Australian Government

Legal framework for integrating authorities undertaking high risk[1] projects – project level requirements

Introduction

1. Data custodians must be, and must be seen by the public to be, appropriate agencies to collect, use and store identifiable data[2].

2. Each Commonwealth agency collecting data has specific legislation which controls access to that data, and prescribes penalties for unauthorised use or disclosure. The requirements set out below reflect these legislative obligations.

3. Data custodians are subject to Commonwealth, state and territory privacy regimes (such as the *Privacy Act 1988*) which regulate their use of personal information, including the provision of data to integrating authorities. Specific laws also govern how integrating authorities may use this information once it is provided to them. The Privacy Act regulates the handling of personal information held by both Commonwealth and ACT government agencies and most private sector organisations. Generally, entities that hold personal information should not disclose it to another person, body or agency unless an exception permits the disclosure. Exceptions include: where the individual is reasonably likely to have been aware that information of that kind is usually passed to that person, body or agency; where the individual consents; or where the disclosure is required or authorised by or under law.

4. Commonwealth Portfolio Secretaries have endorsed a set of high level principles for data integration involving Commonwealth data for statistical and research purposes. Principle 3 states that an integrating authority must be nominated for each data integration project.

5. An assessment of the existing legislation, to determine if it allows an integrating authority to undertake a high risk project, must be done for each individual project, or family of projects. (Integrating authorities must also be accredited to undertake high risk projects. Accreditation applies to an institution such as an agency or organisation, rather than a project.)

Requirements

6. For each project, or family of projects, the data custodian(s), in consultation with the proposed integrating authority, will assess whether an integrating authority:

   a. is authorised to access and use the data custodian's identifiable data for the proposed purpose – either by legislation or by obtaining consent from the data provider[3]; and
   b. has appropriate legal protections in place prohibiting the disclosure of identifiable data, other than where allowed by law.

[1] Data custodians assess the risk of a project in accordance with the risk assessment framework

[2] Identifiable data enables a person to establish the identity of a person or organisation to which some data relate.

[3] The individual, family, household or organisation which provides data either to administrative collections or statistical collections.

Authorisation to access and use identifiable data – by legislation or consent

7. Legislated authority exists for an integrating authority to receive identifiable data from a data custodian when:

a. the integrating authority is explicitly named in the legislation under which the data was collected as an agency which can access and use the identifiable data for statistical and research purposes (for an example see the Australian Taxation Office legislation in Attachment 1); or

b. the legislation under which the data was collected provides for this type of agency or body to access and use the identifiable data for statistical and research purposes; or

c. the integrating authority is covered by legislation that authorises it to access and use the data custodian's data for statistical and research purposes.

8. For cross portfolio projects the decision on authorisation will be made collaboratively by multiple custodians. Each data custodian will need to separately assess the legislated authority.

Attachment 1 provides a brief overview of some relevant provisions in data custodians' legislation, to demonstrate some of the legal issues that arise. **The information in Attachment 1 is current as at 30 October 2013 and is provided solely for information. Data custodians may need to seek legal advice to determine whether a particular project is consistent with legal requirements.**

9. Authority for the data custodian to provide identifiable data to an integrating authority can also be obtained through consent from the data provider where this is not precluded by legislation. In such cases data custodians must assure themselves that appropriate informed consent has been given by data providers, to the disclosure of their identifiable data to the agency or body nominated to be the integrating authority.

Legal protections prohibiting the disclosure of identifiable data

10. There must be appropriate legal protections in place prohibiting the integrating authority from disclosing identifiable data, other than where allowed by law. These protections may come from the legislation that applies to an integrating authority (such as the Commonwealth Privacy Act or state equivalent, or the *Australian Institute of Health and Welfare Act 1987* (AIHW Act) as outlined in Attachment 1) or be provided by other arrangements, such as secondment arrangements. An officer seconded to a Commonwealth agency becomes subject to the legislation of that agency.

Attachment 1: Data custodians' legislation: some examples.
The information in this attachment provides a brief overview of some relevant provisions in legislation, to demonstrate some of the legal issues that arise. This information is current as at 30 October 2013 and is provided solely for information**.** Data custodians may also need to seek legal advice to assess whether a particular project is consistent with legal requirements.

