



ABORIGINAL LEGAL SERVICE OF WESTERN AUSTRALIA

SUBMISSION IN RESPONSE THE WA GOVERNMENT DISCUSSION PAPER: Privacy and Responsible Information Sharing for the Western Australian Public Sector

31 October 2019

About the Aboriginal Legal Service of Western Australia (ALSWA)

ALSWA is a community-based organisation which was established in 1973. ALSWA aims to empower Aboriginal peoples and advance their interests and aspirations through a comprehensive range of legal and support services throughout Western Australia.

ALSWA aims to:

- Deliver a comprehensive range of culturally-matched and quality legal services to Aboriginal peoples¹ throughout Western Australia;
- Provide leadership which contributes to participation, empowerment and recognition of Aboriginal peoples as the First Peoples of Australia;
- Ensure that Government and Aboriginal peoples address the underlying issues that contribute to disadvantage on all social indicators; and
- Create a positive and culturally-matched work environment by implementing efficient and effective practices and administration throughout ALSWA.

ALSWA uses the law and legal system to bring about social justice for Aboriginal peoples as a whole. ALSWA develops and uses strategies in areas of legal advice, legal representation, legal education, legal research, policy development and law reform.

ALSWA is a public company limited by guarantee and is governed by an Aboriginal board. The board consists of five elected directors and two co-opted directors who commit time, cultural and business expertise to provide leadership and governance. ALSWA provides legal advice and representation to Aboriginal peoples in a wide range of practice areas including criminal law, civil law, family law and human rights law. ALSWA also provides support services to prisoners and incarcerated juveniles. Our

¹ In this submission, ALSWA uses the term 'Aboriginal peoples' to refer to Aboriginal and Torres Strait Islander peoples.

services are available throughout Western Australia via 11 regional and remote offices and one head office in Perth.

Introduction

On 5 August 2019, the Western Australian Government announced its plan to develop privacy legislation for Western Australia and published a Discussion Paper: *Privacy and Responsible Information Sharing for the Western Australian public sector* (the **Discussion Paper**). In the Discussion Paper, the Government is seeking feedback in relation to a proposed whole-of-sector approach to protecting privacy and enabling safe information sharing within the public sector and with authorised third parties.

ALSWA welcomes the opportunity to provide a formal submission in response to the Discussion Paper.

Response to Discussion Paper

These submissions primarily address the following issues:

- 1 The process by which consent to the collection of information is obtained.
- 2 The sharing of information.
- 3 The position in respect of group information.

Consent

Obtaining consent

The appropriate role for individual consent as the basis for the collection and use of personal information (sometimes referred to as a 'self-management' approach to privacy regulation) is a vexed issue for any proposed privacy framework.² Nevertheless, the requirement to obtain consent prior to certain information being collected, used and disclosed – and, in particular, what might be described as 'sensitive' personal information – is likely to be a significant consideration for any privacy legislation enacted in Western Australia. Where consent is required, it is vital that all individuals who have their information collected, used or disclosed by any organisation understand the consequences of providing or refusing to provide their consent.

Some individuals, including some clients of ALSWA, experience cultural and/or language barriers, which makes it more difficult to obtain their consent and for them to understand the consequences of providing their consent. As such, the questions around when consent is required and how it will be obtained are important in relation to the proposed reforms in the Discussion Paper generally, and for ALSWA in particular.

The Discussion Paper does not appear to have proposed any specific consent provisions but does propose to use the Australian Privacy Principles as the basis for establishing the regulation for the collection and use of personal information. The relevant federal regulator, the Office of the Australian Information Commissioner (**OAIC**), has published a set of Australian Privacy Principles Guidelines (**Guidelines**).³ The Guidelines elaborate on the key elements of consent at the federal level and state that a limited understanding of English is an issue which could affect an individual's capacity to consent. The privacy legislation in other Australian jurisdictions adopts privacy principles that are substantially

² See, e.g., Daniel J Solove, 'Privacy Self-Management and the Consent Dilemma' (2013) 126(7) *Harvard Law Review* 1880.

³ Australian Privacy Principles Guidelines, available at <<https://www.oaic.gov.au/assets/privacy/app-guidelines/app-guidelines-july-2019.pdf>>

similar to the Australian Privacy Principles.⁴ It is vital that individuals who have their information collected by any organisation understand the consequences of providing their consent to the collection or distribution of that information; therefore, there is a need to ensure appropriate steps are taken to obtain consent where individuals are impacted by cultural or language barriers.

Method of providing consent

In certain circumstances it may be necessary for ALSWA to provide information, including sensitive information, to the State on behalf of its clients. Provided that the individual has informed ALSWA that it consents to the particular use and sharing of the information, either through the provision of a signed confirmation or verbally, it is important that ALSWA is able to communicate that consent (rather than a requirement being imposed that the individual provide consent for a second time directly to the relevant State agency).

