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By email: email withheld

Dear Public Sector Reform Unit

Response to the Discussion Paper on Privacy and Responsible Information Sharing for the Western Australian public sector

Edith Cowan University (**ECU**) welcomes the West Australian Government's discussion paper 'Privacy and Responsible Information Sharing for the Western Australian public sector' (**Discussion Paper**).

This letter sets out our response to the Discussion Paper. We would welcome the opportunity to discuss our response with you in more detail.

1 Summary

Our feedback addresses both issues covered by the Discussion Paper.

In relation to privacy, ECU understands the need to ensure that personal information is properly handled and protected. However, it is important to ensure that measures to protect privacy do not:

- unduly increase the compliance burden on organisations;
- hamper the ability of universities to continue conducting beneficial research; or
- unreasonably fetter universities' capacity to investigate, report on, and respond to complaints, and allegations of misconduct (including both academic and general misconduct).

Section 2 of this letter sets out our proposals for balancing these considerations.

In relation to **information sharing**, ECU supports efforts to facilitate safe information sharing within the public sector and with authorised third parties. We have a number of suggestions as to how this can be facilitated, which are set out in section 3 of this letter.

2 Privacy

2.1 Background

ECU understands the importance of protecting the privacy and security of personal information. In fact, ECU is a world-leading institution in the area of information security research, and is committed to furthering efforts in this area. In September 2019, we launched the ECU Institute for Securing Digital Futures, which focuses on linking research across a range of fields related to cyber-security.

The tertiary education sector is also increasingly competitive. This competition extends beyond the boundaries of Western Australia, with ECU and other Western Australian universities increasingly competing with interstate and overseas universities for students, staff, and resources. To the extent that new privacy or data sharing frameworks impose additional reporting, compliance or administrative costs on the Western Australian university sector, care should be taken to ensure that the competitive position of Western Australian universities on both the national and international stages is not diminished.

For this reason, ECU is concerned to ensure that efforts to protect privacy do not:

- impose an unreasonable compliance burden on state-based organisations – in particular where they are already subject to privacy regulation;
- hamper the beneficial research that universities (both students and academics) conduct; or
- unreasonably fetter universities' capacity to investigate, report on, and respond to complaints, and allegations of misconduct (including both academic and general misconduct).

To address these concerns, ECU suggests:

- (a) including targeted exemptions in the privacy laws – see sections 2.2, 2.3, 2.4 and 2.5 below;
- (b) ensuring that the role of the Privacy Commissioner is focussed more on assisting organisations to comply with privacy laws, rather than enforcement and penalties – see section 2.6 below; and
- (c) giving organisations sufficient lead time to bring their practices into compliance with the new privacy laws – see section 2.7 below.

2.2 Exemption – where other privacy laws apply

In some cases, organisations are already required to comply with privacy laws. This could be because of:

- (a) **direct obligations** – the organisation is directly required by law to comply – for example, within Australia universities are required by the *Higher Education Support Act 2003* (Cth) to comply with the Australian Privacy Principles in respect of certain personal information they collect. Internationally, some universities (including ECU) may also be subject to privacy obligations arising under foreign legislation such as the Global Data Protection Regime for those entities operating in the European Union; or
- (b) **indirect obligations** – the organisation is required to deal with a regulator or other official body (e.g. an accreditation body) in order to carry out its functions, and that body requires privacy compliance.

If an organisation is already required to comply with privacy laws, then imposing additional privacy obligations on that organisation would result in a double-compliance situation. The need to comply with two privacy regimes would add unnecessarily to the compliance burden of the organisation.

We suggest a general exemption so that the state-based legislation does not apply to situations where an organisation is covered by privacy obligations – either directly under another law, or indirectly imposed by regulators or accreditation bodies – that are broadly consistent with the state-based privacy obligations.

2.3 Exemption – required disclosures

In some cases, universities are required to disclose information to statutory or other bodies in order to be able to continue to carry out their functions. For example, universities are required to provide certain information to accreditation bodies in order to be able to continue offering accredited courses. In addition, universities may share the assessed work of students for benchmarking and calibration purposes.

These disclosures may not be required by law, but are still a necessary part of the organisation's activities. Permitted disclosures under the proposed legislation should be wide enough to capture these types of required disclosures.

2.4 Exemption – research

The Australian Law Reform Commission (**ALRC**), in its report *For Your Information: Australian Privacy Law and Practice* (ALRC Report 108), discussed at length the need for a broad research-based exemption to privacy obligations. (Among other things, the ALRC pointed to:

- (a) the great public benefit from many different fields of research – including health and medical research (which is exempt from Commonwealth privacy obligations) and research in other areas;
- (b) the impairment to the quality of research caused by having to comply with privacy obligations – for example, seeking consent to use personal information for research can lead to self-selection bias among research participants, and an under-representation of 'hard to reach' (often disadvantaged) populations; and
- (c) the barriers to research caused by having to comply with privacy obligations – for example, it is extremely difficult to conduct some forms of research in ways that comply with existing privacy laws.