In addition, all Commonwealth agencies are subject to the *Privacy Act 1988*. The website for the Office of the Australian Information Commissioner provides detailed information about the Act, see http://www.privacy.gov.au/law/act. Some of the examples below also discuss the implications of the Privacy Act, for illustrative purposes.

Australian Bureau of Statistics (ABS)

Organisations to which ABS can provide identifiable data

Section 13 of the *Census and Statistics Act 1905* prohibits the ABS from releasing information of a personal or domestic nature relating to a person in a manner that is likely to enable the identification of that person.

Under Clause 7A and Clause 6 of the *Statistics Determination 1983*, identifiable information relating to an organisation or business may be disclosed for statistical purposes. Release of information under a clause of the Statistics Determination is at the discretion of the Statistician, and is only to be used for statistical purposes and when an enforceable undertaking has been signed.

The ABS is also subject to, and compliant with, the *Privacy Act 1988*.

Legal protections prohibiting the disclosure of identifiable data

Section 12 of the *Census and Statistics Act 1905* (Subsection 12(2)) requires that information supplied to the ABS cannot be published or disseminated in a manner that is likely to enable the identification of a particular individual or organisation. Section 19 of the *Census and Statistics Act 1905* makes it an offence for any past or present ABS officer to divulge, either directly or indirectly, any information given under the Act other than in accordance with a determination under Section 13, or for the purposes of this Act. The penalty for this offence is a fine of up to $20,400, imprisonment of up to two years or both.

Australian Institute of Health and Welfare (AIHW)

Organisations to which AIHW can provide identifiable data

Section 29(2)(c) of the AIHW Act provides that the AIHW may provide identifiable data, relating to living or deceased individuals, to any person specified in writing by the AIHW Ethics Committee, provided this is not contrary to the terms and conditions under which the information was directly provided to the AIHW. This applies to both health and welfare-related data.

However, AIHW is also subject to the *Privacy Act 1988*, which restricts AIHW's ability to release identifiable data about living individuals. Guidelines issued by the National Health and Medical Research Council under Section 95 of the *Privacy Act 1988* (s95) provide the basis on which the AIHW Ethics Committee may approve the release of health information about living individuals

for the purpose of medical research if this satisfies a public interest test. Section 95 does not provide for the release of identifiable welfare data.

In summary, the combined effect of these legislative enactments is that AIHW may make health data about living individuals available for research with the approval of the AIHW Ethics Committee, in the terms outlined above. Release of identifiable welfare data may only be approved by the AIHW Ethics Committee in respect of deceased individuals.

Legal protections prohibiting the disclosure of identifiable data

Data collected under the AIHW Act are protected by the confidentiality provisions in section 29 of that Act. These provisions prohibit, except for the purposes of the AIHW Act, an 'informed person' from making a record, or divulging or communicating 'information concerning a person' to any person. Under the Act, such information cannot even be subpoenaed by a court.

Section 29 provides that an 'informed person' is any person who holds such information because of: holding an office or position, performing a function or duty, or exercising a power under the Act, or under an agreement or arrangement with the AIHW. 'Information concerning a person' is undefined by the Act, but essentially encompasses both identified and identifiable data. The penalty for breach of section 29 is $2,000 or imprisonment for 12 months, or both. Under section 29(3) of the Act, a person to whom such information is divulged for any reason becomes an 'informed person' and is therefore subject to the same penalties for breach.

The section 29 restrictions outlined above do not apply to non-identifiable information.

Australian Taxation Office (ATO)

Organisations to which ATO can provide identifiable data

Under Section 355-65 of the *Taxation Administration Act 1953,* the ATO can provide identifiable information to the Australian Statistician (ABS) for the purpose of administering the *Census and Statistics Act 1905*.

The ATO can provide information to organisations other than the ABS, but this is for other purposes (rather than those in scope of statistical data integration) such as administering laws, providing data to an Australian government agency to prevent or lessen serious threats to life and safety, or for purposes related to corporate regulation.

