



TITHE AN OIREACHTAIS

**An Comhchoiste um Airgeadas, Caiteachas Poibli agus Athchóiriú, agus
Taoiseach**

**Tuarascáil maidir leis an nGrinnscrúdú Réamhrechtach ar Scéim
Ghinearálta an Bhille um Chomhroinnt Sonraí agus Rialachas**

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**Joint Committee on Finance, Public Expenditure and Reform, and
Taoiseach**

**Report on Pre-legislative scrutiny on the General Scheme of the Data
Sharing and Governance Bill**

July 2017

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Joint Committee on Finance, Public Expenditure and Reform, and Taoiseach

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CHAIRMAN'S FOREWORD



On 22 July 2016, the Minister for Public Expenditure and Reform, Mr. Pascal Donohue T.D., submitted the General Scheme of the Data Sharing and Governance Bill ('the General Scheme') to the Joint Committee on Finance, Public Expenditure and Reform and Taoiseach ('the Joint Committee'), in accordance with Standing Orders for the purpose of pre-legislative scrutiny ('PLS') by it of the General Scheme. This marked the culmination of work which had begun in 2013 when the then Government approved the preparing of Heads of a Bill on data sharing in the public service.

A strategic priority in the context of the reform of delivery of public services, the Government's objectives in bringing forward the General Scheme are to promote data-sharing between public bodies for legitimate and clearly specified purposes and to improve transparency for individual rights by setting new governance standards for data-sharing between public bodies.

The General Scheme aims to provide a legal basis to allow public bodies to share citizens' personal data once they have complied with the governance requirements set down therein.¹ It aims also to facilitate an "ask-once, use-many [times]" vision within the public service, e.g. a person will only be asked for their information once, but that information can be shared within the public service for the provisions of other services².

In conducting pre-legislative scrutiny of the General Scheme, the Committee met in public session on 18 May 2017 and 23 May 2017. Written submissions were also received by the Committee. The following stakeholders appeared before the Committee and I would like to express my appreciation to the witnesses for their contributions.

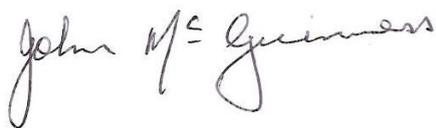
- Officials from the Department of Public Expenditure and Reform;
- Officials from the Department of Justice and Equality; and
- Representatives from the Office of the Data Protection Commissioner ('DPC')
- Representatives from Digital Rights Ireland ('DRI'); and
- Mr. Denis Kelleher, barrister-at-law.

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The landscape concerning data protection has evolved considerably since the publication of the General Scheme which was submitted to the Committee. The EU adopted the General Data Protection Regulation ('GDPR')³ and Directive (EU) 2016/680⁴. In addition, the Department of Justice and Equality has since published the General Scheme of the Data Protection Bill which will give further effect to the GDPR and transpose Directive (EU) 2016/680. The General Scheme published in 2015 was provided to the Committee for scrutiny without revision, notwithstanding the changing data protection landscape. This has raised legitimate questions regarding the suitability of the General Scheme as presented to the Committee as a legislative basis for sharing data between public bodies.

The approach taken by the Committee in reporting on the scrutiny of the General Scheme was not to examine each Part of the General Scheme, rather to identify the most pertinent broad themes treated by the General Scheme and to focus on these. In particular, a number of the key issues identified in this Report consider the General Scheme in the context of the legal developments in data protection since it was first published. The Committee has made **30** recommendations which are explained in detail in the body of the Report.

I anticipate that the views of the Committee will be considered and acted upon by Government in finalising the draft Bill so as to ensure appropriate legal safeguards are provided and that citizens rights are protected by legally sound and robust legislation, while also achieving necessary efficiencies in the delivery of public services to those same citizens.



John McGuinness TD
Chairman

July, 2017.

¹ Department of Public Expenditure and Reform, *Opening Statement Joint Committee on Finance, Public Expenditure & Reform, and Taoiseach Draft General Scheme of the Data Sharing & Governance Bill* (18/05/2017)

² Department of Public Expenditure and Reform (2014), '[Data Sharing and Governance: Policy Proposals](http://www.per.gov.ie/en/datasharing/)' (at p.2). Available here: <http://www.per.gov.ie/en/datasharing/> [accessed on 10/11/2016]

³ Available here: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:JOL_2016_119_R_0001&from=EN

⁴ Available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_2016.119.01.0089.01.ENG

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1. INTRODUCTION

In September 2013, the Government approved the preparing of “Heads” of a Bill relating to data sharing in the public service. On 1 August 2014, the Department of Public Expenditure and Reform (‘Department’) published a policy paper entitled ‘*Data Sharing and Governance: Policy Proposals*’ (‘Policy Proposals’) and invited submissions on the Policy Proposals.⁵

On 7 July 2015, the Government approved the drafting of the General Scheme of the “Data-Sharing and Governance Bill”.⁶ The General Scheme aims to provide a generalised legal basis to allow public bodies to share citizens’ personal data once they have complied with the governance requirements set down therein.⁷ The General Scheme was published in 2015.⁸

As noted in evidence before the Committee data is neutral. In this respect, the sharing of data is neither good nor bad. In order to protect individuals’ fundamental right to protection of personal data, good governance structures around personal data and the sharing of it are necessary.

On 2 July 2016, the Minister for Public Expenditure and Reform, Paschal Donohue, TD, requested the Oireachtas Joint Committee on Finance, Public Expenditure and Reform, and Taoiseach to consider the General Scheme in terms of pre-legislative scrutiny. A Regulatory Impact Assessment (‘RIA’) for the Data Sharing and Governance Bill was sent to the Committee with the request for PLS.

As part of its scrutiny of the Draft Heads of the General Scheme, the Committee met with stakeholder in public session on 18 May 2017 and 23 May 2017. Submissions were also received from the Office of the Revenue Commissioners and Department of Public Expenditure and Reform.

The landscape concerning data protection has evolved considerably since the publication of the General Scheme and its subsequent referral to the Committee for PLS. For example, the EU adopted the General Data Protection Regulation (‘GDPR’)⁹ and Directive (EU) 2016/680¹⁰. In addition, the Department of Justice and Equality has since published the General Scheme of the Data Protection Bill which will give further effect to the GDPR and transpose Directive (EU) 2016/680. The General Scheme considered by the Committee was not revised and does not take account of these updates. Many of the key issues identified in this Report consider the General Scheme in the context of the legal developments in data protection since it was first published.

Following this introduction, the Report is set out as follows:- Section 2 lists the recommendations in the Report, Sections 3-8 are thematically based and set out the rationale for the recommendations contained in the Report.

- **Summary of Recommendations (section 2):** this section lists the recommendations made.

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- **Background (section 3):** This section provides an overview of the policy and legal backgrounds to the General Scheme.
- **Compliance with Data Protection Law (section 4):** this theme considers the General Scheme in the context of EU and national legal developments in data protection since the General Scheme was first published.
- **Application of the proposed legislation (section 5):** this theme looks at the legal basis for data sharing proposed in the General Scheme, in particular the recommendations from stakeholders to underpin Data Sharing Agreements by secondary legislation. It also looks at the scope of the proposed legislation, e.g. what public bodies and data sharing arrangements it applies to.
- **Governance (section 6):** this theme considers the governance framework proposed in the General Scheme. It looks at the need to ensure strong governance controls in the proposed legislation, the provisions concerning a Ministerial Code and Guidelines and Data Sharing Agreements in the proposed legislation. In addition, it sets out recommendations from stakeholders that the proposed legislation should be accompanied by a “standardised and scalable” ICT infrastructure that also automatically logs access to personal data.
- **Sanctions (section 7):** this theme considers the need for sanctions in the proposed legislation. The General Scheme is silent as to sanctions.
- **Transparency (section 8):** this theme considers making publically available information pertaining to, and public consultations on, data sharing in the public sector.

⁵ Available here: <http://www.per.gov.ie/en/datasharing/>

⁶ Available here: <http://www.per.gov.ie/en/datasharing/>

⁷ Department of Public Expenditure and Reform, *Opening Statement Joint Committee on Finance, Public Expenditure & Reform, and Taoiseach Draft General Scheme of the Data Sharing & Governance Bill* (18/05/2017)

⁸ Communication from Department of Public Expenditure and Reform to Oireachtas L&RS (20/06/2017)

⁹ Available here: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L_2016_119_R_0001&from=EN

¹⁰ Available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2016.119.01.0089.01.ENG

2. SUMMARY OF RECOMMENDATIONS

The recommendations are listed below in the order in which they occur in the main body of the Report and are grouped into the main five themes. Some recommendations refer to specific Heads within the General Scheme while others refer to the general policy context within which the General Scheme lies. The rationale for the recommendations is fully explained in the body of the Report.

