non-legal purposes, and all these purposes are of equal weight, then the communication will not be privileged.

The following is a guide only and should not be understood to be conclusive in any particular case. Whether or not legal professional privilege is arguable in relation to a communication depends on all of the circumstances of a particular case, and not on general categories.

Privilege MAY be arguable	Unlikely to be privileged
Instructions taken by a lawyer from a client for the purpose of providing legal advice, or in relation to an upcoming matter in a tribunal or court.	Discussions with a case worker to locate a client.
Advice provided by a lawyer to a client on a legal matter.	Communications that are not confidential: (i) communications with "the other side"; or (ii) communications with a public body (e.g. Victoria Police, DHHS).
Discussions between a client and a paralegal or an employee of the legal practice who is subject to confidentiality obligations, provided that the communication is for one of the dominant purposes.	Discussions between a lawyer and a client's relative (except, for example, where for the purpose of obtaining instructions).
A draft letter of support from a doctor obtained by a lawyer to support a client's infringement application (until it is used in Court).	Discussions about a client's general well-being (e.g. suicidality, health) (unless that question is relevant to any legal case, or for the purpose of giving or receiving instructions to provide legal advice).
Discussions between a lawyer and a third party (e.g. a caseworker or a psychologist) to establish whether a client has capacity to give instructions in relation to an upcoming hearing.	Submissions to a tribunal or court (although draft submissions remain privileged).

Waiving privilege

Once privilege has been established, it will remain unless it is waived. Waiver can be express or implied and may occur if the privileged communication is re-communicated to a third party.[3]

Waiver will **not** occur if the information is re-communicated to a third party in a manner that is not inconsistent with the privilege being maintained, that is:

1. the re-communication is for a **specific** and **limited purpose**; and
2. the **confidential nature** of the material being re-communicated is maintained (i.e. the third party keeps the information confidential).

It is important that both of these elements are maintained in order to avoid waiver.

Whether privilege will be waived in a particular situation is a complex question. Re-communication of privileged communications should therefore be avoided where possible.

2. Privilege and mandatory reporting

Privilege is an exception to mandatory reporting obligations in relation to child sexual offences (section 7(b) of the *Crimes Act 1958* (Vic)). See Part 2 of this Toolkit for further information on mandatory reporting obligations.

3. Privilege in practice

This section considers some typical examples of where CLCs are likely to encounter issues in relation to privilege.

The column 'is privilege likely to be arguable?' is a guide only. In practice, the Court will ultimately make the decision as to whether a communication is privileged.

[3] Although not a privilege per se, practitioners should also be mindful of the potential risk of relinquishing the confidential communications protection under the *Evidence (Miscellaneous Provisions) Act 1958* (Vic) where a social worker/counsellor is providing counselling to a client who discloses, within the context of that relationship, that he or she has been sexually assaulted (*Evidence (Miscellaneous Provisions) Act 1958* (Vic) ss32B & C). The provision protects oral and written communications made in confidence, by a person who alleges she or he has been sexually assaulted to a counsellor, from being used as evidence in court proceedings. If the counsellor has given the lawyer access to the contents of the counselling notes to assist with preparation of legal documents, this can potentially relinquish the protection of the provision. However, there may be a separate basis for legal professional privilege attaching to the document in any event. The situations where this issue may arise include criminal or civil proceedings, and family law or child protection proceedings, where allegations of sexual assault are in issue.

Triage

EXAMPLE	IS PRIVILEGE LIKELY TO BE ARGUABLE?
A paralegal's written summary of a client's legal issues, prepared to pass on to the responsible lawyer.	• **Yes.** • Communications between a client and employees of a legal practice (other than lawyers) who are bound by confidentiality obligations may attract privilege, provided the communication is prepared for a relevant dominant purpose. • Privilege will attach to the summary to the extent that it records communications for a relevant dominant purpose, regardless of whether the paralegal maintains a separate file or uses the main legal file.

Ahead of a client meeting, a social worker receives a copy of the summary prepared by the paralegal (subject to privilege).	• **Possibly.**
	• Privilege may be arguable if:
	  • the paralegal's summary was prepared in a confidential manner for the specific and limited purpose of taking instructions for use in the lawyer-client relationship;
	  • the summary is provided to a social worker in a confidential manner for the same specific and limited purpose; and
	  • the summary is not otherwise used in any manner inconsistent with this purpose.
	• Special care (including training and clear procedures) should be taken to avoid an inadvertent waiver of privilege, and the summary should not be treated as a general reference that is available to service providers acting for the client.

Practical Tips

- Record paralegal notes in the main legal file. This will make it easier to assert legal professional privilege.
- To minimise the impact on the client if privilege over paralegal notes is later challenged, be cautious about what is included in the initial summary and avoid recording any impressions, judgements or advice (e.g. possible weaknesses in the client's case).

