

27 January 2017

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Dear Mr Hubscher

**Proposed Approved Information Sharing Agreement with Crown Law**

Thank you for your letter of 7 December 2016 and the invitation to comment on the Ministry of Justice's proposed Approved Information Sharing Agreement (AISA) with Crown Law.

The following consultation materials were provided in relation to the proposed AISA:

- *Sharing of Court information with the Public Prosecutions Unit: Background Information, December 2016*, by Crown Law (the background paper);
- *Sharing Court information with the Crown Law Office: Privacy Impact Assessment Report* (the PIA report); and
- the consultation draft of the Ministry of Justice-Crown Law Office AISA (the draft AISA).

The New Zealand Law Society has reviewed and considered the consultation materials in detail. The consultation materials did not include a detailed Privacy Risk Assessment, which made it difficult to evaluate the full range of potential privacy risks associated with the proposed information sharing.

For the reasons set out below, the Law Society has some concerns about the purpose and scope of the proposed information sharing, and considers that the draft AISA should be amended, including in particular to incorporate greater privacy safeguards.

*Purpose of the information sharing*

The recently enacted Senior Courts Act 2016 and District Court Act 2016 enable the sharing of 'court information' and 'Ministry of Justice information'<sup>1</sup> pursuant to an AISA.

The purpose of the proposed AISA with Crown Law, as described in the letter of 7 December, is to enable the Solicitor-General to "fulfil her responsibilities to retain oversight of all public prosecutions, for conducting prosecutions under the Criminal Procedure Act 2011, and to manage Crown Solicitor funding". This is reflected in clauses 6 and 7 of the draft AISA:

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<sup>1</sup> See ss 173-174 Senior Courts Act 2016, ss 236-237 District Court Act; the terms are defined in Schedule 2 and Schedule 1 of those Acts respectively.

6. The Ministry will provide permitted information and Ministry information to CLO for the following purposes:
  - 6.1 To assist the Solicitor General to fulfil his or her statutory responsibility to retain oversight of all public prosecutions, and for conducting prosecutions under the Criminal Procedure Act 2011, and a Cabinet directive to retain greater oversight of public prosecutions; and
  - 6.2 To manage and allocate Crown Solicitor funding for the conduct of Crown prosecutions.
7. The information will enable CLO to pay Crown Solicitors their fees while maintaining Cabinet's budget constraints through a 'bulk funding' arrangement. It has also allowed CLO to get a picture as to the scope and operation of non-Crown prosecution. On both aspects, the sharing of prosecution information between the Ministry and CLO has allowed the Solicitor-General to facilitate a public service she is statutorily required to facilitate.

The consultation materials state that the information provided to Crown Law enables the Solicitor-General to fulfil her statutory duty under section 185(1) of the Criminal Procedure Act 2011, for "maintaining general oversight of the conduct of public prosecutions".

The background paper outlines the work done since 2012/13 to obtain data in relation to public prosecutions undertaken by the Crown Solicitor network and non-Crown prosecuting agencies (departments and Crown entities), in order to determine the cost of all public prosecutions and assess quality of performance and outcome across the public prosecutions network.

The Law Society agrees that these are relevant aspects of maintaining general oversight of the conduct of public prosecutions, and that the information is required in order for the Solicitor-General to fulfil her statutory duty under section 185(1).

It is, however, also important that the AISA distinguishes between that statutory duty and the Solicitor-General's role as a party to all Crown prosecutions. Currently clause 6.1 of the draft AISA includes facilitating the Solicitor-General "conducting prosecutions under the Criminal Procedure Act 2011" as a permitted purpose of the Ministry sharing information with Crown Law. This is outside the terms of the section 185(1) duty and those words should be deleted, to ensure there is no actual or perceived conflict between the Solicitor-General's statutory duty and his or her participation as a party to prosecutions. Clause 6.1 should also reflect the actual wording of section 185(1). The Law Society therefore recommends the following amendments to clause 6.1:

To assist the Solicitor General to fulfil his or her statutory responsibility to ~~retain oversight~~ maintain general oversight of the conduct of all public prosecutions, ~~and for conducting prosecutions under the Criminal Procedure Act 2011,~~ and a Cabinet directive to retain greater oversight of public prosecutions;

*The information to be shared*

The "permitted information" to be shared pursuant to the draft AISA, as specified in clause 10 and listed in Appendix 1, includes information from the permanent court record (as prescribed by rule 7.2 of the Criminal Procedure Rules 2012). The permanent court record includes particulars relating to the identity of individuals involved in prosecutions:

- (2) the judicial officer or Registrar who presided over each hearing:

- (5) the name of any private prosecutor who commences a proceeding:
- (6) the particulars of the defendant provided under section 16(2)(a) of the Act:

Paragraph (6) in particular covers personal and potentially highly sensitive information. The background paper at paragraph 29 states that the Crown Law Public Prosecutions Unit does “*not* collect” –

“Any personal information about the defendant other than their name, which is only used to cross check CRI numbers (eg we do not collect their date of birth, PRN, criminal history, or bail/custodial status and associated conditions);”

The paper also states that information about “The identity of the Judge(s) and Court staff involved” is not currently collected. Neither of these current restrictions is reflected in the draft AISA.