1. Compliance with Data Protection Law (*reference section 4 of the Report*)

Recommendation 1: Principles-based legislation

To ensure harmony with EU and national data protection law which is principles-based, it is recommended that the proposed legislation reflects the theme and ethos of that principles-based legislation and that its provisions will ensure that those principles are applied in practice.

Recommendation 2: Compliance with the protection law

In view of the recent developments in data protection law at the EU and national level, it is recommended that (i) the underlying assumptions underpinning the General Scheme and (ii) the full text of the General Scheme be reviewed and revised, as necessary, to reflect the content and principles set out in the GDPR and other data protection legislation, e.g. the forthcoming Data Protection Bill and the *Data Protection Acts*, and also the *Barra Judgement*, to ensure it complies with the changed data protection landscape.

Recommendation 3: Continued consultation with the Office of the Data Protection Commissioner and the Department of Justice and Equality

In view of the evidence of the DPC regarding the necessity for further enhancements and amendments to the General Scheme to ensure consistency with the forthcoming Data Protection Bill, it is recommended that the Department should continue its engagement with the DPC and with the Department of Justice and Equality in relation to these issues, to ensure the proposed legislation achieves its objectives in a manner that is consistent and compliant with the Data Protection Bill and the GDPR.

Recommendation 4: Full regard should be had to the Data Protection Commissioner guidance

It is recommended that full regard is had to the DPC's guidance on '[Data Sharing in the Public Sector](#)' as drafting of the proposed legislation progresses. This will help to ensure that any data sharing carried out under the proposed legislation is lawful and that the Bill will be legally robust from a data protection perspective.

Recommendation 5: Revisions to the proposed legislation

The Department is considering a number of additional measures to enhance the governance, oversight and transparency provisions in the legislation. To date these revisions have not been circulated or published. Such revisions must be compliant with data protection law and requirements and ensure that the personal data of citizens are adequately safeguarded. The Committee considers that there is merit in the Department publishing these revisions.

2. Application of the proposed legislation (*reference section 5 of the Report*)

Recommendation 6: Guidelines for determining the legal basis for data sharing

It is recommended that consideration be given to including an obligation that guidelines be drawn up and published, either standalone ones or as part of the Ministerial Code and Guidelines provided for under Head 4, setting out how assessments should be carried out when determining the legitimate basis for sharing data and the safeguards that should apply.

Recommendation 7: Secondary legislation to underpin Data Sharing Agreements

In view of the divergent expert opinion heard in evidence regarding the adequacy of the General Scheme as a legal basis for data sharing in the Public Service and the benefit of, or requirement for secondary legislation to underpin proposed 'Data Sharing Agreements' in particular, it is recommended that this issue be subject to further detailed consideration and clarification by the Department.

Recommendation 8: Data sharing in accordance with data protection law

It is recommended that Head 4 of the General Scheme concerning the '*Regulation of Data-Sharing between Public Service Bodies and Applicable Safeguards and Conditions*' be reviewed and revised, as necessary, to ensure that all data sharing is done in accordance with data protection legislation.

Public service bodies:

Recommendation 9: Application to public service bodies

It is recommended that clarity be provided on which public service bodies will fall under the scope of the proposed legislation and those public bodies which are proposed to be exempt.

Recommendation 10: Clarity as to the scope of the legislation

It is recommended that consideration be given to including in the proposed legislation provisions to clarify the scope of the legislation and the data sharing arrangements it will apply to.

Distinguishing between data processing for the purpose of prevention, detection, investigation and prosecution of crime and more general purposes:

Recommendation 11: Distinguishing between criminal and non-criminal related data

From May 2018 three separate regimes will apply to the processing of personal data. It is recommended that consideration be given in the proposed legislation to distinguishing between data processing for the purpose of prevention, detection, investigation and prosecution of crime (criminal related data) and more general purposes (non-criminal related data).

3. Governance Framework (*reference section 6 of the Report*)

Governance controls:

Recommendation 12: Governance controls

It is recommended that the proposed legislation provides the necessary governance controls to ensure that personal data will be shared in compliance with data protection law, including the forthcoming GDPR and the Data Protection Bill. This will help to ensure compliance with data protection law and the safeguarding of citizens personal data.

Advanced publication of, and consultation on, Data Sharing Agreements:

Recommendation 13: Advanced publication of, and consultation on, Data Sharing Agreements

It is recommended that the proposed legislation provide for the advance publication of, and consultation on, draft Data Sharing Agreements and any Data Sharing Agreements that are being reviewed.

Review of Data Sharing Agreements:

Recommendation 14: Review of existing Data Sharing Agreements

It is recommended that consideration be given to providing a transitional provision in the proposed legislation requiring the review, and where necessary updating, of existing Data Sharing Agreements between public bodies facilitating data sharing under other legislation.

Recommendation 15: Periodic review of Data Sharing Agreements

It is recommended that the proposed legislation provide for the periodic review, and where necessary updating, of all Data Sharing Agreements.

Ministerial Code and Guidelines:

Recommendation 16: Ministerial Code and Guidelines

In Head 4(3) of the General Scheme, it is recommended to substitute "*shall*" for "*may*" thereby placing a positive obligation on the Minister to draw up and publish a Code of Practice ('Code') and Guidelines.

Recommendation 17: Consultation when preparing the Ministerial Code and Guidelines

It is recommended that the proposed legislation would provide an obligation on the Minister to consult with stakeholders, in particular the Data Protection Commissioner and/or the proposed Data Governance Board (if approved by Government) when preparing the Code and Guidelines to ensure that the rights of individuals are protected.

Recommendation 18: Advanced publication of, and consultation on, draft Ministerial Code and Guidelines

It is recommended that consideration be given to the advance publication of, and public consultation on, draft Ministerial Code and Guidelines.

Standardised and scalable infrastructure:

Recommendation 19: Standardised and scalable infrastructure

It is recommended that, in implementing the proposed legislation, there is a “standardised and scalable” ICT infrastructure with a set of rules that allow public bodies to connect to, once they have adopted those rules. This will help to minimise cost over-runs in the implementation of any e-infrastructure created as a result of the proposed legislation.

Data protection implementation principles:

Recommendation 20: Data protection implementation principles

It is recommended that in the implementation of any shared State-citizen e-infrastructure, consideration should be given to the feasibility of incorporating ‘data protection implementation principles’ validated by the DPC to ensure compliance with data protection law and the safeguarding of citizens’ personal data.

Recommendation 21: Data protection implementation principles - *Identity and opt-in*

It is recommended that the e-infrastructure underpinning the proposed legislation be implemented in a manner that complies with data protection law and that existing and new identity mechanisms also comply in this regard.

Data access not sharing

Recommendation 22: Data protection implementation principles - *Data access, not sharing*

In view of the evidence heard that the focus of the proposed legislation should be on data access and not data sharing, it is recommended that consideration should be given to exploring this alternative option in the context of revisions to the General Scheme.

Authentication and access

**Recommendation 23: Data protection implementation principles -
*Authentication and access***

It is recommended that consideration be given to including in the proposed legislation the requirement for rigorous authorisation and authentication of every person in the public service with access to data. This will restrict access to those who are legally authorised to access personal data and help to ensure compliance with data protection law.

Data access logging

Recommendation 24: Data protection implementation principles - *Data access logging*

It is recommended that consideration be given to including in the proposed legislation the requirement to automatically log access to data. This will enable audits to be carried out on who, why and when personal data was accessed and enable citizens to track who, why and when their personal data was accessed.

Secure online portal for individuals

**Recommendation 25: Data protection implementation principles -
*Secure online portal for individuals***

In view of the evidence heard highlighting the importance of a secure online portal for individuals, it is recommended that consideration be given to creating a secure online portal for citizens. This will help to ensure the citizens' right to data access as required under the GDPR. It will also allow citizens to track State services provided to them and access details of use of, and access to, their data. Such consideration should take into account significant issues that may arise with such a portal, such as security and costs issues.

Interoperability:

Recommendation 26: Improvement, standardisation and professionalisation of data governance functions

It is recommended that the legislation provide for the improvement, standardisation and professionalisation of data governance functions and data protection officer functions in public bodies. In addition that clear and common data definitions are developed to ensure interoperability between public bodies when data sharing.

4. Sanctions (*reference section 7 of Report*)

Recommendation 27: Sanctions

It is recommended that consideration be given to creating an offence for illegally/wrongfully accessing personal data that has been processed by the State.

