



18 March 2015

By email: community.affairs.sen@aph.gov.au

Committee Secretary
Senate Standing Committee on Community Affairs
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Sir/Madam

Inquiry into the impact on service quality, efficiency and sustainability of recent Commonwealth community service tendering processes by the Department of Social Services

Consumer Action Law Centre and Financial Rights Legal Centre welcome the opportunity to provide a submission to the above inquiry being undertaken by the Senate Community Affairs References Committee.

This submission provides comment relevant to items 'm' and 'n' of the terms of reference for the inquiry, being issues relating to sharing of data and contractual conditions. While we do have concerns with other aspects of the Department of Social Services' (DSS) tendering processes, we leave comment on that to other organisations, particularly the peak organisations.

About us

Our organisations are specialist community legal centres offering legal advice and representation in the area of consumer credit and debt (among other areas). Our organisations have long-standing relationships with the financial counselling sector, both through employing financial counsellors to deliver holistic services in coordination with consumer lawyers and providing significant training and secondary support services to financial counsellors operating in the community.

We also provide financial counselling through the national financial counselling hotline, 1800 007 007. This hotline was established in 2010 by the Federal Government and is now a 'first point of call' for accessing financial counselling throughout Australia. A different organisation is funded in each state and territory to operate the 1800 service; Consumer Action delivers the service to Victoria, while Financial Rights delivers the service to New South Wales.

With support from Financial Counselling Australia (**FCA**), we coordinate with organisations in each state and territory that deliver the 1800 007 007 service with the aim of delivering a consistent and high quality service that is integrated with broader financial counselling and legal

assistance services. During 2013/14 each of our organisations answered over 16,000 calls to the telephone financial counselling hotline.

DSS funding and tender

Since 2010, the Federal Government has provided funding to support the hotline. For both of our services, the Victorian and NSW Governments have also provided significant financial support for telephone financial counselling—indeed, the majority of our services’ delivery of the hotline is funded by state governments.

In 2014, DSS invited our organisations to respond to a direct tender (not competitive) for funding to support the telephone financial counselling service. On 23 December 2014, our organisations received notification that our applications were successful, and on 30 January 2015 our organisations received formal letters of offer.

Upon reviewing the funding agreement conditions, we identified a number of concerns that we wished to discuss further with DSS. The most pressing concern was a condition that required us to comply with the DSS Data Exchange Protocols. Among other things, these protocols included the mandatory data values to be provided to DSS. The mandatory data values included given and family names, date of birth, gender, residential address, a number of demographic details and program and service types.

Our concerns

We have four main concerns with these data requirements:

1. Our ethical duty of confidentiality;
2. Privacy & security of personal information;
3. The sacrifice of personal privacy without a clearly identifiable and justifiable purpose; and
4. Blurring the lines between government services and an independent community sector and the consequences for community confidence and trust.

Confidentiality

Our concerns are based upon the fact that our services provide confidentiality to clients. As legal centres, we have professional obligations to maintain client confidentiality. Solicitors have both a common law duty and a statutory obligation not to disclose the confidential information of clients, except in narrowly defined circumstances. Financial counsellors have an obligation under the FCA code of ethics to keep client information confidential. The data requirement to provide name, dates of births and addresses risks us breaching these duties.

The DSS protocols include a process whereby personal information is to be de-identified and encrypted, so that “no personal information will be accessible to DSS”.¹ The protocol proposes this through the generation of a Statistical Linkage Key (SLK). The SLK allows for two or more records belonging to the same individual to be brought together. Technically, the SLK is a code consisting of the second, third and fifth characters of a person’s family name, the second and third letters of the person’s given name, the day, month and year when the person was born and

¹ Communication from DSS.

the sex of the person. For example, John Smith, a male born on 14 February 1971 has an SLK of: MIHOH14219711.

When objections were raised by our services to providing client names, the DSS responded that it would allow services to provide the SLK only where that can be technically accommodated with their system. DSS states that individual consent to provide personal data in the form of the SLK is not required under privacy law.² We do not accept that: if we are to provide personal information to funding bodies, we should be obtaining consent as to the collection and use of that information. This is required both by Privacy Law and in accordance with our duty of confidentiality.