Client meetings

EXAMPLE	IS PRIVILEGE LIKELY TO BE ARGUABLE?
Communications between a client and a lawyer in a meeting, where a social worker is present.	• **Yes.** • Communications between a client and a lawyer can attract privilege, regardless of whether a non-lawyer is present at the meeting, provided the communication is made for a relevant dominant purpose (i.e. legal advice or anticipated litigation) and the non-lawyer is subject to an appropriate confidentiality obligation
Notes of the meeting taken by the social worker as an “aide memoire”.	• **Possibly.** • To the extent that the notes record communications between the client and lawyer for the dominant purpose of legal advice or preparing for anticipated litigation, then privilege may be arguable. • Notes made for the social worker’s own purposes will not be privileged (e.g. a summary of the client’s mental health situation to be used to make a mental health service referral).
A client attends an appointment with a lawyer seeking advice on family violence. During the meeting, the lawyer recognises the client is distressed and invites the social worker into the appointment to assist with the assessment of non-legal support needs.	• **Depends on the individual circumstances.** • The dominant purpose of the meeting will need to be for providing legal advice or in relation to anticipated litigation. If the meeting is predominantly for providing legal advice or preparing for anticipated litigation, then notes and other documents arising from the meeting will be privileged. • If, however, the meeting predominantly becomes an assessment for non-legal support, there is a risk that any notes or other documents created during this meeting will not be privileged. • Consider separating the meetings and making the client aware of the difference between the two meetings, particularly if the client is going to disclose something the social worker may be obliged to report if not protected by privilege.

Practical Tips

- While joint meetings between lawyers, clients and social workers are often a key aspect of integration – to avoid a 'mixed purpose' it is useful to structure these meetings so that the legal matters are the focus, with non-legal needs being addressed in a separate part of the meeting, e.g. call a coffee break before a detailed discussion of non-legal matters.
- At the beginning of the meeting (or part of) clarify that the primary purpose of the meeting is to provide legal assistance to the client, and ensure that the flow of information and nature of the meeting reflect this.
- All notes, by lawyers or non-lawyers, should be marked as "Legally Privileged and Confidential".
- If a meeting covers both legal and non-legal matters, ensure any notes clearly distinguish between the legal and non-legal parts of the meeting (e.g. by taking notes relating to social assistance on a fresh page).
- Where a lawyer and social worker are both interviewing a client in the same room as part of an integrated model, and the lawyer suspects the client is going to begin discussing matters that a social worker might be legally or ethically bound to report (see Part 2 of this Toolkit), the social worker should leave the room temporarily. If there is nothing reportable, the social worker can be invited to return, and the matters discussed can be summarised for the benefit of the social worker. If there is something reportable, the lawyer should explain to the client the consequences of mentioning that matter to the social worker (i.e. reporting) and ask the client whether they want it reported. The lawyer should explain that the lawyer will not report it (or disclose it to anyone else, without permission) but the social worker would be obliged to report it if he or she knows of it.
- Be aware of situations where the dominant purpose of a meeting shifts from providing legal advice to other purposes, such as providing social support. Once the meeting moves into assessment of non-legal needs, the communications are not privileged even if they involve some elements which remain legal in character. What this means in practice is that, if subpoenaed, the notes of these conversations would become known to the other party in legal proceedings (e.g. family law or child protection).

Communications with third parties (including team social workers)

EXAMPLE	IS PRIVILEGE LIKELY TO BE ARGUABLE?
A lawyer, in preparation for an upcoming hearing writes an email to a support worker, the purpose of which is requesting a letter of support. In that letter, the lawyer also organises transport to court.	• **Yes.** • The 'litigation privilege' limb of legal professional privilege extends to confidential communications between a lawyer and a third party, such as a social worker, so long as the communications are for the dominant purpose of preparing for actual or anticipated litigation.
Re-communications of legal advice to a third party e.g. a lawyer who advised their client that a possession order will likely be granted at a VCAT hearing recommunicates this advice (with consent) to a social worker to allow them to assist the client to find new housing.	• **Possibly.** • Special care must be taken when re-communicating privileged information to ensure privilege is not waived. If the recommunication is made in a confidential manner, for the specific and limited purpose of supporting the client to find new housing, it is unlikely that privilege will be waived.
A social worker is helping a client with emotional support in connection with a Court process. That social worker then also assists the client with other services, for example, connects the client with housing and financial counselling. The social worker re-communicates advice given by the client's lawyer to other workers to give them an indication of the merit of the client's case and likelihood of success with the aim of facilitating a coordinated response.	• **Possibly, but special care is required.** • If the re-communication is made in a limited way which maintains confidentiality in the re-communication of the lawyer's advice, and the purpose is to facilitate a coordinated response, privilege may be maintained. It will need to be made clear that each of these workers has an obligation of confidentiality and that the information has been communicated or re-communicated for the specific and limited purpose of supporting the client to access to appropriate services. • However, any deviation from these processes may lead to a waiver of privilege.

