



School Curriculum and Standards Authority response to 'Privacy and Responsible Information Sharing for the Western Australian Public Sector' Discussion Paper

School Curriculum and Standards Authority Background

The School Curriculum and Standards Authority (the Authority) is the Western Australian (WA) Government statutory agency responsible for setting standards of student achievement and for assessment and certification (in Year 12) according to these standards. The Authority is also responsible for setting year-level syllabuses across learning areas from Pre-primary to Year 10 and issuing the Kindergarten Curriculum Guidelines through the *Western Australian Curriculum and Assessment Outline*. Additionally, the Authority is the Test Administration Authority for the National Assessment Program (including NAPLAN and NAP sample assessment) and for assessing students standards of literacy and numeracy in Western Australia.

The Authority is also required, as part of its statutory responsibilities, to collect an array of longitudinal data related to student achievement, enrolment, certification and demographics. This function is currently being expanded following the development of an enhanced Student Record Management System and within the next few years the Authority will collect comprehensive data across all students (regardless of system/sector) in Pre-primary to Year 12. The Authority's submission to the WA Government Department of the Premier and Cabinet's *Privacy and Responsible Information Sharing: Discussion Paper* (Discussion Paper) is made in consideration of community expectation with respect to the access, use and disclosure of this data. The Authority gauged this community expectation through the development of the Regulations described below. In making this submission, the Authority has only considered the Discussion Paper from the perspective of WA Government department or agency. No consideration has been given to the application of a Privacy and Responsible Information Sharing (PRIS) legislative regime on private sector entities or citizens.

School Curriculum and Standards Authority Regulations

To undertake its statutory functions, as described in the *School Curriculum and Standards Authority Act* (the Act), the Authority collects student achievement, enrolment, registration, certification and demographic data. The Authority is in the final stages of making Regulations to support a 2017 amendment to its Act to disclose data for the purposes of research promoting, or understanding outcomes connected with, student achievement or well-being. The 2017 amendment and the draft Regulations once made, will enable the Authority to release data subject to addressing prescribed criteria, which reflect an ethics-based approach to disclosure.

In respect to the request for a response to the ten questions posed in the WA Government Department of the Premier and Cabinet's *Privacy and Responsible Information Sharing: Discussion Paper* (Discussion Paper), the following points are submitted for consideration concerning questions relevant to the Authority.

Responses to Discussion Paper

1. *What issues should be considered when developing privacy and information sharing legislation for Western Australia?*

The Authority considers that the primary issue for the development of a PRIS legislative framework is that it must adequately address the potential benefit with the potential for harm arising out of data sharing or disclosure. It is an established practice in various Australian jurisdictions that the sharing of information without consent is acceptable where the potential public benefit from the disclosure outweighs potential individual harm. Any PRIS legislation must contain a clear practical framework for WA Government departments and agencies to measure and make a decision on the public benefit versus harm. An example of harm measurement includes the WA Health Departments 'Risk Matrix for Health Impact Assessment', which measures the risk of harm by balancing 'Consequences' with 'Likelihood'.

A further critical issue the Authority believes must be considered when developing PRIS legislation is the establishment of safeguards and support to protect WA Government departments and agencies, and their staff, who have shared data in accordance with this legislation. These protections are particularly necessary where data sharing does not align with community expectation. The Authority is concerned that authorised data sharing may not align with the original purpose of collection, which may discourage individuals submitting certain data in the future, thereby restricting the execution of statutory functions. The Authority considers that safeguards and support embedded in the PRIS legislation that indemnify compliant departments and agencies, and their staff, is warranted to facilitate data sharing in accordance with the intent of the legislation. To address public expectation, it is important that the PRIS legislative framework be accompanied by a considerable public information campaign prior to enactment.

