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12 August 2016

The Manager
Data Availability and Use
Productivity Commission
GPO Box 1428
Canberra ACT 2601

Dear Sir/Madam,

Inquiry into Data Availability and Use

The Law Institute of Victoria (LIV) appreciates the opportunity to contribute to the Productivity Commission's Inquiry into Data Availability and Use (Inquiry) and to make a submission on the Data Availability and Use Issues Paper (Issues Paper).

The LIV has considered the questions posed in the Issues Paper and offers comments on issues of general application.

1. An integrated approach to privacy

The LIV understands that the Productivity Commission seeks to balance the benefits of greater disclosure and use of data with protecting the privacy of the individual.

The LIV is concerned that the Issues Paper maintains the notion that privacy and economic value are trade-offs, and that enhancing one necessarily means sacrificing the other. The LIV considers this approach to be too limiting, and recommends that the Productivity Commission explore how privacy and economic value can be integrated, rather than be seen as opposing interests.

The LIV recommends a "privacy by design" approach be adopted as the starting point for any consideration of increasing data availability, where privacy is "built in" to the design of data collection, retention and sharing processes, to ensure that privacy is considered before and during the development and implementation of initiatives that involve the collection and handling of personal information.

The "privacy by design" approach has been recommended by the Office of the Australian Information Commissioner.

2. Broader consent issues to be addressed

The Issues Paper acknowledges that the notion of consent can be problematic, both with respect to what constitutes consent and the debate over the distinctions between "informed consent", "passive consent", "unknown consent", and "non-consent". The LIV recommends that the Inquiry include in this discussion the concept of "bundled consent" i.e. the combining of a number of matters on which consent is sought, thereby removing the option to consent to some matters but not other. This is also described as "all or nothing" consent. The LIV further suggests that the Inquiry critically assess in what circumstances bundled consent is appropriate.

The LIV is concerned that much of the discussion regarding data sets being used for different purposes appears to overlook the issue of consent. The LIV is of the firm view that discussions around consent, as with privacy, should not be dealt with separately to other issues associated with data availability and use, but rather viewed holistically.

The Issues Paper briefly explores concepts of "meaningful consent" using the individual's agreement to Facebook's *Data Use Policy* as an example. The LIV recommends that the Inquiry consider broader issues regarding consent.

One such issue to be considered is the proportionality between availability of data and coercion used to collect it. A current example can be found in the mandatory collection of data through the 2016 Australian Census. The LIV queries whether data of this nature should be made available for private use, where individuals have no choice in its provision. This becomes particularly relevant where individuals can be identified through the data collected.

The LIV further recommends that the Inquiry address the tendency of organisations to collect more data than is necessary to provide a good service under the guise of "consent", especially bundled consent.

It is often the case that for an individual to receive a service, they must provide a disproportionate amount of data that is then commercialised. The value of the service to the individual does not equate to the amount of data used to access it. For example, the consumer may implicitly agree to share data with a bank in exchange for the convenience of a credit card. It should not follow that the consumer has therefore agreed to the bank then using that data for commercial value, especially when none of that value flows back to the consumer.

Currently, companies have an incentive to collect more data than they need, and to refuse to offer services unless that additional data is provided. This is permitted under the current Australian Privacy Principle (APP) 3.2, because organisations can collect personal information that is reasonably necessary for one or more of their functions.

The difficulty for the consumer is that this binary approach results in their only option being to opt-out of the service. The LIV recommends that the Inquiry explore:

- opportunities for consumers to choose the level of data that they wish to share in exchange for a service;
- the introduction of a proportionality requirement between services and data collected;
- limiting APP 3.2 to the collection of personal information reasonably necessary for the functions/services engaged by the individual at the time of that collection.

3. When organisations can refuse service for refusal to provide personal information.

Where organisations collect personal information which is necessary for functions directly related to the service sought by the individual, failure to provide that information is likely to be a reasonable ground for refusing service.

Where the refusal relates to a function which is not directly related to the service sought by the individuals, it is not reasonable to refuse to provide the service if the information is not provided.

Permitting organisations to refuse service in such circumstances is based on the fallacy that the individual has "consented". However, where consent is bundled and the individual does not have a choice about providing the reasonably necessary information but not the rest, any consent is obtained under a form of coercion or duress and should not be treated as valid.

This reference to duress is considered and not mere hyperbole- many essential services and functions, including banking, communications services and housing services, require personal

information that may be well in excess of what is reasonably necessary for the provision of those services.

4. Greater scrutiny of commercial-in-confidence

The Issues Paper poses the question of whether there is a need for a more uniform treatment of commercial-in-confidence data held by the Australian Government and state and territory governments.

The LIV recommends there be greater scrutiny regarding commercial-in-confidence and the benefit of agencies and organisations having restrictions on the release and use of particular data.

The LIV queries why commercial-in-confidence is regularly given priority over other interests (such as the interest in public debate about government procurement and projects) and yet personal privacy is framed as a trade off that may compromised for economic, and other public and private interests.

The LIV considers this to be particularly problematic where documents are sought under FOI. The LIV recommends that the question to be asked is, whether there is a greater public interest in disclosure of information regarding government procurement or commercial-in-confidence, especially in the context of major government projects.

4. The need for greater data security

The LIV calls for and supports the introduction of mandatory data breach notification laws; see, for example the LIV media release of 13 October 2015.

Such laws were integral to the recommendations of the Parliamentary Joint Committee on Intelligence and Security (PJCIS) regarding the Data Retention Bill. The PJCIS recommended passage of the Bill and the introduction of mandatory data breach notification laws before the end of 2015. There has yet been no indication that they will be introduced before the end of 2016.

Aside from that particular issue, the failure to introduce mandatory data breach notification laws illustrates a broader problem in dealing with privacy matters. That is, governments are generally quick to authorise privacy intrusions, such as the Data Retention Bill, but much slower authorising or providing privacy protections. The time it has taken to implement the recommendations of the Australian Law Reform Commission's 2008 Report, *For Your Information,* many of which remain unimplemented, is an example.

The LIV considers that the benefits to the public of a mandatory data breach notification scheme include:

- creating an incentive for better information security and handling of personal information by Australian Privacy Principle entities; and
- enabling timely and appropriate action to be taken by individuals when notified of a real risk of harm, for example changing passwords and cancelling credit cards.

A more full discussion of those issues is found in the Law Council of Australia submission to the Serious Data Breach Notification Consultation in February 2016, to which the LIV contributed.

5. Sharing of unique identifiers

The LIV recommends that unique identifiers not be shared when data is made available. If data is to be made available, it should be group, aggregated data, not data attached to any identifier.

This is particularly important in the context of the 2016 Australian Census. The LIV recommends that amendments be made to the *Census and Statistics Act 1905* (Cth) to insert provisions into section 13

of the Act (which deals with the release of information) to ensure that census data continues to be protected, including a prohibition on releasing the unique identifiers with any data sets disclosed to persons or organisations external to the Australian Bureau of Statistics.

If you would like to discuss the matters raised in the submission, please do not hesitate to contact me or Rebekah Farrell or Karen Cheng at rfarrell@liv.asn.au or kcheng@liv.asn.au.

We look forward to engaging further with this consultation, following with the release of the draft report which is anticipated in November 2016.

Yours sincerely

Steven Sapountsis
President
Law Institute of Victoria