Practical Tips

- Be cautious about disclosing privileged information to third parties, particularly where no litigation is on foot or reasonably anticipated. Consider whether it is necessary to disclose the privileged information, and only proceed if you consider it reasonably necessary in order to advance the client's interests in some definable way.
- Where disclosure is required, explain to the third party that you are going to disclose privileged information and request the third party to keep the advice confidential, and only to use the advice for the limited and specific purpose that you have identified for disclosing the advice.
- Request that all participants, including lawyers, non-lawyers or third parties mark any notes or emails "Legally Privileged and Confidential" and explain that this will make it easier for the notes to be identified as privileged in the event that the third party's files are ever subpoenaed. Mark your own notes accordingly.
- Consider including the following disclaimer (or similar) in privileged email communications:

  "The content of this email is privileged and confidential and should not be disclosed to the court. It is only to be used for the limited and specific purposes set out in this email. In the event that your files are subpoenaed please contact [insert CLC] immediately. The content of this email should not be disclosed to the court as it is subject to a claim for legal professional privilege".

Open File: Ongoing Legal Support

EXAMPLE	IS PRIVILEGE LIKELY TO BE ARGUABLE?
A lawyer and social worker discuss a client's general mental health.	• **Possibly.** • It all depends on the purpose of the communication. If the lawyer needs to know, or wants to know, the client's mental health status in connection with providing legal services, and that is the dominant purpose of that communication, privilege may attach. However, communications that are unrelated to a legal matter or only indirectly related to a legal matter will not be for the dominant purpose of providing legal advice or preparing for actual or anticipated litigation, and are therefore not privileged.
A lawyer cannot reach their client and a social worker suggests that they could pass on legal advice to the client on the lawyer's behalf.	• **Usually not.** • It will usually be necessary for a lawyer to give advice directly to their client in order to maintain privilege. There may be special circumstances where an agent could be used, but it is strongly recommended not to consider this approach unless there is some real emergency. In that situation, the lawyer may authorise the social worker to re-communicate the advice verbatim (word for word), on condition of strict confidentiality. • Slightly different considerations may apply in relation to litigation privilege, but it is recommended that specific advice be sought in those situations.

Practical Tips

- If you cannot reach your client by phone and they cannot receive mail, and a social worker suggests dropping a document to them in person, write the legal advice and place it in a sealed envelope marked "Legally Privileged and Confidential" with a direction that the letter is only to be opened by the client.

Written Documents

EXAMPLE	IS PRIVILEGE LIKELY TO BE ARGUABLE?
Documents marked "Legally Privileged and Confidential"	• **Depends on what the document contains.** • Privilege does not automatically attach to a document marked "Legally Privileged and Confidential". The document will only be privileged if the legal professional privilege criteria are met, including the dominant purpose test.

Practical Tips

While it is not definitive evidence that a document is privileged, it is good practice to mark privileged documents as "Legally Privileged and Confidential". This puts the recipient on notice that the document is intended to attract privilege and should be treated in a manner that does not waive privilege.

4. Privilege and responding to a subpoena

In the event that a social worker's or lawyer's file is subpoenaed, the CLC lawyer will need to thoroughly vet the file in order to determine whether a claim of legal professional privilege might be made in relation to any of the contents. The documents should be carefully reviewed to make sure no privileged documents are disclosed (which may waive privilege).

If only part of a document is privileged, it may be possible to redact the privileged sections of the document prior to production.

It is permissible to waive privilege and elect to produce privileged documents when responding to a subpoena. However it is the client's exclusive right (and not the lawyer's) to decide whether privilege is to be waived. Unless the client has clearly and unequivocally consented to the waiver of privilege, documents over which the client claims privilege should be placed in a separate, sealed envelope clearly marked "**Subject to Legal Professional Privilege**" and provided to the Court, to allow the Court to determine the privilege claim (if and when required).

STEP BY STEP GUIDE ON RESPONDING TO SUBPOENA REQUESTS

- Access the client file.
- The principal lawyer should review the file to identify (1) whether there are any grounds for objecting to the subpoena; and, if not, (2) any documents which fall within the scope of the subpoena to produce documents; and (3) of those responsive documents, any privileged documents.
- Contact the client by phone regarding the subpoena.
- If any of the responsive documents are subject to a claim for legal professional privilege, discuss with the client whether privilege is to be maintained or waived (keeping an accurate file note of this). If there is uncertainty about whether a claim of privilege can be made, consider seeking pro bono assistance from a barrister.
- If the client does not waive privilege in relation to the responsive documents subject to legal professional privilege, they should be placed in a separate sealed envelope clearly marked "Subject to Legal Professional Privilege" and provided to the Court. Schedules of documents will need to be produced identifying any documents over which privilege is claimed with sufficient particularity to enable the Court to discern each document from the others (but not so as to waive legal professional privilege).
- Make a copy of all the responsive documents provided to the Court (including privileged and non-privileged documents) and add the copies to the client's file so there is a record of what documents have been provided.
- Send a follow up letter to the client confirming your instructions and the responsive documents provided to the Court (including those over which privilege was maintained).