2. *What privacy principles should WA adopt for regulating the handling of personal information by the public sector? Are any of the existing Australian Privacy Principles, or principles in other Australian jurisdictions, unsuitable for WA?*

It is the Authority's understanding that the Australian Privacy Principles (APP) will be used to guide the development of the PRIS legislative framework. The APP provide a prescriptive regime for data collection, access, use, disclosure and storage. In using the APP as a guiding framework, consideration should be given to how the APP intersects with existing WA legislative mechanisms pertaining to data. For example, APP 12 and 13 describe how an entity must allow the public to access and correct any of their information held by the entity. APP 12 and 13 appear to duplicate *Freedom of Information Act* provisions that provide the public with a mechanism to access and correct personal information held by the WA public sector.

Further APP that may cause issue if implemented include APP 2, which gives individuals the option of not identifying themselves in dealing with an entity to whom the APP apply. It is unclear to what extent the exemptions for this APP would apply to a WA Government department of agency.

Generally, if the development of a PRIS legislative framework is undertaken in consideration of the APP, assessment of the operational impact of such a regime must be performed. The Authority expects that consideration has been given to the likelihood that the adoption of an APP aligned framework (or any framework for that matter) could create substantial workloads for WA Government departments and agencies in terms of policy development and implementation, the development of compliant processes and systems for data collection, use and disclosure.

3. What should the role of a Privacy Commissioner be, and how can this role best protect privacy and ensure public trust?

The Privacy Commissioner should play a pivotal role in the promotion, education and monitoring of best practice with respect to privacy. The Privacy Commissioner should act as an escalation point for any complaints made under the proposed PRIS legislation that are not addressed to the reasonable satisfaction of complainants. Furthermore, the Privacy Commissioner should receive self-reported issues of non-compliance by WA Government departments or agencies. Identifying the Privacy Commissioner as a point of escalation is important to afford WA Government departments and agencies an opportunity to address complaints directly consistent with their statutory decision making powers. The Authority does not believe the Privacy Commissioner should have powers to compel any particular action with respect to data sharing. The Privacy Commissioner should have a mediation role with recommended actions for the parties concerned. The Authority believes that in the instance that a WA Government department or agency is significantly non-compliant with the proposed PRIS legislation, this would be best addressed through existing administrative law processes, e.g. the Public Sector Commission. This would ensure a streamlining of regulation of the system and encourage greater levels of compliance.

The proposed PRIS legislation should empower the Privacy Commissioner to:

- make a preliminary assessment of an escalated complaint or self-reported instance of non-compliance that warrants investigation
- make the assessment on the basis of consideration of the severity of impact of the issue
- investigate complaints and/or instances of non-compliance
- engage parties in a mediation process as required
- provide non-binding recommendations.

4. How should breaches of privacy be managed, and what action should be taken in response to a breach?

In the first instance, breaches of privacy should be managed by WA Government department or agencies in accordance with their own privacy policy. Such policy should be developed in accordance with guidance issued by a Privacy Commissioner. Breaches should be managed using a graduating enforcement approach, where the level of rectification for confirmed breaches is dependent on an assessment of the impact of negligence. To facilitate this, a fault-based instead of a strict liability approach should be implemented. This approach would ensure that a WA Government department or agency is considered non-compliant with PRIS legislation only when negligence present. Under this system, accidental and minor impact non-compliance could then be managed internally through education and training while civil penalties for serious, repeated and/or high impact non-compliance may be pursued through appropriate and existing administrative legal mechanisms.

The Authority would like further clarification around the limit of liability with respect to non-compliance and whether restrictions will be placed on available civil remedies.

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?

The Authority is of the opinion that WA Government departments and agencies should be allowed to share personal information when three key conditions are satisfied:

- a) it is impracticable to get consent for the sharing of personal information
- b) the function that requires the sharing of personal information cannot occur but for the sharing of personal information
- c) potential public benefits from sharing personal information outweighs the potential for harm that may be caused

To effectively make an assessment on the above the conditions, the sharing agency must understand the objective of the receiving agency and the use of the data requested. For example, in an instance of using data to inform policy decisions, there must be a clear connection between the data requested and the proposed policy.