5. Transparency (*reference section 8 of the Report*)

Publication of Data Sharing Agreements and Assessments:

Recommendation 28: Publication of Data Sharing Agreements

It is recommended that the proposed legislation provide for the publication of Data Sharing Agreements (in their entirety as distinct to a list of Data Sharing Agreements). This will enable citizens to view the content of such Data Sharing Agreements, including the purpose for the collection and processing of personal data.

Recommendation 29: Publication Screening Assessments and Privacy Impact Assessments

It is recommended that consideration be given to including in the proposed legislation a provision requiring the publication of any screening assessments or Privacy Impact Assessments that have been carried out.

Certificate under Head 8(6)(a) of the General Scheme:

Recommendation 30: Exception under Head 8(6)(a) to the publication of certain Data Sharing Agreements or Privacy Impact Assessments

It is recommended that consideration be given to qualifying the exception in Head 8(6)(a) that Data Sharing Agreements or Privacy Impact Assessments relating to certain justice or criminal matters be published. The Committee is of the opinion that there is merit in publishing the existence of such Data Sharing Agreements or Privacy Impact Assessment and any parts that do not contain sensitive information.

3. BACKGROUND

This section provides an overview of the policy background to the General Scheme and the legal developments in data protection since the General Scheme was first published.

3.1. Policy Background

The General Scheme forms part of a larger Government agenda to use information communication technologies ('ICT') to develop a more integrated public service network, such as the eGovernment¹¹ agenda and open government data.¹²

The 2011 Government Programme '[Towards Recovery: Programme for a National Government 2011–2016](#)';¹³ and the '[Public Service Reform Plan](#)'¹⁴ mention promoting data sharing within the public service.

In September 2013, the Government approved the preparing of Heads of a Bill mandating more data sharing and linking within the public service, and providing a legal basis and standards for governance and security for data sharing and linking.

Policy Proposals for data sharing and governance

On 1 August 2014, the Department published a policy paper entitled '*Data Sharing and Governance: Policy Proposals*' ('Policy Proposals').¹⁵ The purpose of the Policy Proposals was to set out key elements of proposed legislation on data sharing and governance.

The Department invited interested parties to make submissions on the Policy Proposals. The Department received 23 submissions to the public consultation. The submissions are available on the Department's website [here](#).¹⁶ The Government approved the drafting of the General Scheme of the "Data-Sharing and Governance Bill" ('General Scheme') on 7 July 2015.¹⁷ The Minister for Public Expenditure and Reform, Paschal Donohue, TD, referred the General Scheme to Committee for PLS on 2 July 2016. A Regulatory Impact Assessment ('RIA') for the Data Sharing and Governance Bill was sent to the Committee with the request for PLS. As part of its scrutiny of the Draft Heads of the General Scheme, the Committee met in public session on 18 May 2017 and 23 May 2017.

General Scheme of a Data Sharing and Governance Bill

The Minister for Public Expenditure and Reform, Paschal Donohue, TD, stated that:

"[the] aim of this legislation is to simplify the legal basis for data-sharing between public service bodies while delivering stronger governance arrangements to protect the rights of individuals."¹⁸

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The General Scheme proposes a dual approach to regulating data sharing within the public Service. First, it proposes to provide a “generalised legislative basis” for the sharing of data between public bodies or their agents.¹⁹ Second, it proposes to provide a governance framework that will protect peoples’ data protection rights,²⁰ e.g. to ensure that data sharing adheres to the data protection law.

The RIA provides that the core objectives of the General Scheme are to provide:²¹

- a “generalised legislative basis” for data sharing in the public service;
- enhanced governance and better data management arrangements for data sharing in the public service;
- base registers; and
- a move away from paper for public service bodies (‘public bodies’) in certain cases.

The General Scheme is intended to facilitate an “ask-once, use-many [times]” vision within the public service, e.g. a person will only be asked for their information once, but that information can be shared within the public service for the provisions of other services²²

The [‘Public Service Reform Plan 2014-2016’](#) provides that:²³

“[t]he key goal of the proposed Data Sharing and Governance Bill is to ensure that citizens are not asked for information time after time that is already held in other parts of the public service system.”

According to the Policy Proposals the implementation of an “ask-once, use-many [times]” vision should help to reduce costs and the administrative burden on citizens and businesses, and allow citizens and businesses to use more coordinated public services.²⁴

The General Scheme of the Data Sharing and Governance Bill is composed of six parts – see *appendix 1*.

3.2. Legal Context

The right to privacy and right to protection of personal data (‘right to data protection’) are protected rights under both EU and national law.²⁵ Summarised below are the main pieces of EU and national law regulating the processing of data.²⁶

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Irish Law

Constitution of Ireland

In Ireland, the right to privacy has been recognised by the Irish courts as an unenumerated right under Article 40.3 of the Constitution of Ireland.²⁷ The courts have also recognised that the right to privacy as including the right to privacy of private communications free from interference by the State, e.g. interception or surveillance.²⁸

Furthermore, in *Schrems v Data Protection Commissioner*²⁹ the High Court stated that the accessing of private communications originating within a person's home by State Authorities directly engages the Constitutional right to privacy and the right to inviolability of the dwelling under Article 40.5.

Data Protection Acts 1988 and 2003

The [Data Protection Act 1988](#)³⁰ and the [Data Protection \(Amendment\) Act 2003](#)³¹ ('Data Protection Acts')³² are the main pieces of legislation governing the processing of data in Ireland. In accordance with the *Data Protection Acts*, where a person gives their personal data to an organisation, the organisation has a duty to keep those details private and safe. In addition to placing certain legal obligations on the organisations, the *Data Protection Acts* give people certain rights relating to their personal data.³³

EU Data Protection Law³⁴

Charter of Fundamental Rights of the European Union 2000³⁵

Article 7 of the Charter of Fundamental Rights of the European Union 2000 ('EU Charter') provides for the right to respect for private and family life ('right to privacy'). Article 8 of the EU Charter formally recognised the right to protection of personal data. The EU Charter is a legally binding obligation on Member States.

Data Protection Directive

The 1995 Data Protection Directive (Directive 95/46/EC)³⁶ is currently the primary piece of EU law regulating the processing of data protection. The objective of the Data Protection Directive is the protection of fundamental rights and freedoms, in particular the right to privacy with respect to the processing of personal data. The Directive is transposed in Ireland through the *Data Protection Acts* and accompanying secondary regulations.

Limitations to the right to privacy and right to data protection

Neither the right to privacy nor the right to data protection are absolute rights. The Lisbon Treaty recognises that the right to data protection must be balanced against other rights and freedoms.³⁷ In addition to the obligation to set down data protection rules under Article 16 of the Lisbon Treaty, it also requires EU legislators to set down rules for the free movement of personal data.

The EU Charter also provides that the rights contained in it may be limited, where the limitation is set down in law and it respects the essence of the right being limited. Under Article 52 any limitations must be limited to what is proportionate and necessary, and genuinely meet objectives of general interest recognised by the EU or the need to protect the rights and freedoms of others.

Developments concerning data protection law since the General Scheme was published

The landscape concerning data protection has evolved considerably since the publication of the General Scheme in 2015 and its subsequent referral to the Committee for PLS. The General Scheme provided to the Committee for PLS was not revised to take account of these updates.

General Data Protection Regulation

The Data Protection Directive will be replaced by Regulation (EU) 2016/679 - [General Data Protection Regulation](#) ('GDPR').³⁸ The GDPR is directly applicable from the 25 May 2018 and all data processing must comply with the Regulation from that date.

The core themes of the GDPR are transparency and accountability. The former requires, among other things, that individuals know the reasons for the processing of their data, how it is being used and by whom. Accountability requires data controllers and processors to be responsible for complying with data protection law and to demonstrate their compliance with it. The GDPR, as with existing data protection law, is principles-based. It requires persons processing personal data to carry out assessments before processing in order to ensure the processing is lawful. Article 5 of the GDPR sets down the data processing principles.³⁹ The principles are summarised below: -

- **Lawfulness, fairness, transparency principle** - personal data must be processed lawfully, fairly and in a transparent manner.
- **Purpose limitation principle** - personal data must be collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes.

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- **Data minimisation principle** - personal data must be adequate, relevant and limited to what is necessary.
- **Accuracy principle** - personal data must be accurate and, where necessary, kept up-to-date.
- **Storage limitation principle** - personal data must be kept in a form which permits identification of data subjects for no longer than is necessary.
- **Integrity and confidentiality principle** - personal data must be processed in a way that ensures appropriate security of the data.
- **Accountability principle** - the data controller must be responsible for and be able to demonstrate compliance with all the data protection principles.