5. Case studies – identifying and protecting privilege

The column 'is privilege likely to be arguable?' is a guide only. In practice, the Court will ultimately make the decision as to whether a communication is privileged.

EXAMPLE 1	IS PRIVILEGE LIKELY TO BE ARGUABLE?
Jane's landlord has obtained a possession order against her. Jane has come to Sarah, a social worker, for assistance. Sarah helps Jane file her application to have the order set aside and Jane tells her a little bit about what is going on.	**NO** There is no lawyer-client relationship.
The next day Jane meets with her lawyers, Emily and John, to give them instructions about the re-hearing of the possession order. Sarah the social worker comes to the meeting to give Jane support. Sarah confirms to Emily and John that she will keep the matters discussed confidential. At that meeting, Emily and John tell Jane that they are worried about her prospects of success at VCAT and that they think there is a chance she might be evicted.	**YES** Jane's instructions, and Emily and John's advice about the prospects of success at VCAT, are privileged. They are confidential communications between a client and their lawyers for the 'dominant purpose' of the client obtaining legal advice in relation to an upcoming hearing. As Sarah has agreed to keep the meeting confidential, the fact that Sarah is present at the meeting is unlikely to waive privilege in the advice.
With Jane's consent, Sarah contacts Robert, who works for a housing provider. She tells him Jane has been advised by her lawyers that she will likely be evicted next week. Sarah asks Robert to provide Jane with emergency accommodation. Sarah makes it clear that this information is privileged and confidential and that Robert should only use the information to help Jane find emergency accommodation.	**LIKELY YES** Sarah is re-communicating privileged information. Sarah has been careful not to waive the privilege by: • requiring Robert to only use the information for a specific purpose (to help find Jane housing); and • noting the confidential nature of the information. Where possible, Sarah should communicate more generally with Robert, for example, "Jane is likely to need emergency accommodation", which would not waive privilege in earlier lawyer-client based communications.
The matter escalates. At a hearing, Sarah, the social worker, is questioned about the discussion between Jane, Emily and John.	**LIKELY YES** Sarah should claim privilege from answering the question on behalf of the privilege holder, Jane. She should state that she was party to the conversation as a third party in the context of litigation privilege, and that the discussion was between the client and her lawyers for the dominant purpose of facilitating legal advice.[4]

[4] There is unlikely to be any risk of a contempt of Court, unless the Court orders that the question be answered despite the objection. In that circumstance, the representative for Jane should request an adjournment and request a separate ruling on the privilege claim. Sarah should then comply with that ruling. If she complies with that ruling, she does not risk any contempt of Court.

EXAMPLE 2	IS PRIVILEGE LIKELY TO BE ARGUABLE?
Sam is receiving support from a social worker, Jo, while recovering from a workplace injury. During some of these appointments, Jo observes that some of Sam's injuries indicate the existence of physical family violence. Jo asks Sam if a lawyer can attend their next appointment. During that appointment, Sam discloses to Jo and the lawyer that some of the injuries were received in circumstances of family violence. The lawyer advises that Sam should take out a Family Violence Intervention Order (**FVIO**). Some months later, Jo's notes that were taken during the meeting between the lawyer and Sam are subpoenaed for the purposes of the workplace injury claim.	**LIKELY YES** The notes taken during the consultation between the social worker, lawyer and client will be covered by legal professional privilege provided that the dominant purpose of the meeting was for the provision of legal advice. Any other notes where Jo has made a record of Sam's family violence that are not connected to the provision of legal advice are unlikely to be privileged (for example, if Jo took notes at another appointment regarding the family violence where a lawyer did not attend). If Jo's role is funded to deliver specialist family violence services under a State contract (e.g. by DHHS and in some cases DOJR), then she may be required to share information that is not subject to a claim of privilege for family violence risk assessment and risk management in accordance with Part 5A of the *Family Violence Protection Act 2008* (Vic).[5]

In brief

1. **During a client meeting where both a lawyer and social worker are present, remain mindful of the dominant purpose requirement and clearly separate the time dedicated to legal advice from the time dedicated to social worker advice. Keep all notes separate and clearly identified.**
2. **Keep the legal files separate from the social worker files.**
3. **Be cautious when re-communicating client related information to third parties.**
4. **The following documents should be marked as "Legally Privileged and Confidential":**
   - File notes taken by a social worker during a legal meeting.
   - Documents sent between a lawyer and a client or a lawyer and a social worker relating to legal issues.
   - Documents or communications between a lawyer and third parties relating to legal advice or legal proceedings.