It is unclear whether WA Government departments or agencies will only share information when it is in the best interests of the individuals whose information is being shared. When sharing personal information without consent, the Authority is of the opinion that sharing an individual's personal information could lead to an evidence-based policy decision that is not in the best interests of the individual. There appears to be no guiding principle for the 'on sharing' of data whether that be a data recipient providing it to another department or agency, or even with departments and agencies. This situation requires clarification particularly where departments and agencies hold third party information that is not owned by the department or agency but collected for a statutory purpose.

6. *What should the role of a Chief Data Officer be? How can this role best support the aims of Government and the interests of the public?*

The role of the Chief Data Officer should be to facilitate data sharing processes between WA Government departments and agencies through maintaining the systems and infrastructure for data sharing. The Chief Data Officer should also drive best practice for data transmission by providing guidance and training for this process. Making available a panel of technical experts, under the Chief Data Officer, to enhance WA Government department and agency capacity for data sharing would be beneficial in the initial stages.

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?*

As with all information sharing decisions, the key consideration as to whether an agency should share information outside the WA public sector must be the weighing of potential public benefit versus the potential for harm. Furthermore, information must be categorised as personal, confidential and/or sensitive in nature and either identified or de-identified in form. The nature and form of the information will be instrumental in determining the potential harm. Disclosure of personal information should address the conditions found in the response to question five.

If the proposed PRIS legislation enables the sharing of information with non-public sector entities without the consent of individuals about whom the information concerns, irrespective of whether or not the information would be personal information, the Authority recommends this is communicated to the broader community by a public information campaign. If this responsibility were given to each agency, individuals would receive multiple notifications resulting in less public confidence and increased costs for the departments and agencies. Consideration should be given as to whether the private individuals should be given the opportunity to 'opt-out' of having their data shared both inside and outside the WA public sector.

8. *What criteria should be included as part of a risk management framework such as the Five Safes?*

The *Five Safes* is an internationally recognised framework to assist in effective decision making regarding the sharing of information. It encompasses Safe Data, Safe People, Safe Settings, Safe Output and Safe Projects. While the *Five Safes* is comprehensive, two key considerations appear not to explicitly fit into the model as described in the Discussion Paper. These considerations include the legal implications around ownership of the information provided and any resulting data sets developed from this information. Ownership must be explicitly agreed to in a data sharing agreement between the parties to data sharing, which must consider secondary use of information.

The second consideration is with respect to cultural or specific ethnic context applicable to the information shared. Specifically, WA Government departments and agencies need to take into account expectations around the sharing of personal and sensitive data regarding Aboriginal and Torres Strait Island people. These considerations feed into the 'harm and benefit' analysis as cultural considerations escalate the potential consequences resulting from a breach.

It is unclear who, in the result of a breach, will consider whether the *Five Safes* had been appropriately 'applied and satisfied'. As this is not a prescriptive framework and instead relies on a principle-based approach, WA Government departments or agencies will require guidance in the application and understanding of the model. As agencies are being encouraged to seek assistance from the Chief Data Officer, it creates a possible conflict of interest if the Chief Data Officer also has the power to determine whether the framework has been appropriately applied. Further, if departments and agencies do seek assistance from the Chief Data Officer and the subsequent sharing of data results in a breach, it is unclear what the apportionment of liability will be between the department, agency and the Chief Data Officer.

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

The Authority is of the opinion that the only time in which confidential information may be shared is when:

- a) all parties concerned consent to the sharing
- b) a significant public benefit could not otherwise be realised without the sharing of the confidential information
- c) there would be no detriment to WA Government from sharing the information.

10. *What should the WA Government be doing to support successful implementation of privacy and information sharing?*

WA Government departments and agencies that will be bound by the proposed PRIS legislation could face significant operational challenges in adapting to support implementation. The discussion paper mentions:

- development of new internal policies and procedures
- training and retraining of public servants
- modification of current technology systems or implementation of new ones.

The Authority would like clarity on the actual levels of operational support that will be provided for the implementation of the legislation.