General Scheme of the Data Protection Bill

On 12 May 2017, the Department of Justice and Equality published the General Scheme of the Data Protection Bill.⁴⁰ The proposed Data Protection Bill will give further effect to some flexible provisions in the GDPR (Part 3 of the Data Protection Bill). It will also transpose [Directive \(EU\) 2016/680](#)⁴¹ concerning the processing of personal data by law enforcement into national law (Part 4 of the Data Protection Bill). In addition it provides a number of provisions concerning the supervision and enforcement powers of the Data Protection Commission (Part 5 of the Data Protection Bill).

European Union Case Law

There have been a number of judgments by the Court of Justice of the European Union ('CJEU') affirming the importance of the fundamental right to protection of personal data. Of particular relevance to data sharing by public authorities is [C-201/14 *Bara & Others v CNAS and ANAF*](#) ('*Bara*'). In *Bara*, the CJEU highlighted that the transfer of personal data between public authorities must have a legal basis and that data subjects must be informed of the transfer or processing.⁴²

As a result of the decision in *Bara*, the Data Protection Commissioner ('DPC') updated its guidance on data sharing in the public sector. The DPC guidance on '[Data Sharing in the Public Sector](#)' recommends that public sector data sharing arrangements should:⁴³

- "Have a basis in primary legislation;
- Be made clear to individuals that their data may be shared and for what purpose;
- Be proportionate in terms of their application and the objective to be achieved;
- Have a clear justification for individual data sharing arrangements;

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- Share the minimum amount of data to achieve the stated public service objective;
- Have strict access and security controls; and
- Ensure secure disposal of shared data.”

¹¹ The OECD defines eGovernment as “[t]he term “e-government” focuses on the use of new information and communication technologies (ICTs) by governments as applied to the full range of government functions. In particular, the networking potential offered by the Internet and related technologies has the potential to transform the structures and operation of government”. OECD (2001), *E-government: Analysis Framework and Methodology* [online]. OECD Public Management Service, Public Management Committee. Available here: <https://stats.oecd.org/glossary/detail.asp?ID=4752> [accessed 08/11/2016]

¹² The OECD explain open government data as “[t]he two main elements of OGD are normally defined as follows: Government data is any data and information produced or commissioned by public bodies; Open data are data that can be freely used, re-used and distributed by anyone, only subject to (at the most) the requirement that users attribute the data and that they make their work available to be shared as well.” OECD (n.d.), *Open Government Data* [online]. Available at: <http://www.oecd.org/innovation/public-innovation/opengovernmentdata.htm> [accessed on 10/11/2016]

¹³ Department of Public Expenditure and Reform (2014), ‘*Public Service Reform Plan 2014-2016*’. Available here: http://vhlms-a01/AWDData/Library2/PublicSectorReformPlan20142016_144059.pdf [accessed on 14/11/2016]

¹⁴ Available at: http://vhlms-a01/AWDData/Library2/Programme_for_Government_2011_162347.pdf

¹⁵ Available here: <http://www.per.gov.ie/en/datasharing/>

¹⁶ The submissions are available on the website of the Department of Public Expenditure and Reform here: <http://www.per.gov.ie/en/datasharing/>

¹⁷ Department of Public Expenditure and Reform, ‘*Letter of Referral to the Oireachtas Joint Committee on Finance, Public Expenditure and Reform for Pre-legislative Scrutiny on the Data Sharing and Governance Bill*’ (2/07/2016)

¹⁸ Select Committee on Finance, Public Expenditure and Reform, and Taoiseach, ‘*Debate*’ (22/06/2016). Available here: <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/committeetakes/FPS2016062200002#M01100> [accessed on 23/11/2016]

¹⁹ Department of Public Expenditure and Reform (2015), ‘*Regulatory Impact Assessment (RIA) for Data Sharing and Governance Bill*’.

²⁰ Select Committee on Finance, Public Expenditure and Reform, and Taoiseach, ‘*Debate*’ (22/06/2016).

²¹ Department of Public Expenditure and Reform (2015), ‘*Regulatory Impact Assessment (RIA) for Data Sharing and Governance Bill*’.

²² Department of Public Expenditure and Reform (2014), ‘*Data Sharing and Governance: Policy Proposals*’ (at p.2). Available here: <http://www.per.gov.ie/en/datasharing/> [accessed on 10/11/2016]

²³ Department of Public Expenditure and Reform (2014), ‘*Public Service Reform Plan 2014-2016*’. Available here: http://vhlms-a01/AWDData/Library2/PublicSectorReformPlan20142016_144059.pdf [accessed on 14/11/2016]

²⁴ Ibid.

²⁵ Neither the right to privacy nor the right to data protection are absolute rights. For more information on the limitations on the right to privacy and right to data protection please refer to &RS’ Note (October 2016), *European Union Data Protection Law and Policy*. Available here: http://vhlms-a01/AWDData/Library2/LRSNote_EuropeaDataProtectionLawPolicy_154828.pdf [accessed on 19/05/2016]

²⁶ For information on European Union data protection law and policy please refer to the L&RS’ Note (October 2016), ‘*European Union Data Protection Law and Policy*’.

²⁷ *McGee v Attorney General* [1973] IESC 2; *Kennedy and Arnold v Attorney General* [1987] IR 587; *Re a Ward of Court* (No 2) [1996] 2 IR 79

²⁸ *Kennedy and Arnold v Attorney General* [1987] IR 587 at p. 592 and *Schrems v Data Protection Commissioner* [2014] IEHC 310 at para.47

²⁹ *Schrems v Data Protection Commissioner* [2014] IEHC 310 at para.48

³⁰ Available at: <http://www.irishstatutebook.ie/eli/1988/act/25/enacted/en/html>

³¹ Available at: <http://www.irishstatutebook.ie/eli/2003/act/6/enacted/en/html>

³² An administrative consolidated version of the Data Protection Acts (updated to 7 April 2017) is available on the Law Reform Commission website here: <http://revisedacts.lawreform.ie/eli/1988/act/25/front/revised/en/html> [accessed on 22/06/2017]

³³ Data Protection Commissioner, ‘*A guide to your rights*’ [online]. Available here: <https://www.dataprotection.ie/docs/A-guide-to-your-rights-Plain-English-Version/r/858.htm> [accessed on 22/06/2017]

³⁴ For more information on the GDPR and the Directive (EU) 2016/680 please refer to the L&RS’ Note on ‘*European Union Data Protection Law and Policy*’ (October 2016)

³⁵ The EU Charter may only be invoked when a domestic court is applying EU law (for more information on the EU Charter please refer to the L&RS Spotlight No.2 of 2016 ‘*International human rights law: operation and impact*’, at pp.12-13. Available at: http://data.oireachtas.ie/ie/oireachtas/libraryResearch/2016/2016-09-28_spotlight-international-human-rights-law-operation-and-impact_en.pdf [accessed on 26/05/2017])

³⁶ Available here: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31995L0046&from=EN>

³⁷ Karen Murray (2016), ‘*EU Data Protection Reform*’, (2016) 34 Irish Law Times 26-28

³⁸ Available here: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:JOL_2016_119_R_0001&from=EN

³⁹ At present under s.2 of the *Data Protection Acts* personal data may only be processed provided the data controller complies with the rules for processing personal data. The Data Protection Commissioner provides that a data controller must: “Obtain and process the information fairly; Keep it only for one or more specified and lawful purposes; Process it only in ways compatible with the purposes for which it was given to you initially; Keep it safe and secure; Keep it accurate and up-to-date; Ensure that it is adequate, relevant and not excessive; Retain it no longer than is necessary for the specified purpose or purposes; Give a copy of his/her personal data to any

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individual, on request.” (see Data Protection Commissioner, *‘The Data Protection Rules Your legal responsibilities as a Data Controller’* .

Available at: <https://www.dataprotection.ie/docs/Data-Protection-Rules/y/21.htm> [accessed on 18/05/2017])

⁴⁰ Available at: <http://www.justice.ie/en/JELR/Pages/PR17000155>

⁴¹ Available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2016.119.01.0089.01.ENG

⁴² [C-201/14](#) *Bara & Others v Președintele Casei Naționale de Asigurări de Sănătate, Casa Națională de Asigurări de Sănătate (CNAS), Agenția Națională de Administrare Fiscală (ANAF)* available here:

<http://curia.europa.eu/juris/document/document.jsf?docid=168943&doclang=EN> [accessed on 22/12/2016]

⁴³ Available here: <https://dataprotection.ie/docs/Data-Sharing-in-the-Public-Sector/m/1217.htm> [accessed on 14/11/2016]

4. COMPLIANCE WITH DATA PROTECTION LAW

The data protection landscape has evolved considerably since the General Scheme was published in 2015. This section of the Report considers the proposed legislation in the context of developments in data protection law since the General Scheme was published. In particular, it summarises evidence before the Committee setting out how:

- EU data protection law is principles-based;
- further amendments to the proposed legislation are necessary to ensure compliance and consistency with data protection law; and
- the Department are considering a number of additional measures to enhance that the governance, oversight and transparency provisions.