[5] Detailed information about the family violence information sharing scheme under Part 5A of the *Family Violence Protection Act 2008* (Vic) is available at: State Government of Victoria, *Information Sharing and Risk Management* (https://www.vic.gov.au/familyviolence/family-safety-victoria/information-sharing-and-risk-management.html).

PART 2: MANDATORY REPORTING, VOLUNTARY REPORTING AND FAILURE TO REPORT

In brief

1. **Legal requirement to report concerns of abuse and neglect?**
   - **Lawyers – No**. There are no general obligations on lawyers to report, however lawyers in the Family Court system may be captured by reporting obligations (e.g. where independently representing children's interests).
   - **Social workers – No.** However, any person may report concerns that a child is in need of protection (as defined under the *Children, Youth and Families Act 2005* (Vic)) to the Department of Health and Human Services Child Protection (**DHHS**) and the ethical and professional obligations of lawyers and social workers may differ in this area.
2. **Legal requirement to report suspected child sexual offences?**
   - **Lawyers – No, unless the information is not privileged**. In general, information communicated to lawyers for the purpose of receiving legal advice or in respect of pending litigation is subject to a claim of privilege, which is a reasonable excuse for not reporting suspected child abuse. Refer to Part 1 of this Toolkit for further information.
   - **Social workers – Yes, unless the information is privileged**. All adults who hold a reasonable belief that a sexual offence has been committed by an adult against a child in Victoria must report that belief to police, unless they have a reasonable excuse for not reporting or are otherwise exempt (e.g. privileged information). In most cases information communicated to social workers may attract obligations of confidence, but not privilege, and therefore must be reported.

1. Overview of legislation in Victoria

Mandatory reporting obligations require selected classes of persons, in all states and territories of Australia, to report suspected cases of **child abuse** and **neglect** to government authorities. The obligations vary across the states and territories. The table below provides a summary of the mandatory reporting obligations applicable in Victoria:

TYPE OF HARM, TREATMENT OR ABUSE	LAW	WHO	TO WHOM	WHEN IS NOTIFICATION REQUIRED?	STATE OF MIND
Physical injury or sexual abuse.	**VIC** *Children, Youth and Families Act 2005* (Vic) (the **CYF Act**) ss 162, 182, 184.	• Registered medical practitioners, nurses and midwives; • Teachers; • Principals; and • Police officers.	**DHHS**.	As soon as practicable after forming a **belief** (and after each occasion on becoming aware of any further grounds for the belief) that a child is in need of protection on the grounds that the child has suffered, or is likely to suffer **significant harm** as a result of: • **physical injury**; or • **sexual abuse**, and the child's parents have not protected, or are unlikely to protect, the child from that type of harm.	Belief on reasonable grounds, formed in the course of practising his or her office or position.
Sexual offences	**VIC** *Crimes Act 1958* (Vic) (the **Crimes Act**) s 327.	Any adult who does not have reasonable excuse or an exemption, for example: • privileged information; • confidential communications between victim and a medical practitioner or counsellor; • victim is 16+ and requests confidentiality.	**Police Officer**. Failure to disclose is a criminal offence.	As soon as practicable after forming a **reasonable belief** that a **sexual offence** has been committed in Victoria against a child under the age of 16 by another person of or over the age of 18 (unless the reporter has a reasonable excuse for not doing so).	Belief on reasonable grounds.
Ill treatment	**CTH** *Family Law Act 1975* (Cth) ss 4, 67ZA.	• Registrars, family consultants and counsellors employed in the Family Court system; • Family dispute resolution practitioners or arbitrators; and • Lawyers independently representing children's interests.	**Child welfare authority**.	As soon as practicable after forming a **suspicion** that a child has been **ill-treated**, or is at risk of being ill-treated or has been exposed or subjected, or is at risk of being exposed or subjected, to behaviour which **psychologically harms** the child.	Suspects on reasonable grounds, in the course of performing duties or functions, or exercising powers.