By way of hypothetical example, if an individual provided information to ALSWA that indicated they were at risk of self-harming and confirmed to ALSWA that they consented to this information being provided to a State agency so that appropriate treatment services could be provided, it would be impractical and potentially dangerous to impose a requirement for the State agency to seek consent for a second time directly from the individual.⁵

Sharing of information

The circumstances in which information can be shared by one agency with another agency or with the public sector should be clearly defined and, particularly in respect of sensitive information, should be strictly limited.

The example above also highlights the importance of ensuring that there are stricter controls around the use of sensitive information for unrelated or secondary purposes to the initial purpose for which consent was obtained. It would likely not be appropriate to seek a wider consent at the time of collection than is absolutely necessary in the case of sensitive information (such as mental health information in the example above) – and so it would be important that this information could not then be used by the State in a way which the individual is not aware of and would not expect.

In particular, it is not clear from the Discussion Paper what protections and controls would be in place for the sharing of an individual's sensitive information beyond the scope of their initial consent. The Discussion Paper states that: '*Restrictive policies and practices designed to keep sensitive information confidential are sometimes extended to information that could be safely shared*', and that this leads to '*inhibiting cross-government service provision and evidence-based decisions*'.⁶ The example provided is that mental health and child protection information is routinely not provided to public housing staff, which limits the relevant department's understanding. This may well be the case, but the Discussion Paper does not address the impact this has on the scope of the individual's consent and reasonable expectations for use of their sensitive information. The comments in this section of the Discussion Paper appear to closely link what is in the State's interest – i.e. for increased knowledge, awareness, or efficiency – with what is in the public interest. These may be related, but there may be significant impacts on vulnerable people.

⁴ For example, *Information Privacy Act 2009* (Qld), Schedule 4; *Privacy and Data Protection Act 2014* (Vic), Schedule 1; *Personal Information and Protection Act 2004* (Tas), Schedule 1; *Information Privacy Act 2014* (Act), Part 3.

⁵ This situation is to be distinguished from circumstances in which the individual is unable to provide consent and consent has to be provided on the individual's behalf.

⁶ WA Government, *Privacy and Responsible Information Sharing for the Western Australian Public Sector*, Discussion Paper (2019 14).

The responses to the questions below include comments on the communication of the purpose for which the information is obtained and the types of information that should be considered sensitive information (Question 5), comments on when information should be shared outside the public sector (Question 7) and when information should be shared within the public sector (Question 9)

Group Information

In most jurisdictions, privacy legislation regulates 'personal information' – which is generally defined along the lines of information or opinion about a reasonably identifiable individual. This is not necessarily the same for specific data sharing legislation. For example, the *Victorian Data Sharing Act 2017* (Vic) provides a general framework for the Chief Data Officer to request and receive data held by 'data sharing bodies', other than limited categories of 'restricted data'.⁷

For many Aboriginal people there are unique and specific cultural concerns on group information, and the protection and sharing of culturally sensitive information among and across particular groups. Despite the fact that the relevant groups consider this to be culturally sensitive and deeply private information, this information is neither well protected by existing privacy frameworks, nor other areas of the law. As the Aboriginal Justice Advisory Council (**AJAC**) submitted to the landmark *For Your Information* inquiry by the Australian Law Reform Commission in 2010: '*existing Australian laws, including laws relating to intellectual property and cultural heritage, offered only limited protection for the rights of Indigenous groups*'.⁸ While there are protections for tangible objects of cultural significance, there are few protections for intangible things such as cultural secrets, knowledge or rites.⁹

Matters of privacy and secrecy among Aboriginal groups are highly relevant to the group involved. The Discussion Paper notes, and ALSWA would agree with the statement, that: '*The rights of Aboriginal people as custodians of their cultural information are vital in considering a model for information sharing*'.¹⁰ However, the Discussion Paper offers little detail on how communities and individuals will be involved in the scope of data sharing under the proposed law. For example, issues of consent and collection may not necessarily be overcome by one member of that group providing consent to the collection of information about the group.

ALSWA is concerned that any eventual legislation should not authorise the collection of information which is private to a cultural group, and ideally would impose an obligation or restriction not to use or disclose such culturally sensitive information which the State obtains (by whatever means). This may be achieved, for example, by including culturally sensitive information about or private to an Aboriginal group as a category of 'restricted data' for the purpose of any data sharing provisions.

This is not to say that information about Aboriginal communities should not be collected or used at all, and ALSWA recognises there may be significant benefits from data sharing which addresses social and economic disadvantage. However, ALSWA suggests that the proposition that increased data sharing by the State may 'protect, maintain and revitalise Aboriginal cultural knowledge' should be treated with caution and should not extend to the collection of group information.