Since it is apparent that the information is not required for monitoring purposes, the Law Society questions its inclusion in the AISA. The information in paragraph (2) should not be shared. In particular, personal information about defendants, other than their name, should not be shared in the absence of evidence of a compelling reason to do so. Appendix 1 should expressly state that “(6) the particulars of the defendant provided under section 16(2)(a) of the Act” does *not* include personal information about the defendant other than their name.

The detailed spreadsheets (a) – (e) attached to the background paper, but not appended to the draft AISA, should also be incorporated in Appendix 1 of the AISA. This would ensure there is transparency about the detail of the case information to be shared.

#### *Suppressed information to be shared*

Clause 11 of the draft AISA states that the Ministry will provide to Crown Law permitted information that is subject to a suppression order, on the basis that:

“The Solicitor-General, as the junior law officer for the Crown is a party to all Crown prosecutions, and has a general oversight duty with regards to all public prosecutions (Crown and non-Crown alike) pursuant to section 185 Criminal Procedure Act 2011. Suppression orders in criminal prosecutions do not prevent reporting the prosecution to the Solicitor-General.”

The types of suppressed information to be shared, and why they need to be shared, are not explained. Suppressed information from court files is, by definition, sensitive. Apart from the (legitimate) purpose of cross-checking the defendant’s name (where that has been suppressed) with the relevant case file, it is not clear what purpose is served by providing a range of suppressed information to Crown Law. Nor is there any discussion about the need for safeguards to ensure the suppressed information is not accidentally disclosed. These omissions need to be addressed before the AISA is finalised.

#### *Safeguards*

The draft AISA contains the standard Privacy Act requirements for auditing and reporting. Otherwise, the privacy safeguards listed in the draft AISA are limited to the following –

- 13. The Parties will:
  - 13.1 Develop plans for reversing transfers if a mistake in providing information is made;

13.2 Ensure the information is transferred to CLO via secure mechanisms that are compliant with the relevant government security requirements;

...

14. The information will be provided once a month on a password encrypted memory stick, which will be physically exchanged in person between nominated contact person (both Parties are located at the Justice Centre buildings). The password will be emailed separately to CLO.
15. Once provided to CLO, the information will be located on CLO's secure servers.

No detailed Privacy Risk Assessment has been done in relation to the Ministry-Crown Law information sharing, so it is difficult to assess whether the mechanism for information exchange is sufficiently secure.

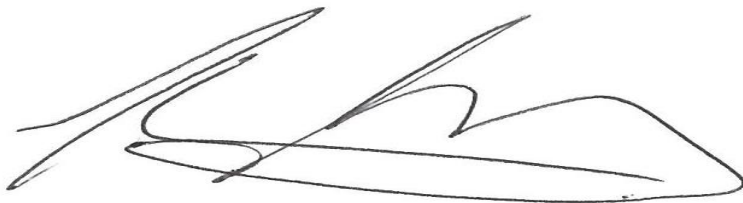
There are also no explicit safeguards in relation to access and use of the information, to ensure there is no unauthorised or accidental disclosure. In particular, it is important to implement a robust system for ensuring that suppressed information is not transferred in error. Appropriate safeguards need to be included in the AISA before it is finalised.

The PIA report recommended that a Memorandum of Understanding (MOU) between the Ministry and Crown Law is developed, detailing roles and responsibilities for the data sharing (recommendation 12.3). The MOU is not referred to in the draft AISA. The Law Society recommends that an MOU is developed, and referred to in the AISA.

#### *Conclusion*

The Law Society would appreciate being kept informed of developments as the AISA and MOU are finalised, and in particular would appreciate receiving a copy of the documents in their final form. Contact can be made in the first instance through the Law Society's Law Reform Manager, Vicky Stanbridge ([vicky.stanbridge@lawsociety.org.nz](mailto:vicky.stanbridge@lawsociety.org.nz) / 04 463 2912).

Yours sincerely

A handwritten signature in black ink, appearing to read 'Kathryn Beck', with a large, sweeping flourish at the end.

Kathryn Beck  
**President**