



**SUBMISSION TO THE WA  
GOVERNMENT:**

Privacy and Responsible Information  
Sharing for the WA Public Sector

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**Legal Aid WA**

**8 November 2019**

## INTRODUCTION

Legal Aid WA (LAWA) refers to the Government's Discussion Paper on *Privacy and Responsible Information Sharing for the Western Australian public sector* and welcomes the opportunity to make a submission on this important issue.

## ABOUT LEGAL AID WESTERN AUSTRALIA

LAWA is an independent, statutory body established under the *Legal Aid Commission Act 1976 (WA)* (the LAC Act). The functions of LAWA under section 12(1) of the LAC Act are to:

- a. provide legal assistance
- b. control and administer LAWA funding

LAWA is funded by the State and Commonwealth governments, to provide legal assistance services, with a particular focus on the needs of people who are economically and/or socially disadvantaged. LAWA services are provided pursuant to the LAC Act and the National Partnership Agreement on Legal Assistance Services 2015-2020 (NPA).

Pursuant to the LAC Act, LAWA provides legal services through a combination of directly employed lawyers and staff, and private lawyers, contracted to perform legal aid work.

LAWA is a "public sector body" and part of the "Public Sector", as a "non-SES organisation", pursuant to the definition of these terms in section 3 of the *Public Sector Management Act 1994 (WA)* (the PSM Act). LAWA is not an entity listed in **Schedule 1 – Entities which are not organisations** or **Schedule 2 – Entities which are SES organisations** of the PSM Act, which are the entities proposed to be captured by the Proposed Legislative Model for Privacy and Responsible Information Sharing. However, LAWA acknowledges that the application of the proposed legislation may be broader than "Public Sector" agencies.

## STRUCTURE OF SUBMISSION

The submission is structured under the following headings/issues:

- LAWA's current statutory/regulatory framework
- General comments on the proposal.
- Comments on the proposed privacy regime.
- Comments on the proposed data sharing arrangements.
- Comments on implementation.

We have considered the 10 discussion questions posed in the Discussion Paper and made comments under the relevant heading. Where we have not addressed a discussion question, we are in general agreement with the proposal but may wish to make additional comments once the finer details are available for comment.

## LAWA'S CURRENT STATUTORY/REGULATORY FRAMEWORK

Pursuant to section 61(1) of the LAC Act, LAWA is subject to the same legislative and regulatory framework that applies to other lawyers and legal services. This includes compliance with the relevant statutory and professional requirements of:

1. The *Legal Profession Act 2008 (WA)* (the LP Act)
2. The *Legal Profession Conduct Rules 2010 (WA)* (the LPC Rules)

The LPC Rules contain specific provisions in relation to client confidentiality and information sharing. Client information is unable to be shared or disclosed without consent, except in the circumstances in Rule 9(3).

Section 64 of the LAC Act restricts and criminalises the disclosure of information held/obtained by LAWA concerning the “personal affairs” of anyone, other than administrative information concerning decisions and services, except with written consent and LAC approval, or in a limited range of circumstances.

It is important to recognise that the duty of confidentiality is different from a right to privacy. The duty of confidentiality is an ethical and professional duty arising out of the client relationship and is owed by the service provider to the client. Whereas, privacy is an individual right to safeguard their information from other parties.

### GENERAL COMMENTS

We support the introduction of a whole of government approach to privacy and information sharing. Western Australia is in the unique position of designing and implementing privacy and information sharing regimes at the same time and thus has the opportunity to design a regime where the individual right to privacy and the public benefit in information sharing complement each other. In particular, we would support an acknowledgment that information is both a “whole of government asset” and also something in which the individual concerned has an expectation of privacy or confidentiality.

We note that the Discussion Paper provides broad concepts for discussion, with limited detail. LAWA would need to consider the finer details of the proposed legislation before we could fully understand how the framework would affect LAWA. In particular, how the privacy and information sharing regimes would interact with LAWA’s current legal obligations.

We note and endorse the proposed exclusions of information subject to legal professional privilege from the Information Sharing proposals. As LAWA’s current legal obligations relating to confidentiality and information disclosure, we consider a helpful mechanism to clarify LAWA’s legal position would be to amend the LAC Act, rather than rely on a blanket exemption in the data sharing legislation. Such an amendment would clarify the ability to share

information more explicitly and set out the guidelines, process and safeguards, for permitted usage.

This could be achieved through an amendment to the LAC Act to clarify the use of identifying and re-identifiable information for specific purposes, where no detriment to clients, on the basis of a right of veto of LAWA, and with clear restrictions on the permissible purposes and re-sharing/re-use of information.