Some consideration should also be given to the obligations or requirements around whether the State should be required to delete or destroy information which it could not lawfully collect or share under the legislation. If culturally sensitive information of Aboriginal groups was carved out of the scope of the

⁷ *Victorian Data Sharing Act 2017* (Vic) s 8.

⁸ Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice* (ALRC Report 108) para 7.41.

⁹ See, e.g., *Protection of Movable Cultural Heritage Regulations 2018* (Cth); *Protection of Movable Cultural Heritage Act 1986* (Cth).

¹⁰ WA Government, *Privacy and Responsible Information Sharing for the Western Australian Public Sector*, Discussion Paper (2019) 40.

legislation as suggested, then such an obligation to delete or destroy could assist in increasing privacy protection for those groups – where an individualised framework of ‘personal information’ could not.

Responses to Discussion Paper Questions

Question 5 – When should government agencies be allowed to share personal information? Are there any circumstance in which it would not be appropriate to do so?

As a general principle, ALSWA agrees that the proposed legislation in Western Australia should be consistent with other Australian jurisdictions in relation to the sharing of personal information.

ALSWA notes that there are a number of proposed acceptable *reasons* for sharing information outlined on page 34 of the Discussion Paper. It is clear that these reasons are broad in nature and are meant to cover many scenarios.

ALSWA understands that it is unwise to create a closed list of circumstances in which information can be shared between government agencies. However, in view of the fact that information may often be collected from vulnerable people, when collecting information each agency should outline the purpose of collection in clear and precise terms, as this purpose will inform the circumstances in which the information can be shared.

By way of example, it may not be appropriate for a State agency to request information for “general welfare” purposes when the information is in fact required for a specific purpose. By way of example, if an individual may pose a threat to him/herself or others, an appropriate purpose for collection of information may be to determine if such a risk of harm exists. Although it would fall under the general purpose of welfare, the reason for the request would be clear so that, objectively, there was no doubt as to why the information had been collected.¹¹

In circumstances where the information is shared between agencies, the protection of an individual's personal information should not be diluted. This mitigates any risk of potential abuse of the laws – for example, an agency using the personal information to unfairly discriminate against an individual.

Similarly, if an organisation (such as ALSWA) provides personal information relating to an individual to the State, whether solicited or unsolicited, the permitted use of that personal information should be set out in a clear and concise manner.

The security of the method of sharing personal information and the security related to the storage of personal information is also an issue that could be addressed in the proposed legislation and/or accompanying guidance.

As in other jurisdictions, there should necessarily be additional provisions defining the scope of sensitive information, which could include information concerning:

- racial or ethnic origin;
- criminal investigation or proceedings, or for the imposition of a fine;
- legally assumed identities;
- health records or information;
- legal professional privilege;
- active police operations;
- mediation, conciliation or other dispute resolution processes;
- proceedings that are being heard, or are to be heard, before a court or tribunal; and

¹¹ This approach is generally consistent with the approach in other jurisdictions: see, eg, Information Privacy Principle 1.3(c) and 2.1 of the the *Privacy and Data Protection Act 2014* (Vic)

- national security.

Question 7 – Should the WA Government facilitate sharing of information outside the WA public sector? What should be considered when making a decision to share outside the WA public sector?

ALSWA recognises that, in limited circumstances, information may be shared outside of the Western Australian Government, to the extent it is required to inform research, improve accountability for contracted service outcomes, or assist in coordination of policy initiatives between jurisdictions (in most, if not all, of these cases the relevant information should be capable of anonymisation – although of course the standards and protocols for that anonymisation will be an important factor in how effective this is).

State agencies should be transparent in their information sharing activities and make the individual or organisation providing the information aware of their intentions during the consent process. As noted in the submissions under Question 5, the clear and concise purpose for the sharing of information must be outlined in a request from an agency.

In addition to outlining the purpose, the method of sharing must be secure and the recipient of the personal information must undertake to store the information in a secure manner. This undertaking should be received before sharing the personal information.

Question 9 – Under what circumstances would it be considered acceptable to share confidential information within the public sector?

These circumstances should be limited. In the case of sensitive information, in circumstances where informed and express consent has been granted by the affected individual(s), the information may be shared. Where that consent has not or cannot be obtained, the default position should be that the information should not be shared. There may be instances where extremely sensitive information is shared on behalf of an individual to a State agency. Such information should not be provided on a government-wide basis. For example, in circumstances where an individual in police custody has shared suicidal thoughts or exhibited such tendencies, it would be in the client's best interests to notify the police of this information so that they are protected in custody. The extent to which this information is shared with educational or health services should be limited to circumstances where the client has consented to and is seeking direct assistance for these issues.



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