

Privacy and Responsible Information Sharing Project Team
Department of the Premier and Cabinet
Government of Western Australia

Dear Project Team

Submission on Privacy and Responsible Information Sharing Consultation

Thank for the opportunity to comment on this important proposal.

I believe the overall design of the proposed legislation is sound and commend the project team and all stakeholders who have helped get the proposal to this stage. The quality of the discussion paper is high. It gives a clear and comprehensive account of the issues and the rationale and structure of the reforms.

I only have two concerns.

Implementation challenges: decision-making capacity around risk and procedural fairness

One is about the challenges of implementing the light-touch aspects of the legislative model. In brief I believe the light-touch design approach is right, but to realise the strategy, the public sector is going to have to take a much more sophisticated approach to risk management and decision making than has generally been seen to date. In that respect the legislation could be a catalyst for agency capacity building – an implementation issue noted in the discussion paper.

To develop these remarks further, it is noted that the reforms are intended to avoid an overly prescriptive approach. Instead the onus would be on public servants to consider the potential benefits, and harms, that could flow from decisions to share information, or not, and to be accountable for the decisions made. This will involve in many instances some complex considerations. It appears that mostly there would be high-level guidance in the form of principles to be followed, around the Five Safes, rather than a detailed set of rules. Consequently, the legislation is going to require a degree of subtlety in applying risk management thinking to decisions about sharing information and weighing up the public benefits and risks case by case, where there is no formula to determine the correct response. In particular, for the information-sharing aspect of the reforms to work, public servants will need a sense of proportionality in applying principles to cases in a form of cost-benefit analysis, rather than using the notion of risk as a reflexive justification for not disclosing.

Given the degree of goodwill towards the reforms, the expectations that the legislation must work, and the sense among stakeholders that these are overdue, there is no reason to assume the initiative is doomed to failure - but it will be challenging. There is a great opportunity here for agencies to develop capacity in decision making around risk, governance and procedural fairness. Moreover, it will be essential that they do so, if the intent of the reforms – better services and decision-making - is to be achieved. As noted in the discussion paper, training (including in risk management thinking) will be essential. Enacting the legislation will only be the first step.

'Twin Peaks' Oversight Model

My only other misgiving is with having two separate oversight bodies for the single legislative scheme: one responsible for privacy protection and the other for promoting information sharing. In this case my concern is with the actual design of the proposal rather than, as above, the challenges of implementing a sound design approach (light-touch). The discussion paper does articulate the rationale for having agencies accountable to two separate watchdogs in that each has, on one view of the matter, a distinct brief. I worry however that this will create undue complexity and compliance burdens via the governance model, and inconsistent expectations. The intent of the legislation is that decision makers will take a balanced approach: their thinking is to integrate both data-sharing and privacy imperatives. But the governance framework (at least, the oversight bodies) appears to be siloed rather than integrated. The impression given is that in the policy development process each interest group has been given the kind of watchdog they want: one for Team Privacy and another for Team Data-sharing. But these arrangements seem out of sync with the expected holistic approach to decision making on privacy and data sharing. As such I recommend some more thought should be given to the merits of a single oversight body with responsibility for the full scope of the reforms, rather than setting up two separate offices which may potentially provide oversight which is seen to be contradictory or inconsistent. If the decision makers are expected to consider the full range of privacy and data-sharing issues then it seems logical that the oversight body should incorporate a similar, broad understanding.

Thank you again for the opportunity to comment. I would be pleased to provide further input at a later stage should that be needed.

Dr Andrew Lee

Principal - Andrew Lee Consulting

1 November 2019