## PRIVACY

LAWA envisages that compliance with any privacy regime will require us to further research how the proposed privacy requirements will apply to our current operations as well as to understand how the privacy obligations will interact with our existing legal obligations.

It appears that there are some instances where the introduction of Privacy Principles could clash with LAWA's obligations as a legal service provider. For example, fully adopting the principle of pseudonymity may affect LAWA's obligation to provide services free from conflict of interest.

Other issues that will require further research include:

- Deletion of sensitive data when no longer required
- Limiting use of government identifiers
- Consent to secondary use.

## INFORMATION SHARING

LAWA supports the following general principles:

- Sharing of data for planning, research, evaluation and measuring purposes
- Protection of our data to ensure accuracy and prevent misinterpretation
- Protection of client confidentiality and legal professional privilege
- Protection of individual clients from any detrimental consequences as a result of data sharing
- Request for information be processed according to the principles in the "Five Safes"

LAWA holds the following data types:

1. Data about legal services carried out by LAWA staff, and LAWA contractors, to clients

2. Data about the personal information and affairs of applicants for legal services
3. Data about administrative information - administrative matters and decisions in relation to applicants for legal services
4. Data about financial performance
5. Human resources data

LAWA data can be organised and shared/disclosed as non-aggregated or aggregated data, which is either:

*a. Identifiable*

Where the identity of a person is likely or obvious.

*b. Potentially Re-Identifiable*

Where the identity of a person is not immediately obvious but could be ascertained through a unique combination of fields or using information that the recipient already holds.

*c. Un-identifiable*

Where the identity of the person is not immediately obvious, and it is not reasonably possible to re-identify a person using other sources of information.

As a legal service provider, LAWA should continue to be subject to the same regulation, and clients should be afforded the same protections, as exist for other legal services and legal clients. LAWA therefore believes that the information in "1.", "2." and "3." should be exempt from the general proposed information sharing legislation/scheme. Information should be treated as set out below, depending on whether it is Identifiable, Potentially Re-Identifiable or Un-identifiable. In addition, the application of the "Five Safes" framework would need to be customized for LAWA to exclude the purposes of law enforcement and emergency planning.

The information in "4." and "5." does not need to be exempted.

#### Identifiable and Potentially Re-Identifiable Information

LAWA supports tight controls on information in "1." and "2." Under these categories.

Information should only be disclosed or shared:

- In accordance with the exceptions in the LAC Act and LPC Rules
- For planning, research, evaluation and measuring purposes, with strict limitations through contractual arrangements or MOUs limiting the use and re-use of the information, and where individuals are not identified or re-identifiable in what is published
- In line with the principles in the "Five Safes"

#### Non-Identifying Information

LAWA supports the sharing of non-identifying information for:

- Research
- Planning
- Other beneficial purposes

### Administrative Information

The Director of LAWA has the discretion to disclose the data in category “3.” to any person, under the “administrative information” exception to the secrecy provisions in 64 of the LAC Act. LAWA sees no reason to alter this or to exclude this type of information from any information sharing scheme.

### Chief Data Officer

We have considered the role of the Chief Data Officer (CDO) and do not support the Chief Data Officer being able to compel data sharing. Our view is that the CDO could provide guidance on best practice, templates and training.

### Information sharing outside the WA public sector

LAWA considers that the legislation should allow information sharing outside the WA public sector and should adopt the same risk management framework for all information sharing. LAWA is currently required to share information with the Commonwealth and organisations nominated by the Commonwealth as a condition of funding agreements. Our funding contracts specify defined reporting arrangements. Additional requests for information sharing are also made to support planning for new and additional funding.

## IMPLEMENTATION

LAWA makes the following suggestions to support successful implementation of privacy and information sharing:

### Transition period

LAWA suggests that there be a transition period before the privacy regime is fully operational to enable agencies to analyse existing systems and practices and implement necessary changes.

### Compliance costs

LAWA has identified two types of compliance costs. The first is where technical system changes are required. The second, is the additional duties required to ensure compliance.

LAWA suggests a transition fund that would enable agencies to seek funding for costs of implementing system changes.

#### Guidance for agencies

LAWA would suggest guidance and training for agencies on best practices in implementing privacy and information sharing. LAWA would be particularly interested in learning what strategies the WA Data Linkage System uses for data protection and linking data.

#### Public information/ education

LAWA suggests an information and education program for members of the public. This would not only inform members of the public on their rights and responsibilities but would also support agencies in implementing necessary operational changes.

#### **CONCLUSION**

LAWA thanks the Government for the opportunity to provide a submission and is happy to elaborate on any aspect of the submission in more detail if required.