Legal protections prohibiting the disclosure of identifiable data

Under Section 355-25 of the *Taxation Administration Act 1953,* the penalty for a tax officer who discloses protected information (except in performing his/her duties as a tax officer) is two years imprisonment. Under Section 355-155 of the *Taxation Administration Act 1953,* other people (not ATO officers) who make a record of protected information, or disclose protected information, also incur a penalty of two years imprisonment. Consent is not a defence.

Department of Social Services

The Department of Social Services is subject to a number of Acts which are relevant here, including the *Social Security (Administration) Act 1999* (Cth) (the SS Admin Act); Family Assistance law (sections 161-170 of the *A New Tax System (Family Assistance) (Administration) Act 1999* have provisions about confidentiality); and the *Disability Services Act*. As this attachment is provided for illustrative purposes only, rather than as a comprehensive guide to all of the legal issues that apply when considering whether a particular data integration project can proceed, the *Social Security (Administration) Act 1999* is the only Act considered below.

Social security law – use and disclosure of identifiable information

Protected information can only be used and disclosed in accordance with the confidentiality provisions set out in Division 3 of Part 5 of the *Social Security (Administration) Act 1999* (Cth) (the SS Admin Act). Protected information is defined in section 23(1) of the *Social Security Act 1991* (Cth).

Paragraph 208(1) of the SS Admin Act permits the Secretary to disclose information acquired by an officer (the meaning of 'officer' is defined in section 201A of the Act) in the performance of their functions or duties under the social security law for certain purposes, if the Secretary certifies that it is necessary in the public interest to do so. The Secretary may disclose the information to such persons as the Secretary determines, or to other parties such as:

- the Secretary of a Department of State of the Commonwealth or to the head of an authority of the Commonwealth for the purposes of that Department or authority; or
- a person who is expressly or implicitly authorised by the person to whom the information relates to obtain it.

Subsection 202(2C) of the SS Admin Act may enable disclosure or use of protected information, if, for example, that is done for the purpose of research or statistical analysis of matters relevant to a Department that is administering any part of the social security law.

Information may constitute both protected information (under the social security law) and personal information (under the *Privacy Act 1988*). If the data is protected information and the disclosure is authorised under the SS Admin Act then the disclosure will also be permitted under the *Privacy Act 1988* on the basis that the disclosure is 'authorised by law' (as per the exception at Information Privacy Principles (IPP) 11(1)(d)).

However, if the data is not protected information for the purposes of the social security law – for example, if the data is about a direct registration participant who is not in receipt of social security payments – then it may not be possible to rely on the IPP 11(1)(d) exception, as the disclosure would not be authorised under the SS Admin Act. In that instance it would be necessary to consider whether one of the other IPP 11(1) exceptions applies instead, if the information in question was personal information.

Legal protections prohibiting the disclosure of identifiable data

Under Section 204 of the SS Admin Act, if a person intentionally makes a record of, discloses to any person, or otherwise makes use of information, where they were not authorised or required by law to do so and where they know (or ought reasonably to know) the information is protected information, then the person is guilty of an offence. The offence is punishable by imprisonment for a term not exceeding two years. The SS Admin Act also contains offences in relation to soliciting disclosure of protected information and offering to supply protected information (see Sections 205 and 206).

Department of Health

Organisations to which the Department of Health can provide identifiable data

Under Section 130 of the *Health Insurance Act 1973* and Section 135A of the *National Health Act 1953* the Secretary (or the Chief Executive Medicare, Department of Human Services) may release information if the Minister certifies that it is necessary in the public interest. Information may also be released to a prescribed authority or a prescribed person.

Legal protections prohibiting the disclosure of identifiable data

Under Section 130 of the *Health Insurance Act 1973* and Section 135A of the *National Health Act 1953*, if a person directly or indirectly divulges or communicates information with respect to the affairs of a third person, and is not authorised to do so by law, the person is guilty of an offence.

For information collected under the *Health Insurance Act 1973*, the offence is punishable by a $500 fine. For information collected under the *National Health Act 1953*, the offence is punishable by a $5,000 fine, imprisonment for 2 years, or both.

Any authority or person to whom the information is divulged is subject to the same continuing obligations and liabilities as a Department of Health officer except where the legislation provides otherwise.