Submission No 1

INQUIRY INTO WORK HEALTH AND SAFETY AMENDMENT (INFORMATION EXCHANGE) BILL 2020

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Date Received: 6 August 2020

Standing Committee on Law and Justice
Legislative Council
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6 August 2020

Work Health and Safety Amendment (Information Exchange) Bill 2020

This submission addresses the *Work Health and Safety Amendment (Information Exchange) Bill 2020* (NSW) under consideration by the Legislative Council Standing Committee on Law & Justice for report in September 2020.

Overall the Bill is an example of deficient statutory drafting that should not be endorsed by the Committee and should not be passed by the Legislative Council. It is overly broad, is contrary to the Government's recognition of the importance of privacy and – most importantly – will foster distrust in the community about the handling of sensitive personal health information. Trust is the foundation of an effective public health regime and not something that should be disregarded on the basis of bureaucratic convenience.

The concluding page of this submission offers suggestions about how the proposed sharing regime can be fixed.

Basis

I am an academic at Canberra Law School (University of Canberra) with doctoral and other qualifications relevant to the Committee's inquiry. My work on regulation and privacy in the health sector has been acknowledged in a range of reports by law reform commissions, parliamentary committees and regulatory bodies.

The submission reflects my participation in OECD health data working parties, peer-reviewed research regarding confidentiality and privacy regarding health data, and teaching of tort (ie injury) and privacy law.

The submission does not represent what would be reasonably construed as a conflict of interest.

The Bill

The Government's commitment to addressing concerns regarding dust related diseases and in particular protecting workers from harms attributable to silicosis associated with manufactured stone is commendable. The Bill however is an inappropriately broad response that is contrary to the Government's stated commitment to privacy, has not been the subject of appropriate consultation and will erode public trust that is a foundation of the health system. The Bill is an example of deficient drafting and should be rejected.

<u>The Bill is overly broad</u>

The Bill seeks to authorise *any* sharing of data, including but not restricted to sensitive personal health data, by NSW Health with the state Workplace Health & Safety regulator (SafeWork NSW). It expressly takes that sharing outside the coverage of the NSW privacy regime. It does not feature a review mechanism. It is silent on discretion but the 2nd Reading

Speech indicates that decision-making about sharing is left to the Secretary of NSW Health. The Bill is thus contrary to best practice and public trust.

A key principle in Australian and international law is that any erosion of human rights, such as privacy, must be necessary and proportionate rather than on the basis of bureaucratic convenience. Necessity requires that erosion of a right be justified by a discernible and substantive benefit for the community, as distinct from making life easier for a government agency or partner. Proportionality requires that erosion of a right not go beyond what is required to achieve a public good. A salient test is accordingly whether a particular enactment or other mechanism will do the least harm, be the least erosive.

The principle means that legislators should be wary about giving public/private sector entities the equivalent of a blank cheque, in this instance a proposed statutory authority for sharing of **any** NSW Health information (gathered on a statutory and/or other basis) without any restriction under NSW privacy law such as the *Privacy & Personal Information Protection Act 1998* (NSW) and the *Health Records & Information Privacy Act 2002* (NSW).

The sharing envisaged in the Bill should be specifically restricted to silicosis-related data rather than authorising the sharing of any data.

If the expectation is that the NSW Health be authorised to share non-silicosis data (for example relating to environmental contaminants, carcinogenic chemicals and other harmful substances in the workplace) that very expansive authorisation should be clearly expressed and subject to public discussion. Such sharing should be specifically accommodated within the state's privacy enactments and subject to external scrutiny. The 2nd Reading Speech refers to "limited personal and medical information about workers" and other workers. There is no indication in the Bill on constraints regarding that sharing, with for example no identification of the meaning of "limited".

The overly-broad sharing – irrespective of exclusion from coverage by the Privacy & Personal Information Act and irrespective of the future Memorandum discussed immediately below – must not be regarded as a model for exclusion of privacy protection in other areas of the state's public administration. As it stands both the Bill and inadequate process regarding its development are a disquieting precedent that should be challenged by the Committee.

Ministers have in the past used language such as "privacy is sacred" (for example in introducing legislation regarding the NSW digital driver licence scheme) and stated that the Government has a commitment to respecting privacy as one of the rights identified in a range of international human rights agreements to which Australia is a member. The basis for walking away from that commitment through an express exclusion of privacy in the Bill is unclear. It is not articulated in the very summary Explanatory Statement accompanying the Bill or in the Parliamentary Debates.