4.1 Principles-based Legislation

The Committee heard in evidence that EU data protection law is principles-based and not technology-based.⁴⁴ The DPC emphasised the importance of complying with the principles of data protection law. In evidence the DPC stated: ⁴⁵

“[w]hile we want to facilitate legitimate data-sharing, it is very important that the principles and requirements of data protection law be met. ... These principles are very important and must be adhered to under the [D]ata [P]rotection Acts.”

Regarding public sector data sharing, Mr O’Brien (representative of DRI) in evidence stated that: ⁴⁶

“[i]n the context of public sector data sharing, it is important that any legislative framework that is put forward to underpin that sort of sharing reflects the theme and ethos of principles-driven legislation within a very strong governance component, rather than focusing on a linear enabling of technology.”

Recommendation 1: Principles-based legislation

To ensure harmony with EU and national data protection law which is principles-based, it is recommended that the proposed legislation reflects the theme and ethos of that principles-based legislation and that its provisions will ensure that those principles are applied in practice.

4.2 Further Amendments

The Committee heard in evidence that DRI concluded from a review it had carried out on the General Scheme in 2014 that the “cart had been put before the horse”.⁴⁷ When asked if the proposed legislation was “fit for purpose”, Mr O’Brien (DRI) responded that “[it] was not fit for purpose in 2014. Things have moved on since then... Since then, we have had the GDPR and the Bara ruling and there has been a shift in the public perception and awareness of the impact of data sharing”⁴⁸

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The DPC in evidence emphasised that the proposed legislation must comply with the GDPR and be consistent with the forthcoming Data Protection Bill under the auspices of the Department of Justice and Equality.⁴⁹ It went to state that it believed “further enhancements” were necessary if the Bill will achieve its aims of providing authority and clarity for data sharing and that its office may suggest further amendments as drafting continues.⁵⁰

Dr Kelleher (barrister-at-law) in a written statement to the Committee⁵¹ stated that “significant amendments were necessary, and could be made, in order to bring the proposed legislation into compliance with the GDPR”.⁵²

Recommendation 2: Compliance with the protection law

In view of the recent developments in data protection law at the EU and national level, it is recommended that (i) the underlying assumptions underpinning the General Scheme and (ii) the full text of the General Scheme be reviewed and revised, as necessary, to reflect the content and principles set out in the GDPR and other data protection legislation, e.g. the forthcoming Data Protection Bill and the *Data Protection Acts*, and also the *Barra Judgement*, to ensure it complies with the changed data protection landscape.

Recommendation 3: Continued consultation with the Office of the Data Protection Commissioner and the Department of Justice and Equality

In view of the evidence of the DPC regarding the necessity for further enhancements and amendments to the General Scheme to ensure consistency with the forthcoming Data Protection Bill, it is recommended that the Department should continue its engagement with the DPC and with the Department of Justice and Equality in relation to these issues, to ensure the proposed legislation achieves its objectives in a manner that is consistent and compliant with the Data Protection Bill and the GDPR.

In terms of progressing the drafting of the proposed legislation, the DPC in its written statement stated that:

“[w]e would recommend that as the drafting of the Bill progresses, full regard should continue to be had to the DPC’s guidance on data sharing [[‘Data Sharing in the Public Sector’](#)] as adherence to our guidelines will not only facilitate the lawful sharing of personal data but also ensure that the Bill is legally robust from a data protection perspective.”⁵³

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Recommendation 4: Full regard should be had to the Data Protection Commissioner guidance

It is recommended that full regard is had to the DPC's guidance on '[Data Sharing in the Public Sector](#)' as drafting of the proposed legislation progresses. This will help to ensure that any data sharing carried out under the proposed legislation is lawful and that the Bill will be legally robust from a data protection perspective.

4.3 Revisions

The Department in its written statement stated that:⁵⁴

"[a] number of governance provisions in the Bill will also help public bodies in ensuring they are compliant with the GDPR. In this regard, we have also reviewed the governance, oversight and transparency provisions in the draft general scheme and we are actively considering a number of additional measures to enhance these provisions".

Examples given of provisions under consideration by the Department for strengthening data subjects' rights include:⁵⁵

- subject to Government approval, the establishment of a **Data Governance Board**; the Board would play a role in scrutinising and approving Data Sharing Agreements and advising the Minister on the development of Standards, Codes and Guidelines; and
- advance **publication** of, and **public consultation** on, draft Data Sharing Agreements.

Recommendation 5: Revisions to the proposed legislation

The Department is considering a number of additional measures to enhance the governance, oversight and transparency provisions in the legislation. To date these revisions have not been circulated or published. Such revisions must be compliant with data protection law and requirements and ensure that the personal data of citizens are adequately safeguarded. The Committee considers that there is merit in the Department publishing these revisions.

⁴⁴ Oireachtas Joint Committee on Finance, Public Expenditure & Reform, and Taoiseach, '*General Scheme of Data-Sharing and Governance Bill: Discussion*', evidence of Daragh O'Brien (representative of DRI), at p.17 (23/05/2017). Available at: [http://oireachtasdebates.oireachtas.ie/Debates%20Authoring/WebAttachments.nsf/\(\\$vLookupByConstructedKey\)/committees~20170523~FPJ/\\$File/Daily%20Book%20Unrevised.pdf](http://oireachtasdebates.oireachtas.ie/Debates%20Authoring/WebAttachments.nsf/($vLookupByConstructedKey)/committees~20170523~FPJ/$File/Daily%20Book%20Unrevised.pdf) [accessed on 19/06/2017]

⁴⁵ Oireachtas Joint Committee on Finance, Public Expenditure & Reform, and Taoiseach, '*General Scheme of Data-Sharing and Governance Bill: Discussion*', evidence of Dale Sunderland (representative from the DPC), at p.15 (18/05/2017) Available at: [http://oireachtasdebates.oireachtas.ie/Debates%20Authoring/WebAttachments.nsf/\(\\$vLookupByConstructedKey\)/committees~20170518~FPJ/\\$File/Daily%20Book%20Unrevised.pdf](http://oireachtasdebates.oireachtas.ie/Debates%20Authoring/WebAttachments.nsf/($vLookupByConstructedKey)/committees~20170518~FPJ/$File/Daily%20Book%20Unrevised.pdf) [accessed on 19/06/2017]

⁴⁶ Ibid., at p.17

⁴⁷ Oireachtas Joint Committee on Finance, Public Expenditure & Reform, and Taoiseach, '*General Scheme of Data-Sharing and Governance Bill: Discussion*', evidence of Daragh O'Brien, at p.4 (23/05/2017)

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⁴⁸ Oireachtas Joint Committee on Finance, Public Expenditure & Reform, and Taoiseach, '*General Scheme of Data-Sharing and Governance Bill: Discussion*', evidence of Daragh O'Brien, at p.13 (23/05/2017)

⁴⁹ Oireachtas Joint Committee on Finance, Public Expenditure & Reform, and Taoiseach, '*General Scheme of Data-Sharing and Governance Bill: Discussion*', evidence of Dale Sunderland, at p.5 (18/05/2017)

⁵⁰ Ibid., at p.5

⁵¹ Denis Kelleher (barrister-at-law), '*Comments on Data-Sharing and Governance Bill*' submitted to the Joint Committee on Finance, Public Expenditure and Reform, Taoiseach' (12/05/2016)

⁵² Dr Kelleher's comments were made on the assumption that the proposed legislation would not be enacted for another year. In this context it is noteworthy that in May 2017 the Irish Times reported the Minister for Public Expenditure and Reform as saying that he would like the Data Sharing and Governance Bill passed by the end of 2017 before the GDPR comes into effect in May 2018 (see Elaine Edwards, '*Privacy campaigners concerned over 'national ID card by stealth''*', Irish Times (22/05/2017). Available at:

<http://www.irishtimes.com/news/ireland/irish-news/privacy-campaigners-concerned-over-national-id-card-by-stealth-1.3091209> [accessed on 22/05/2017])

⁵³ Data Protection Commissioner, '*Opening Statement of the Office of the Data Protection Commissioner General Scheme of the Data Sharing and Governance Bill*' (18/05/2017)

⁵⁴ Department of Public Expenditure and Reform, '*Opening Statement Joint Committee on Finance, Public Expenditure & Reform, Taoiseach Draft General Scheme of the Data Sharing & Governance Bill*' (30/03/2017)

⁵⁵ Ibid.

5. APPLICATION OF THE PROPOSED LEGISLATION

This section considers the legal basis for data sharing proposed in the General Scheme, in particular the evidence presented to the Committee that Data Sharing Agreements should be underpinned by secondary legislation and the scope of the proposed legislation e.g. which public bodies and data sharing arrangements it applies to.