There is broad recognition in the research sector that existing exemptions for health and medical research need to be broadened due to both:

- difficulties in distinguishing health and genetic information from other types of personal information (such as demographic information); and
- an understanding that there may be an equally significant public interest for research into other areas (such as criminology and legal processes) to be facilitated in the same manner as health and medical research.

New South Wales privacy legislation (see s 27B *Privacy and Personal Information Protection Act 1998* (NSW)) includes an exemption from compliance with privacy principles for any type of research (or the compilation or analysis of statistics) that is in the public interest.

We recommend that the Western Australian legislation contains a similar public interest exemption for research generally – so long as the research complies with ethical guidelines. For example ECU is required to comply with the National Statement on

Ethical Conduct in Human Research made by the National Health and Medical Research Council (**NHMRC**) – not just in relation to health and medical research, but in relation to its human research generally. This includes making all human research (other than low risk research) subject to the approval of a Human Research Ethics Committee (**HREC**), consisting of a variety of members of the community with expertise in various areas, which makes decisions on research with reference to detailed and specific principles.

In addition, it is important to note that enforcement mechanisms for the public service may not be appropriate when considering that researchers are frequently not university staff, but rather students or other experts with various, sometimes unpaid, associations with ECU.

2.5 Exemption - investigating and responding to complaints and misconduct

In order to provide a safe and supportive environment for students and the general public who access university facilities, universities must have robust processes for handling complaints and allegations of misconduct. Such matters include:

- (a) complaints – where a member of the public raises an issue regarding the university or one of its students; and
- (b) allegations of misconduct – where an allegation has been made regarding the conduct of a student or staff member – which could be:
 - (1) academic misconduct – which includes conduct such as bribery or coercion, cheating, contract cheating, plagiarism, fraud, or unauthorised collaboration; or
 - (2) general misconduct – which includes a broad range of inappropriate behaviour ranging from less serious matters such as causing a nuisance at a campus to more serious matters such as sexual assault.

While more serious instances of misconduct may be referred to external authorities (such as industry regulators or police) who have broad investigative powers, there is a level of conduct which is better investigated and dealt with at a university level. Investigations concerning staff might be covered under employment-related exemptions and laws – but those would not cover investigations concerning students. Universities should have the right to collect information about students (as well as staff) as required to properly investigate and respond to complaints and allegations of misconduct, and to refer complaints and allegations to external authorities.

In addition to the investigation of, and response to such matters, it is important for universities to be able to report to, and share information with, each other and with peak industry bodies about complaints and allegations of misconduct. By way of example, industry-wide action on important issues such as the Respect. Now. Always initiative (which is aimed at preventing sexual assault at universities) would not have been possible had universities not been able to investigate and report on instances of, and allegations involving, sexual assault.

It would be highly undesirable if universities' capacity to deal with complaints and allegations of misconduct was unreasonably fettered by privacy obligations.

We recommend that the West Australian legislation contains exemptions or permissions that would adequately allow universities to investigate, report on, and respond to such matters. Where this kind of information is shared within the sector, it would be for the

purpose of conducting research and developing policies for the welfare and safety of students and staff. We expect that universities would take reasonable steps to de-identify information before sharing it, recognising that sometimes full de-identification may not be possible (e.g. due to a small number of individuals being the subject of a complaint).

2.6 Role of Privacy Commissioner

Experience nationally and in other states and territories has indicated that organisations are often unclear about their privacy compliance obligations – and many instances of non-compliance arise from this uncertainty. It is useful for organisations to feel comfortable in turning to the Commissioner for guidance and advice, without taking the risk of facing enforcement action if they disclose any non-compliance.

As noted regarding research staff, a great deal of work being undertaken by universities is undertaken by people who are not university staff but rather students or other experts with various, sometimes unpaid, associations with ECU. Enforcement action which is directed at punishing entities for non-compliance may have several undesired impacts including dis-incentivising universities engaging in tasks where the cost of compliance of privacy monitoring makes such work unfeasible.

The role of the proposed Privacy Commissioner in Western Australia should focus on helping organisations to comply. That is, the Privacy Commissioner should provide advice and guidance, rather than having a primarily enforcement role.

2.7 Lead time for compliance

The proposed legislation should provide a substantial amount of time for organisations to bring their policies and practices into compliance with the new requirements. The effort required to meet the new requirements in a short time frame should not detract from the core functions of organisation – for example (for ECU) providing quality education to our students.