2. Summary of obligations to report physical injury, sexual abuse or sexual offences against a child

This table summarises the different mandatory and voluntary reporting obligations and considerations for lawyers and social workers.[6]

	MANDATORY REPORTING (SPECIFIC PROFESSIONS) (PHYSICAL INJURY OR SEXUAL ABUSE)	MANDATORY REPORTING (ANY ADULT) (SEXUAL OFFENCES)	VOLUNTARY REPORTING
LAWYERS	**No, unless you are in the Family Court System.** There are no obligations that apply specifically to legal practitioners in Victoria to report instances of actual or suspected abuse or neglect of a child, outside the reporting duties imposed on lawyers independently representing a child's interests or otherwise acting in the Family Court of Australia, the Federal Magistrates' Court or the Family Court of Western Australia.[7]	**No, unless the information is not privileged.** It is an offence for any adult to fail to disclose a reasonable belief that a sexual offence against a child under 16 years of age has been committed unless a reasonable excuse applies (e.g. the information is privileged).[8] For further information see Section 3 below.	**Any person**, who believes on reasonable grounds that a child is in need of protection (as defined in the CYF Act and summarised in the table in Section 1 above), **may** report their concerns to DHHS. However, lawyers are bound by a professional duty of confidentiality[9] unless an exception applies. Examples include: • information disclosed for the **sole purpose of avoiding the probable commission of a serious criminal offence**; or • information disclosed for the purpose of preventing **imminent serious physical harm** to the client or to another person.[10]

[6] As noted above, in response to the findings of Victoria's Royal Commission into Family Violence, a family violence information sharing scheme has been created by Part 5A of the *Family Violence Protection Act 2008* (Vic). The scheme began on 26 February 2018, and it authorises a select group of prescribed information sharing entities (**ISEs**) to share information between themselves for family violence risk assessment and risk management. Community Legal Centres are not ISEs and are not covered by the scheme (Centres that are auspiced by an ISE should seek separate advice). Social workers who are funded to deliver specialist family violence services under a State contract (e.g. by DHHS and in some DOJR) are subject to the information sharing scheme. This does not affect legal professional privilege or the mandatory reporting obligations discussed in this guide, but it does create an additional regime for information sharing that CLCs need to be aware of. Detailed information about this regime is available at: State Government of Victoria, Information Sharing and Risk Management (https://www.vic.gov.au/familyviolence/family-safety-victoria/information-sharing-and-risk-management.html).

[7] Pursuant to s67ZA of the *Family Law Act 1975* (Cth) registrars, family counsellors, family dispute resolution practitioners, arbitrators and lawyers independently representing children's interests in the Family Court of Australia, Federal Magistrates' Court and Family Court of Western Australia must report reasonable grounds for suspecting that a child has been abused or is at risk of being abused. The person must, as soon as practicable, notify a prescribed child welfare authority of his or her suspicion and the basis for the suspicion in the course of performing duties or functions, or exercising powers.

[8] *Crimes Act 1958* (Vic) s 327.

[9] A lawyer's duty of confidentiality to the client is set out in rule 9 of the *Legal Profession Uniform Law Australian Solicitors Conduct Rules 2015* (**Conduct Rules**). These rules apply to lawyers in both Victoria and NSW, and were made pursuant to the *Legal Profession Uniform Law.*

[10] Exceptions to a lawyer's duty of confidentiality to the client are set out in r 9.2 of the Conduct Rules.

	MANDATORY REPORTING (SPECIFIC PROFESSIONS) (PHYSICAL INJURY OR SEXUAL ABUSE)	MANDATORY REPORTING (ANY ADULT) (SEXUAL OFFENCES)	VOLUNTARY REPORTING
SOCIAL WORKERS	**No, not yet.** In Victoria, social workers are *not* presently mandated to report to DHHS under the CYF Act.[11] However, persons: • with a post-secondary qualification in youth, social or welfare work who work in the health, education or community or welfare services field; and • who [are] not a person employed under Part 3 of the *Public Administration Act 2004* (Vic) to perform the duties of a youth and child welfare worker (**CYF Social Workers**), are identified under section 182(g) of the CYF Act as persons who *may*, in the future, be determined by the Government (by publication in the Government Gazette) to be mandatory reporters.[12] At the date of this Toolkit, CYF Social Workers have not been gazetted as mandatory reporters. However various commentary including the State of Victoria Department of Premier and Cabinet's Report "*Report of the Protecting Victoria's Vulnerable Children Inquiry*" (2012) recommends that the Victorian Government should progressively gazette the relevant professions set out in section 182 of the CYF Act. If this occurs in the future, the mandatory reporting obligations as they apply to all social workers and to CLCs will need to be reviewed. Note also the obligations of social workers employed in the Family Court system summarised in the table in Section 1 above.	**Yes, unless the information is privileged.** It is an offence for any adult to fail to disclose a reasonable belief that a sexual offence against a child under 16 years of age has been committed unless a reasonable excuse applies or they are exempt from reporting. For further information see Section 3 below.[13]	**Any person**, who believes on reasonable grounds that a child is in need of protection (as defined in the CYF Act and summarised in the table in Section 1 above), **may** report their concerns to DHHS. However, social workers may be bound by obligations of client confidentiality. Social workers may be guided by the Australian Association of Social Workers' Code of Ethics (the **AASW Code of Ethics**).[14]