5.1 Legal basis for data sharing

A principal aim of the General Scheme is to provide a generalised legal basis for data sharing in the public service.⁵⁶

Head 4 of the General Scheme entitled '*Regulation of Data-Sharing between Public Service Bodies and Applicable Safeguards and Conditions*' proposes to set down "purposes to establish a new legal basis for data-sharing between public bodies".⁵⁷ The RIA states that providing a new "general legislative basis" for data sharing in the public service "will facilitate broader access to data-sharing by public bodies by specifying categories where sharing is permitted ...".⁵⁸

Head 4 proposes that public bodies may share data for the following purposes:

- **performing a function** conferred on either or both of the public bodies by or under an enactment e.g. in the performance of a statutory function (Head 4(1));
- for the **prevention, identification, investigation and prosecution** of offences (Head 4(2)(a));
- to improve the **provision of services** by public bodies (Head 4(2)(b));
- to identify and correct **erroneous data** held by a public body (Head 4(2)(c));
- to **collect debts** owing to the State (Head 4(2)(d));
- to **audit** the activities of a public body (Head 4(2)(e));
- to **assess the effectiveness** of a programme or policy (Head 4(2)(f));
- **identifying, freezing, preserving or seizing** the proceeds of criminal conduct (Head 4(2)(g)).

The purposes for data sharing in *Head 4* are broadly similar to those set out in the Policy Proposals.⁵⁹ Submissions to the Policy Proposals queried whether the purposes set out in the Policy Proposals were specific and clear enough to provide a basis for data sharing.⁶⁰

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The General Scheme as a framework to assess whether data sharing can lawfully occur

The DPC in its evidence stated that the proposed legislation provides a “framework” for public bodies to assess whether data sharing can lawfully occur. It stated that it “cannot create a new legal basis for sharing data in any given case that does not otherwise exist” and emphasised that “legislation on its own is not sufficient to prevail over data protection law in light of its status in the European Charter of Fundamental Rights”.⁶¹

The DPC in evidence stated that it accepts:

“the rationale for the proposed Bill in so far as it will provide a legal framework for public sector authorities to carry out the requisite analysis and balancing tests that respect the fundamental EU right of individuals to have their personal data protected.”⁶²

Under the framework provided public sector managers would “carry out the requisite analysis and balancing tests that respect the fundamental EU right of individuals to have their personal data protected.”⁶³ It is the outcome of the assessment that will determine whether data sharing can occur and on what basis.⁶⁴

The DPC stated in its written statement to the Committee that it would:⁶⁵

“expect standard and comprehensive guidelines to be set out and applied to all assessments carried out in determining the legitimate basis for sharing data and the safeguards that should apply.”

Recommendation 6: Guidelines for determining the legal basis for data sharing

It is recommended that consideration be given to including an obligation that guidelines be drawn up and published, either standalone ones or as part of the Ministerial Code and Guidelines provided for under Head 4, setting out how assessments should be carried out when determining the legitimate basis for sharing data and the safeguards that should apply.

5.2 Secondary legislation to underpin Data Sharing Agreements

The Department in evidence stated that:

“[a]t this point the data sharing may be underpinned by a [D]ata [S]haring [A]greement. That is the view of the Attorney General’s office.”⁶⁶

However, evidence before the Committee recommended that Data Sharing Agreements be legally underpinned by secondary legislation. Some stakeholders

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queried whether Data Sharing Agreements were sufficient to provide a sound legal basis for data sharing.

Requirement for a legal basis to process personal data

In evidence to the Committee, Dr Kelleher stated that under the GDPR the processing of personal data must be done on the basis of a legal obligation set out in legislation, including data sharing by the State. He stated that the model proposed in the General Scheme was one of memoranda between Departments - Data Sharing Agreements – and that such memorandum are an “administrative scheme” which would not be sufficient to satisfy the GDPR.

In a further written statement provided to the Committee, Dr Kelleher stated that if primary legislation already permits the processing of data then such memoranda may be sufficient to ensure that data sharing occurs in a transparent manner.⁶⁷ However, he went on to state that such memoranda cannot provide a lawful basis for data sharing. He stated that “[o]nly law can do that and under Irish constitution arrangements, memorandums are not laws.”⁶⁸ Furthermore, he stated that “[i]f a data processing operation [is] to have a basis in a legal obligation or public task that basis must be set out in either primary or delegated legislation ...”.⁶⁹

Dr Kelleher’s interpretation that the GDPR required a legal basis and that Data Sharing Agreements were not sufficient for this purpose was based on Articles 6(1)(c) and (e),⁷⁰ 6(2)⁷¹, 6(3)⁷² and Recital (41)⁷³ of the GDPR.⁷⁴

Do the Heads provide a sufficient legal basis for data sharing?

In written evidence to the Committee, Dr Kelleher questioned whether the Heads of the General Scheme in themselves complied with the requirement in the GDPR that processing has a legal basis. He stated that the Heads of the General Scheme are “not precise enough” to meet the requirements in Article 6(2) of the GDPR that Member State law adapting the application of the rules in the GDPR regarding processing under Article 6(1)(c) and (e) of the GDPR determine specific requirements for that processing and other measures to ensure lawful and fair processing.⁷⁵

In his further written statement, Dr Kelleher stated that Article 6(3) of the GDPR sets out provisions as to what such legislation may contain.⁷⁶ It was his opinion that the provisions in Article 6(3) were non-prescriptive and as such some of the provisions could be dispensed with.⁷⁷ However, other provisions may not be. He went on to state that:⁷⁸

“[i]t seems to me to be correct to read Article 6(3) GDPR as requiring that elements such as these that will be present in any statutory data processing operation be set out so that the law “...be clear and precise and its application should be foreseeable to persons subject to it...”.”

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In further written statement he also stated that the Heads “do **not** require that **data sharing arrangements** between public bodies be **proportionate** and have such **objectives**”.⁷⁹ As a result, they do not comply with the requirement in Article 6(3) that law requiring the processing of data “...meet an objective of public interest and be proportionate to the legitimate aim pursued”.⁸⁰

Achieving a legal basis

While the DPC did not state in evidence whether the Heads provided a sufficient legal basis for data sharing, it stated that adding a requirement to “legally underpin” each Data Sharing Agreement with a statutory instrument would benefit the proposed legislation. It stated that this would provide administrative and legal certainty to public bodies that the data sharing is based on a “proper legitimate legal basis”.⁸¹

The Committee heard in evidence that providing a legal basis could be achieved by way of secondary legislation and suggested inserting a regulation making power into the proposed legislation.⁸² In a written statement Dr. Kelleher suggested this could be achieved by amending Head 4 of the General Scheme to provide principles and policy for the making of secondary legislation.⁸³ In evidence he stated:⁸⁴

“[a] Minister would have to make a decision that there was an objective public interest and legitimate aims that required the making of a statutory instrument. Under the GDPR, that statutory instrument might have to set out general conditions, types of data, data subjects, disclosees, purpose and storage periods. If the Government were to do that, it would have a very secure base for data processing. It would be avoiding two risks in that regard, namely, the risk to data subjects and the risk that this expensive system would be set up but then finds it is not in compliance with data protection law.”

In evidence, DRI similarly stated that statutory grounds should be created for data sharing. It was stated that DRI found it difficult to reconcile the DPC’s view of the General Scheme as a “framework that would allow additional legislation to be enacted” versus the view put forward [by the Department] that the General Scheme was “an umbrella piece of legislation that would allow sharing to take place without additional legislative measures”. Mr. O’ Brien went on to state that:⁸⁵

“[d]ata sharing on foot of umbrella legislation is not compatible with the necessity and proportionality principles of EU law. Clear statutory grounds should be created, and should be open to scrutiny.”

DRI in a written statement stated that Head 4(5) of the General Scheme requiring public bodies to share data in accordance with a Data Sharing Agreements will not be sufficient to meet the requirements of the CJEU’s judgment in *Bara*.⁸⁶

Recommendation 7: Secondary legislation to underpin Data Sharing Agreements

In view of the divergent expert opinion heard in evidence regarding the adequacy of the General Scheme as a legal basis for data sharing in the Public Service and the benefit of, or requirement for secondary legislation to underpin proposed 'Data Sharing Agreements' in particular, it is recommended that this issue be subject to further detailed consideration and clarification by the Department.

It stated that all data sharing be in accordance with data protection legislation.⁸⁷ In that statement, DRI queried the legality of the requirement in Head 4(5)(d) of the General Scheme that a Data Sharing Agreement specify, among other things, where personal data may be disclosed between public bodies without the consent of the data subject. The statement also queries the legality of Head 4(9) of the General Scheme providing that where the conditions of Head 4 have been satisfied data sharing may occur either under the proposed legislation or another enactment "notwithstanding a provision of any enactment or rule of law".