<u>The Memorandum is non-substantive</u>

The 2nd Reading Speech for the Bill refers to future development of a Memorandum of Understanding regarding the sharing of data. It appears that the Information and Privacy Commissioner will be consulted on a retrospective basis, contrary to expectations inherent in for example section 36 of the *Privacy & Personal Information Protection Act 1998*.

As things stand there are no privacy safeguards in the Bill. There is no reference in the Bill to the Memorandum. There appears to be no requirement for the Memorandum to be published (an expectation in relation to best practice in government accountability through independent scrutiny and for legitimacy regarding the 'blank cheque' sharing authorised under the

proposed regime). There is no requirement for the Memorandum to be tabled in Parliament, although that tabling might be strongly encouraged by the Committee.

There is no indication of the justiciability of the Memorandum, for example if there is misuse that would otherwise be actionable under the privacy enactments that are expressly excluded in the Bill. There is no requirement for the Memorandum to be approved by the Information and Privacy Commission NSW. Such a requirement would provide a potential safeguard and a recognition by the Government of the function of the Commission in giving effect to the commitment to respecting privacy noted above.

Overall the Memorandum (with uncertain shape and authority) should not be used as a bandaid to cure a fundamentally deficient proposal.

The Bill erodes public trust

The Bill is not fit for purpose. It does not appear to have attracted substantial public attention, presumably because of lack of public consultation (see below). Silence does not mean community endorsement.

There is increasing recognition within the public and private sectors regarding community disengagement and distrust. A major study last year for example found that only 25% of Australians believe people in government can be trusted, 56% believe government is run for 'a few big interests' and only 12% believe the government is run for 'all the people'. Part of that distrust is attributable to the 'Canberra Bubble' and the 'Macquarie Street Bubble', with government agencies doing things 'because we can' rather than 'because we should' and indeed 'because we must'.

If the Bill is passed 'as is' its enactment tells the community that –

- the Government is paying lip service to privacy protection – the Government has excluded the information sharing from the state's privacy regime and has not recognised the salience of privacy in relation to personal information
- the involvement of the Information & Privacy Commission NSW is not valuable or necessary
- people can reasonably assume that sharing will extend to matters beyond silicosis
- people may reasonably suspect that sharing by the Department will provide a model for sharing by a range of agencies about other data that was collected on a mandatory basis.

There has been insufficient independent consideration

There appears to have been no independent privacy impact assessment, something that is required for best practice and legitimacy.

The Information & Privacy Commission NSW does not appear to have been closely involved. Early involvement is a principle of the 'privacy by design' approach that averts many data protection problems and is more cost-effective than retrospective changes. The 2nd Reading Speech can be read as indicating that the Commission is coming in retrospectively.

More broadly, stakeholders might reasonably expect that such a broad exemption from privacy protection would have been the subject of an effective public consultation program that both provides legitimacy and provides critique that addresses concerns overlooked/disregarded by policymakers in the Department and SafeWork NSW.

What needs to be done

As noted above, the Government's commitment to fostering public health in addressing concerns regarding silicosis through the Silicosis Strategy is commendable. The Bill however is defective as a mechanism for implementing that strategy.

The defects can be readily addressed in five ways, both of which are likely to gain support from stakeholders.

The first is that the Bill should be specifically restricted to the sharing of silicosis-related data rather than authorising the sharing of *any* data held by the Department.

The second is that the Bill should not enshrine a blanket exemption from the NSW privacy statutes. Such an exemption is not imperative or proportionate. It is a very disquieting precedent that is of concern to civil society and is contrary to recognition by both NSW courts and the community of the validity of those statutes.

The third is that there should be a statutory requirement for timely and comprehensive reporting on the sharing regime, with that reporting being readily accessible to stakeholders. It should not be a matter of one bureaucratic hand languidly washing the other. Best practice in public policy development and implementation requires independent scrutiny as the basis of accountability and trust. It is insufficient to authorise a broad sharing arrangement that has a discretionary basis without any requirement for detailed disclosure regarding what is being shared, something that needs more than a raw figure on the number of workers and/or employers.

The fourth is that there should be public consultation about the proposed Memorandum of Understanding. That consultation need not be onerous, is an appropriate cost of public administration rather than an onerous burden, and can be used by NSW Health and the Information & Privacy Commission NSW to strengthen public understanding of the sharing arrangements. It is consistent with the principles of Open Government and will deepen the perceived legitimacy of those arrangements.

Finally and fifthly, the Information & Privacy Commission NSW should be closely involved in the monitoring of the sharing regime (rather than merely being informed that there has been an amendment to the Memorandum of Understanding). The Commission should be involved from the initial stage of any other broad-scale sharing arrangement involving Health NSW or another entity within the NSW public sector.

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