3. Reporting sexual offences against a child – Crimes Act

All adults must report a reasonable belief that a sexual offence against a child has been committed

The *Crimes Act 1958* (Vic) was amended by the *Crimes Amendment (Protection of Children) Act 2014* (Vic), to establish a new offence for failing to disclose sexual offences committed against children under 16 years of age.[15]

Any adult (not just professionals who work with children) who:

- holds a **reasonable belief** that a sexual offence has been committed by an adult (aged 18 or over) against a child (under 16 years of age) in Victoria;
- must report that belief to Victoria Police;
- unless they have a **reasonable excuse** for not reporting or are **exempt** from reporting.

[11] As identified in the table in Section 1 above, for professions who *are* mandated, the CYF Act requires reporting to DHHS, as soon as practicable after forming a belief (and after each occasion on becoming aware of any further grounds for the belief) that a child is in need of protection on the grounds that the child has suffered, or is likely to suffer significant harm as a result of physical injury or sexual abuse, and the child's parents have not protected, or are unlikely to protect, the child from that type of harm. The belief needs to be formed on reasonable grounds, in the course of practising his or her office or position (ss 162, 182 and 183).

[12] Note that it is unclear whether or not a person that has, for example, a Cert IV qualification, would be included in the mandatory reporting rules, if CYF Social Workers (as defined) were to be gazetted to be mandatory reporters in the future. This will turn on the construction of 'post-secondary qualification'.

[13] *Crimes Act* 1958 (Vic) s 327.

[14] See also s 5.2.4(f) of the AASW Code of Ethics, which provides guidance to social workers in circumstances where they are considering disclosing information obtained in confidence from a client.

[15] *Crimes Act 1958* (Vic) s 327.

Unlike other mandatory reporting obligations, this offence applies to all adults: all persons are required to report a suspected child sexual offence to police. The maximum penalty for failing to report such an offence is **3 years imprisonment**.

An important exemption for lawyers, however, is that the obligation to report is not contravened if the information on which the report would be based is privileged (refer to Part 1 of this Toolkit).

The below chart provides further information on this obligation to report.

CHILD SEXUAL ABUSE	A sexual offence committed by an adult against a child under the age of 16.
REASONABLE BELIEF	A reasonable person in the same position would have formed the belief on the same grounds. A reasonable belief is more than a suspicion and requires tangible support to take the existence of an alleged fact beyond a mere belief or assertion. Examples of what may constitute a 'reasonable belief' are set out in the Department of Human Services 'Failure to disclose offence' factsheet[16] and include where: • a child states that they (or someone they know) has been sexually assaulted; • someone who knows a child states that the child has been sexually abused; • physical signs of sexual abuse; • professional observations of the child's behaviour or development; and • other signs e.g. risk taking behaviour, genital mutilation, risk to an unborn child, indications that a child is being groomed. **Note:** If any person working with a CLC client has unresolved suspicions that do not lead them to form a reasonable belief, they should consult with the appropriate supervisor within the CLC.
REASONABLE EXCUSE	Examples of a 'reasonable excuse' include: • A reasonable belief that the information has already been reported to police or to DHHS (as a result of mandatory reporting obligations) by another person **and** the person deciding whether to report has no further information to add. • A reasonable fear (subjective) that the disclosure will place someone (other than the alleged perpetrator) at risk of harm, including the discloser.[17] A person **does not** have a reasonable excuse for failing to comply only because the person is concerned for the perceived interests of the person reasonably believed to have committed, or to have been involved in, the sexual offence or the perceived interests of any organisation.
EXEMPTIONS	• **The information is privileged** – this includes legal professional privilege (refer to Part 1 of this Toolkit), journalist privilege and religious confessions. • **The victim (aged 16 or over) requests confidentiality** – the exemption does not apply if the person who receives the relevant information is aware or should reasonably be aware that the victim requesting confidentiality (a) has an intellectual disability or (b) does not have the capacity to make an informed decision about a disclosure. • **The reporter was a child when they formed a reasonable belief** – the potential reporter was under the age of 18 when they formed that belief. • **The information is a confidential communication** – certain professions (e.g. social workers) are not required to disclose information to police if the information is obtained from a child whilst providing treatment and assistance to that child in relation to sexual abuse. • **The information is in the public domain** – a person does not have to disclose if they get the information solely from information that is in the public domain (e.g. television or radio reports).

What happens if I report a belief of a child sexual offence?

1 Your identity is protected

Your identity will remain confidential unless:

- you disclose it yourself or you consent in writing to your identity being disclosed; or

[16] 'Failure to disclose offence' factsheet (Department of Justice and Regulation, Victorian State Government). Available at http://www.justice.vic.gov.au/home/safer+communities/protecting+children+and+families/failure+to+disclose+offence.