Recommendation 8: Data sharing in accordance with data protection law

It is recommended that Head 4 of the General Scheme concerning the '*Regulation of Data-Sharing between Public Service Bodies and Applicable Safeguards and Conditions*' be reviewed and revised, as necessary, to ensure that all data sharing is done in accordance with data protection legislation.

Scope of the proposed legislation

Definition of public service bodies

Head 2 of the General Scheme entitled '*Definitions and Interpretation*' proposes a definition of "public service body" ('public body') to whom the provisions of the proposed legislation will apply.⁸⁸ The text box below reproduces the definition proposed in the General Scheme.

Text box 3: Definition of a 'public body' as set out in the General Scheme

Each of the following is proposed as a "public service body":

- (a) the Civil Service,
- (b) the Garda Síochána,
- (c) the Defence Force,
- (d) a local authority for the purposes of the Local Government Act 2001,
- (e) the Health Service Executive,
- (f) an education and training board established under section 9 of the Education and Training Boards Act 2013,
- (g) a body (other than a body specified in the Schedule to the proposed

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legislation) established -

- (i) by or under an enactment (other than the Companies Acts), or
- (ii) under the Companies Acts in pursuance of powers conferred by or under another enactment, and financed wholly or partly by means of money provided, or loans made or guaranteed, by a Minister of the Government or the issue of shares held by or on behalf of a Minister of the Government, in respect of which a public service pension scheme exists or applies or may be made,
- (h) a body (other than a body specified in the Schedule to the proposed legislation) that is wholly or partly funded directly or indirectly out of money provided by the Oireachtas or from the Central Fund or the growing produce of that Fund and in respect of which a public service pension scheme exists or applies or may be made,
- (i) any subsidiary of, or company controlled (within the meaning given by section 10 of the Taxes Consolidation Act 1997) by, a body to which paragraph (d), (e), (f), (g) or (h) relates and in respect of which a public service pension scheme exists or applies or may be made".

The Schedule to the proposed legislation proposes to contain a list of bodies that will be exempt from the definition of public body. Thus, they would not fall under the scope of the proposed legislation. At present, the Schedule merely lists the following as being exempt from the scope of the proposed legislation:

1. commercial semi-state bodies (no expanded list is provided);
2. a subsidiary of a body to which the Schedule relates, including a subsidiary of any such subsidiary.

The DPC in evidence recommended that "further clarity be provided on the agencies and bodies that will fall under the scope of the Bill".⁸⁹

Recommendation 9: Application to public service bodies

It is recommended that clarity be provided on which public service bodies will fall under the scope of the proposed legislation and those public bodies which are proposed to be exempt.

Large structural government projects

The DPC in evidence stated that it was their understanding that the proposed legislation would not apply to large structural data sharing projects, e.g. the individual health identifier. It stated that such large scale projects (in terms of the information to be shared) need an assessment and specific primary legislation underpinning it to ensure the legal certainty required under national and EU law.⁹⁰

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However, it went on to state that the General Scheme is not sufficiently clear regarding large structural data sharing projects and recommended “that provisions be included to clarify the scope of the legislation and the data sharing arrangements to which it will apply.”⁹¹

Recommendation 10: Clarity as to the scope of the legislation

It is recommended that consideration be given to including in the proposed legislation, provisions to clarify the scope of the legislation and the data sharing arrangements it will apply to.

Distinguishing between data processing for the purpose of prevention, detection, investigation and prosecution of crime and more general purposes

In written evidence to the Committee⁹², Dr Kelleher noted that Head 2 entitled ‘*Definitions and Interpretations*’ and Head 3 entitled ‘*Data-Sharing*’ of the General Scheme referred to the *Data Protection Acts*. However, he went on to state that when the GDPR applies in May 2018 three separate regimes will apply to the processing of personal data.⁹³ In evidence, he stated that:⁹⁴

“[i]n terms of the data to be processed in the system, it would be wise for the legislation to distinguish between data that is processed for the purpose of prevention, detection, investigation and prosecution of crime and more general purposes. Quite different legal regimes apply to both sets of data. It would be wise to split them out in the legislation. If one shares data for a general purpose, one would not necessarily be able to use that personal data for the prevention, detection and investigation of crime...”

Recommendation 11: Distinguishing between criminal and non-criminal related data

From May 2018 three separate regimes will apply to the processing of personal data. It is recommended that consideration be given in the proposed legislation to distinguishing between data processing for the purpose of prevention, detection, investigation and prosecution of crime (criminal related data) and more general purposes (non-criminal related data).

⁵⁶ Department of Public Expenditure and Reform, ‘*Opening Statement Joint Committee on Finance, Public Expenditure & Reform, and Taoiseach Draft General Scheme of the Data Sharing & Governance Bill*’ (18/05/2017)

⁵⁷ See Explanatory Note to Head 4 of the General Scheme of a Data Sharing and Governance Bill

⁵⁸ Department of Public Expenditure and Reform (April 2015), ‘*Regulatory Impact Assessment Data Sharing and Governance Bill 2015*’

⁵⁹ The purposes for data sharing that were being considered in the Policy Proposals were: statutory functions of a Minister; reasons of substantial public interest; evaluation of the effectiveness of a cross-cutting policy; audit the activities of a public body; identification and prosecution of fraudulent activity; identification and rectification of erroneous data held by a public body; and collection of debts owing to the State.

⁶⁰ For example see the submissions of the DPC on the Policy Proposals suggested that the purposes set out in the Policy Proposals “are too broad and it is in fact unclear what the meaning of certain stated purposes is”. The submission went on to say that the purposes “are so broad, non-specific and unclear in certain cases that they deliver no additional legal basis for sharing over and above what the Data Protection Acts already permit” (Office of the Data Protection Commissioner (2014), ‘*Submission of the Office of the Data Protection*

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Commissioner (DPC) on the data-sharing and Governance Bill: - Policy Proposals' (dated the 1st of August 2014) [online] at p. 4. Available here: <http://www.per.gov.ie/en/datasharing/> [accessed on 22/11/2016]). The Association of the Data Protection Officers in its its submission on the Policy Proposals similarly stated that the purposes set out in the Policy Proposals were "very broad and vague" and that "[t]hey don't seem to adhere to the key data protection principle that personal data should only be proposed for specific purposes". The Association also stated that "[t]here is already authority in the Data Protection Acts to process personal data where required for the prevention or detection of crime, or to collect tax or other moneys owed to the state." (Association of the Data Protection Officers (2014), 'Submission of the Association of Data Protection Officers' [online] at p. 3. Available here: <http://www.per.gov.ie/en/datasharing/> [accessed on 22/11/2016]).

⁶¹ Oireachtas Joint Committee on Finance, Public Expenditure & Reform, and Taoiseach, 'General Scheme of Data-Sharing and Governance Bill: Discussion', evidence of Dale Sunderland' at pp.4-5 (18/05/2017).

⁶² Ibid.

⁶³ Ibid.

⁶⁴ Ibid., at pp.4-5

⁶⁵ Data Protection Commissioner, 'Opening Statement of the Office of the Data Protection Commissioner General Scheme of the Data Sharing and Governance Bill' (18/05/2017).

⁶⁶ Oireachtas Joint Committee on Finance, Public Expenditure & Reform, and Taoiseach, 'General Scheme of Data-Sharing and Governance Bill: Discussion', evidence of Barry Lowry (official from the Department of Public Expenditure and Reform), at p.10 (18/05/2017)

⁶⁷ Dr Denis Kelleher, 'Joint Committee on Finance, Public Expenditure and Reform, and Taoiseach Correspondence Item No: 2017/331', at p.4 (at para. 11) (30/05/2017)

⁶⁸ Ibid., (at para. 13)

⁶⁹ Ibid., at p.2 (at para. 8)

⁷⁰ Articles 6(1)(c) and 6(1)(e) of the GDPR provide that "[p]rocessing shall be lawful only if and to the extent that at least one of the following applies: ... (c) processing is necessary for compliance with a legal obligation to which the controller is subject;... (e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller".

⁷¹ Article 6(2) of the GDPR provides that "'Member States may maintain or introduce more specific provisions to adapt the application of the rules of this Regulation with regard to processing for compliance with points (c) and (e)... by determining more precisely specific requirements for the processing and other measures to ensure lawful and fair processing...".