Theoretically, we could seek express consent from every client to provide the requested information. However, we do not believe that is a realistic option for a number of reasons. First, in the context of busy telephone services, it would be practically cumbersome and time consuming to seek consent and would limit our ability to answer calls and deal with the presenting problem. More importantly, requesting permission from clients to provide their personal details to a government department (even with a promise that the department will de-identify them) would undermine the fundamental element of trust required in the financial counsellor relationship.³ Our experience suggests that callers would in a significant number of cases simply hang up or provide false information, undermining our ability to give accurate and informative advice.

Privacy & security of personal information

As noted above, DSS has stated that the SLK protects an individual's identity. In our assessment, the SLK is incredibly basic and would be reasonably simple to reverse engineer. We are aware that combinations of demographic data can be used to identify people very effectively, especially in smaller cohorts. A key that includes gender, date of birth, and aspects of their name, we believe, does not protect identity, especially when connected to a series of other demographic data (such as language and postcode)

The Office of the Victorian Privacy Commissioner has published guidelines about data matching.⁴ In relation to the use of an SLK, it states:

Organisations should ensure that linkage keys are not purported to be used to anonymise data where re-identification is reasonably possible. A similar caution has been asserted by an Australian Ministerial Council working group in its work on statistical data linkage:

It is a very common misconception that an SLK [statistical linkage key] by itself does not allow an individual to be identified when attached to non-identifiable data.... For example, a common SLK (for example, the [joint Commonwealth/State/Territory Home and Community Care program

² They agree that consent is required to provide DSS with the client's name and surname so that their system can create the SLK, but not that consent is required to provide the SLK only.

³ The DSS only funds financial counselling activities. However, both our services and a number of others funded by DSS are based in legal centres and are integrated to varying degrees with the legal services. The confidential relationship between our clients, our financial counsellors and our solicitors cannot be effectively separated.

⁴ [http://www.privacy.vic.gov.au/privacy/web2.nsf/files/data-matching-in-the-public-interest-a-guide/\\$file/guideline_08_09_no1.pdf](http://www.privacy.vic.gov.au/privacy/web2.nsf/files/data-matching-in-the-public-interest-a-guide/$file/guideline_08_09_no1.pdf)

(HACC)] linkage key) includes the gender and date of birth plus three characters from known positions within the surname and a further two from known positions within the first given name. Information at this level contains much that could be used to identify individuals.

The HACC linkage key is primarily a tool used to uniquely identify an individual with a high degree of reliability, without regard for that individual's identity. It is not a tool primarily designed to protect or ensure the anonymity of the individual. While the HACC linkage key does provide some protection to clients to ensure that clients are not unintentionally identified, it is not (on its own) sufficient to provide complete privacy protection.

We are unaware what further steps DSS are taking to encrypt or otherwise protect the data. However, the risk of unauthorised re-identification is only one part of our concern, albeit an important concern in an environment of increasing and fast evolving cyber threats.

DSS has given many assurances such as:

The DSS Data Exchange IT system has been built with stringent security protocols to protect identified client data and prevent possible breaches of privacy

Departmental staff will only ever be able to access de-identified client information from the DSS Data Exchange. Aggregation rules will be applied to all of our data reports (for example self-service reports available to service providers) to ensure that no client is inadvertently re-identified due to a small sample size.

However, we have not seen any of these protocols or rules, we have not seen a Privacy Impact Assessment, and we do not know to what level and by whom any of these systems have been tested. We are effectively being asked to assure our clients of the security of their data and the purity of the department's intentions, and to run our own risk management, on the basis of these very general assurances.⁵

The sacrifice of personal privacy without a clearly identifiable and justifiable purpose

The ultimate purpose of collecting information in this way is to monitor whether an individual is accessing multiple DSS-funded services without identifying them. DSS states this will "improve outcomes for individuals, families and the broader community".

Our organisations welcome efforts to monitor and evaluate performance of services funded by government, and particularly the effectiveness of financial counselling services for client and community wellbeing. However, our concern is that the way this is proposed to be done fundamentally conflicts with the legal and ethical duties of services that provide confidential services. Further, the ways in which this information will be used improve outcomes is completely unclear.