[17] Ibid.

- a Court or Tribunal decides that it is necessary in the interests of justice for your identity to be disclosed.

2 No breach of professional ethics

If a report is made in good faith, reporting actual or suspected child abuse does not constitute unprofessional conduct or a breach of professional ethics on the part of the reporter.

3 No legal liability for the report

The reporter cannot be held legally liable in respect of the report. This means that a person who makes a good faith report, in accordance with the legislation, will not be held liable for the eventual outcome of any investigation of the report.

4. Mechanisms for managing different legal obligations and ethical and professional responsibilities within integrated practices

As set out in Part 2, Sections 1 – 3 of this Toolkit, the legal obligations of lawyers and social workers are different. For example, under the Crimes Act, social workers, like all adults in Victoria, are required to report to Victoria Police a reasonable belief that a sexual offence against a child under 16 years of age has been committed unless a reasonable excuse applies or they are exempt from reporting (e.g. if the social worker obtains the relevant information from a child under the age of 16 whilst providing treatment and assistance to that child in relation to sexual abuse). For lawyers, an important exemption under the Crimes Act is that this requirement to report is not contravened if the information on which the report would be based is privileged (refer to Part 1 of this Toolkit).

Furthermore, although social workers are not (yet) listed as mandatory reporters under the CYF Act (and therefore are not legally required to report to DHHS a reasonable belief that a child is in need of protection because they have suffered or are likely to suffer significant harm as a result of physical injury or sexual abuse), any person who believes on reasonable grounds that a child is in need of protection, *may* report their concerns to DHHS. Notably the ethical and professional obligations of lawyers and social workers may differ in relation to these decisions.[18]

It is important that CLCs have frameworks for effectively managing these differences, including:

- communicating with clients about different roles and obligations within integrated practices;
- meetings and correspondence with clients;
- file management practices (e.g. information barriers and separate files);
- sharing information between lawyers and social workers, including what should be shared and for what purpose;
- making decisions about when a non-legal expert within an integrated practice (e.g. a social worker) might report child abuse or neglect; and
- responding to requests for information or subpoenas, including in relation to family law, family violence, child protection or criminal proceedings.

Practical mechanisms for managing these differing obligations within a CLC can include:

- training for lawyers and social workers about the scope of each profession's obligations;
- external supervision for social workers and other non-legal experts within legal teams, so they have professional support outside the legal practice;
- a script or information sheet that explains the difference between social workers and lawyers for the client (a sample script is included in Practical Tip 2 below);
- clear policies and guidelines to minimise the chance of these challenges arising (see Practical Tip 1 below); and
- clear policies and processes for escalation of these decisions within an organisation (e.g. to the principal lawyer of a CLC).

[18] See, e.g., section 5.2.4(f) of the AASW Code of Ethics, which provides guidance to social workers in circumstances where they are considering disclosing information obtained in confidence from a client; and Rule 9 of the Conduct Rules regarding a lawyer's duty of confidentiality to the client.

Practical Tip 1 – Managing meetings where both the lawyer and social worker are present

If a lawyer thinks the client is about to refer to a matter which would be reportable, consider requesting that the social worker leave the room while the lawyer explores the issues.

- If there is nothing reportable, the social worker can return.
- If there is something reportable, the lawyer should explain to the client the consequences of mentioning the matter to the social worker (i.e. reporting) and ask the client whether they would want the matter reported. The lawyer should explain that the lawyer will not report it (or disclose it to anyone else, without permission) but that the social worker would be obliged to report it if he or she knows of it. If, after receiving that advice, the client instructs that they want to proceed, knowing that the matter may be reported, the social worker can re-enter the room to explore the matter in detail.

Practical Tip 2 – Sample explanation of the difference between the roles and obligations of lawyers and social workers

- We have both a lawyer and a social worker working with you.
- These two professionals have different roles and obligations.
- The lawyer will help you with [insert] and the social worker will help you with [insert].
- Legal privilege means that communications about your legal matter are confidential and legally protected, which means they cannot be disclosed to anyone else without your consent. For example, if your file is subpoenaed in a legal proceeding, communications that are privileged will not need to be disclosed to other parties.
- For a social worker, although my/his/her work with you is confidential, there will be situations where what you discuss is not covered by legal privilege. In practice, this means, if the social work file is subpoenaed in legal proceedings, I/she/he may have to provide it to the Court. There could also be situations where I/she/he may have to break confidentiality. An example is where a social worker forms a belief that a child has suffered or is likely to suffer harm. I/she/he would always attempt to discuss these situations with you first, and would also need to consult with our principal lawyer before disclosing information to others without your consent.
- If you have any questions or concerns about the roles of the lawyer and the social worker working with you, please let us know.