3 Information sharing

We support the proposal to facilitate sharing of information that is held by the WA Government. In setting up an information sharing framework, the WA Government should give careful consideration to:

- the framework's relationship to the Commonwealth government's data sharing framework (see section 3.1 below);
- facilitating the ability for universities to use government-held information for research – see section 3.2 below;
- consistent processes for access to information (see section 3.3 below);
- the information that should be exempted from the framework (see section 3.4 below);
- applying data standards to enhance the quality of information released by the WA Government (see section 3.5 below);
- data ownership and licensing issues (see section 3.6 below); and

- the compliance burden on organisations who access government-held information (see section 3.7 below).

3.1 Relationship to the Commonwealth government's information sharing framework

The WA Government's proposed information sharing framework should be broadly aligned with the information sharing legislation that will be introduced by the Commonwealth.

To reduce the complexity and compliance burden on organisations, the Commonwealth and WA Government information sharing frameworks should:

- be consistent – in that that obligations at both levels should be similar; and
- not unreasonably duplicate requirements (such as reporting or audit requirements).

We support both the State and Commonwealth Governments having clear frameworks to facilitate information sharing, but stress the need for these frameworks to work in tandem.

3.2 Rights to access information for research

Research carried out by universities has significant public benefits. Government-held information is a valuable source of data, and is often used in research carried out by students and academics.

The proposed information sharing framework should facilitate the continued use of government-held information for research by universities – including a simple application process for access to information, and clear rights of appeal if access is denied.

3.3 Consistent processes and terms for accessing information

In our experience, information sharing arrangements are often negotiated on an ad-hoc basis, leading to bespoke arrangements on a case-by-case basis. This creates difficulty for ECU to manage its information sharing rights and obligations at a whole-of-university level.

To avoid unnecessary complexity, the process and requirements for access to government-held information should be standardised across the public sector. There should be:

- (a) clear, unambiguous requirements to gain authorisation or accreditation for access to information; and
- (b) standard terms (or standard template agreements) applying to the use of information.

These requirements and terms should be broadly consistent across the public sector – with additional requirements or terms only where required for particular types of information.

3.4 Information that should be exempted from the framework

Certain types of information are not appropriate for inclusion in the information sharing framework. In particular, if an organisation has a commercial function, then the information sharing framework should not undermine the organisation's commercial relationships or competitive position in the market.

For example, the information sharing framework should not require organisations with a commercial function to disclose information that:

- (a) is commercially sensitive or subject to commercial-in-confidence arrangements;
- (b) forms part of the organisation's valuable intellectual property (for example, universities' own research data, and the analysis applied to that research data);
or
- (c) is subject to other, broadly consistent data sharing obligations – for example, under Commonwealth legislation, or under funding agreements with various government bodies (both Commonwealth and State-level).

With respect to universities' own research data (including publicly funded research), it is also important to preserve the role of HRECs in protecting the welfare and dignity of human research subjects by keeping data from public disclosure.

We note that where these concerns do not arise, ECU along with Western Australia's other universities, are very committed to information sharing, with its institutional research repository Research Online providing access to over 22,000 research publications of ECU researchers.

3.5 Data standards

The information sharing framework should include general requirements regarding the quality of data that organisations are to make available.

The Chief Data Officer's role should include assisting organisations in managing their data – including helping them to:

- (a) make high-quality information available when appropriate;
- (b) resolve discrepancies and conflicts in different datasets; and
- (c) properly de-identify data – acknowledging the increasing ability of systems to re-identify data sets that were previously considered as de-identified, particularly through the sharing of datasets.

3.6 Data ownership and licensing

While we assume that any intellectual property or other rights in data shared by the WA Government will continue to be owned by the WA Government, it is important to ensure that:

- (a) licences granted by the WA Government to its data are broad enough to cover the permitted activities of organisations who access that data – including research and development activities;

- (b) the information sharing framework does not impinge on the university's ability to commercialise certain aspects of its intellectual property – an activity that all universities have done and will continue to do into the future;
- (c) the information sharing framework preserves intellectual property rights and other rights in data that organisations are required to provide to government bodies; and
- (d) the information sharing framework provides clarity on data ownership where data is derived from different sources (e.g. under funding agreements with various State and Commonwealth government bodies).

3.7 Compliance issues

As with privacy obligations, it is important to ensure that the new information sharing framework does not add an undue compliance burden on organisations who access data – for example, through lengthy reporting and registration requirements relating to the use of data. Universities already have a high reporting obligation, and the proposed legislation should not significantly add to it.

Similarly, while it is important for state-based organisations to have well-organised and well-managed data, their obligations to comply with the information sharing framework should not detract from their ability to carry out their core functions.

3.8 Sharing of data within government

If datasets concerning individuals are to be shared between government agencies, there should be protections regarding its use. ECU is concerned to ensure that information about its students is used appropriately and for their benefit, rather than for compliance purposes.

There is also concern that if a broad range of agencies have access to information about students, it would be difficult to keep students fully informed of the likely uses of their information.

4 Next steps

We would be happy to provide further clarification on any of the suggestions set out in this letter. Please contact me if you wish to discuss.

Yours sincerely



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