DSS intends to match client data through the SLK to allow clients (or their SLK) to be effectively tracked over time and across services. As stated above, the use of client data is not acceptable

⁵ We have not asked the Department for any of this documentation etc. at this stage, in part because our concerns are not confined to data security. We are certainly not saying that the Department has refused to provide further information, only that the general expectation seems to be that their assurances will be sufficient to satisfy risk management at the service provider level.

without their being informed of it at the outset prior to providing their personal information and consenting to this use. We also submit that it would be very difficult to draw any meaningful conclusions from monitoring client use of services in this way—further contextualisation as to the reasons and needs clients have for accessing services would be required.

However, the DSS proposals which as far we can tell are so far limited to:

- Tracking clients use of various DSS services at the aggregate level;
- Matching such use to client outcome data (self assessed by services and/or clients) which will be available from services using the Partnership Approach⁶ only; and
- Seeking consent from clients to participate in some future, yet to be designed research.

We respectively submit that this is akin to a fishing exercise whereby client data is gathered simply because it's available with potential uses to be developed once it is analysed. We cannot possibly obtain informed consent from clients to provide their personal details for purposes which are so completely unclear, and may or not ultimately prove to be for their benefit.

We make it clear that we do not object to, and actually encourage, well-reasoned and effective evaluation of services. Indeed, we have committed resources to investigate good practices in measuring effectiveness in service delivery. For example, in 2014 Consumer Action published a report with Australian National University, *Encouraging Good Practice in Measuring Effectiveness in the Legal Service Sector*.⁷ The analysis in that report is as relevant to non-legal services like financial counselling as it is to legal services. Financial Rights has also participated in detailed evaluation exercises, for example *Managing mortgage stress: evaluation of the Legal Aid NSW and Consumer Credit Legal Centre Mortgage Hardship Service*.⁸ We would be happy to work with DSS, other funding bodies and services on developing effective evaluation methodologies.

Blurring the lines between government services and an independent community sector and the consequences for community confidence and trust

Overall we have grave concerns that the lines between government and community services are being effectively blurred. The success of community services is often in their complete independence from government (of any political persuasion). Clients of community services are often marginalised and vulnerable members of the community who are slow to trust any service provider. Allowing government representatives to track the usage of community services by individuals, even on a de-identified basis, erodes the independence of those services and undermines their ability to represent their services as completely safe and confidential. Without this assurance, many clients would not engage effectively. Further, consent to provide information in circumstances where clients are in desperate need of services and feel it is a condition of receiving those services, is not real consent at all.

⁶ The partnership approach involves sharing an extended data set which appear designed to assess client and community outcomes achieved.

⁷ Curran, L, *Encouraging Good Practice in Measuring Effectiveness in the Legal Service Sector*, 2014, available at: <http://consumeraction.org.au/report-encouraging-good-practice-in-measuring-effectiveness-in-the-legal-service-sector/>

⁸ Forell, S & Cain, M 2011, *Managing mortgage stress: evaluation of the Legal Aid NSW and Consumer Credit Legal Centre Mortgage Hardship Service*, Law and Justice Foundation of NSW, Sydney

Discussions with DSS

During February and March 2015, we have had the opportunity to raise our concerns directly with DSS, including through face-to-face meetings. DSS have been responsive to our concerns by agreeing to meet and consider the issues we have raised. We commend DSS on this approach.

DSS has recently informed us that it will not require our services to comply with the Data Exchange Protocols. DSS states that given the types of services we provide on the telephone hotline—much of which is information, referral and minor advice services that are very high in volume—it is not feasible or expected that the client level information be obtained. We agree and very much welcome this concession.

However, we remain concerned about the use of the SLK to track service usage more broadly and the scale of proposed collection of personal information without sufficient purpose to justify the invasion of privacy, risk of unauthorised re-identification and the loss of community sector independence.

We would be happy to assist the inquiry further in relation to the issues raised in this submission.

Yours sincerely

Gerard Brody
CEO
Consumer Action Law Centre

Karen Cox
Coordinator
Financial Rights Legal Centre