⁷² Article 6(3) of the GDPR provides that "[t]he basis for the processing referred to in point (c) and (e)... shall be laid down by: (a) Union law; or (b) Member State law to which the controller is subject. The purpose of the processing shall be determined in that legal basis or... shall be necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller. That legal basis may contain specific provisions to adapt the application of rules of this Regulation, inter alia: the general conditions governing the lawfulness of processing by the controller; the types of data which are subject to the processing; the data subjects concerned; the entities to, and the purposes for which, the personal data may be disclosed; the purpose limitation; storage periods; and processing operations and processing procedures, including measures to ensure lawful and fair processing...The Union or the Member State law shall meet an objective of public interest and be proportionate to the legitimate aim pursued".

⁷³ Recital (41) of the GDPR provides that "[w]here this Regulation refers to a legal basis or a legislative measure, this does not necessarily require a legislative act adopted by a parliament, without prejudice to requirements pursuant to the constitutional order of the Member State concerned. However, such a legal basis or legislative measure should be clear and precise and its application should be foreseeable to persons subject to it...". **Note:** Recitals do not have the status of law. However, they do provide guidance of the intent of the law and should be taken as a strong indication of how the law should be interpreted and implemented.

⁷⁴ Dr Denis Kelleher, 'Joint Committee on Finance, Public Expenditure and Reform, and Taoiseach Correspondence Item No: 2017/331' (30/05/2017)

⁷⁵ Ibid., at p.5 (at para. 17)

⁷⁶ Ibid., (at para. 18)

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ Ibid., (at para. 19)

⁸⁰ Ibid.

⁸¹ Oireachtas Joint Committee on Finance, Public Expenditure & Reform, and Taoiseach, 'General Scheme of Data-Sharing and Governance Bill: Discussion', evidence of Dale Sunderland, at pp.5-6, and Cathal Ryan (official from the DPC), at p.9 (18/05/2017)

⁸² Oireachtas Joint Committee on Finance, Public Expenditure & Reform, and Taoiseach, 'General Scheme of Data-Sharing and Governance Bill: Discussion', evidence of Denis Kelleher, at pp.7, 9 & 13 (23/05/2017)

⁸³ Denis Kelleher (12/05/2016), 'Comments on Data-Sharing and Governance Bill' submitted to the Joint Committee on Finance, Public Expenditure and Reform, Taoiseach, (12/05/2016)

⁸⁴ Oireachtas Joint Committee on Finance, Public Expenditure & Reform, and Taoiseach, 'General Scheme of Data-Sharing and Governance Bill: Discussion', evidence of Denis Kelleher, at p.6 (23/05/2017)

⁸⁵ Oireachtas Joint Committee on Finance, Public Expenditure & Reform, and Taoiseach, 'General Scheme of Data-Sharing and Governance Bill: Discussion', evidence of Daragh O'Brien, at pp.4-5 (23/05/2017).

⁸⁶ Dennis Jennings, 'Notes on the Draft General Scheme of the Data-Sharing and Governance Bill' (06/03/2016) at p.2

⁸⁷ Ibid.

⁸⁸ With the exception of the Central Bank of Ireland which does not appear in the definition of public service body in Head 2 of the General Scheme, the list of public service bodies is similar to the definition of public service in the [Public Service Pension \(Single Scheme and Other Provisions\) Act 2012](#).

⁸⁹ Oireachtas Joint Committee on Finance, Public Expenditure & Reform, and Taoiseach, 'General Scheme of Data-Sharing and Governance Bill: Discussion', evidence of Dale Sunderland, at p.5 (18/05/2017)

⁹⁰ Oireachtas Joint Committee on Finance, Public Expenditure & Reform, and Taoiseach, 'General Scheme of Data-Sharing and Governance Bill: Discussion', evidence of Dale Sunderland, at pp.5 & 7 (18/05/2017)

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⁹¹ Ibid.

⁹² Denis Kelleher (12/05/2016), '*Comments on Data-Sharing and Governance Bill*' submitted to the Joint Committee on Finance, Public Expenditure and Reform, Taoiseach' (12/05/2016)

⁹³ For example, the GDPR for non-criminal data, [Directive \(EU\) 2016/680](#) for criminal related data, and national data protection law e.g. the Data Protection Acts and/or the Data Protection Bill.

⁹⁴ Oireachtas Joint Committee on Finance, Public Expenditure & Reform, and Taoiseach, '*General Scheme of Data-Sharing and Governance Bill: Discussion*', evidence of Denis Kelleher, at p.6 (23/05/2017)

6. GOVERNANCE

This section of the Report considers concerns expressed in evidence before the Committee regarding governance controls in the proposed legislation. In particular it considers:

- the provisions concerning Data Sharing Agreements in the proposed legislation;
- the provisions concerning a Ministerial Code and Guidelines in the proposed legislation;
- the need for a “standardised and scalable” ICT infrastructure and the desirability of data implementation principles to underpin any shared State-citizen e-infrastructure. It also looks at the need to ensure interoperability of data.

6.1 Governance controls

The deliverance of stronger governance arrangements to ensure data is shared in a way that protects individuals’ rights is a core aim of the proposed legislation.⁹⁵ The Department in evidence stated that the proposed legislation delivers the necessary regulation, especially governance, to comply with the GDPR.⁹⁶

In evidence the Committee heard that the GDPR, when it comes into effect, will largely take over the governance role concerning data protection; however, the Oireachtas and the Government will have a role to play in implementing governance controls.⁹⁷ In written evidence to the Committee, Dr Kelleher stated that putting in place the appropriate governance framework to ensure compliance with the GDPR and national implementation of [Directive \(EU\) 2016/680](#) may be more challenging than compliance with the GDPR.⁹⁸

In evidence, Mr O’Brien stated that one of the concerns DRI had with the proposed legislation was that it lacked governance controls.⁹⁹ He explained that:¹⁰⁰

“[d]ata is neutral. It does not care what it is being used for. That is why governance structures around data are essential.”

He went on to state that the focus of the proposed legislation should be on governance, not on sharing. In particular, he stated that:¹⁰¹

“[t]he focus on improving efficiency through sharing in the Bill as proposed does not do anything to ensure the robustness of governance necessary to ensure that the right data is being shared in the right way at the right time, with the right clear basis.

...

[a] far better and valuable focus of the Bill would have been to mandate the improvement, standardisation and professionalisation of data governance functions

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and data protection officer functions in Departments. This is particularly significant given the critical role effective governance of information plays in compliance with the general data protection regulation, which comes into force in a little over 260 working days from today.”

Recommendation 12: Governance controls

It is recommended that the proposed legislation provides the necessary governance controls to ensure that personal data will be shared in compliance with data protection law, including the forthcoming GDPR and the Data Protection Bill. This will help to ensure compliance with data protection law and the safeguarding of citizens personal data.

6.2 Data Sharing Agreements

Head 4(5) of the General Scheme entitled '*Regulation of Data-Sharing between Public Service Bodies and Applicable Safeguards and Conditions*' proposes that data sharing must be carried out in accordance with the terms of a Data Sharing Agreement. Head 4(6) proposes a list of matters that a Data Sharing Agreement must specify.¹⁰²

Head 7(4) of the General Scheme entitled '*Memorandum of Agreement*' proposes that the Minister may after consultation with such other Ministers of Government as he or she considers appropriate and such other bodies or persons he or she considers appropriate:

- “(a) make or revise a model memoranda of agreement for public service bodies to use as a basis for their own agreements, or
- (b) make or revise guidelines on memoranda of agreement for public service bodies, with such variations as the Minister may think fit for the particular classes and sizes of public service bodies.”

The Department in evidence stated that:¹⁰³

“[a] key part of the legislation is to provide governance over the data sharing agreements that must be put in place and published before the data sharing can take place.”

Advanced publication of, and consultation on, Data Sharing Agreements

The Department in its briefing note on the proposed legislation stated that one of the provisions under consideration by the Department for strengthening data subjects' right was the advanced publication of, and consultation on, draft Data Sharing Agreements.¹⁰⁴

Recommendation 13: Advanced publication of, and consultation on, Data Sharing Agreements

It is recommended that the proposed legislation provide for the advance publication of, and consultation on, draft Data Sharing Agreements and any Data Sharing Agreements that are being reviewed.

Review of Data Sharing Agreements

The General Scheme is silent about existing Data Sharing Agreements between public bodies facilitating data sharing under existing legislation providing a specific legal basis for such data sharing.

Recommendation 14: Review of existing Data Sharing Agreements

It is recommended that consideration be given to providing a transitional provision in the proposed legislation requiring the review, and where necessary updating, of existing Data Sharing Agreements between public bodies facilitating data sharing under other legislation.

The DPC in its submission to the Policy Proposals stated that achieving data sharing “lawfully and in practical terms” would require, along with other suggestions:¹⁰⁵

“periodic review of data-sharing arrangements to ensure they are still adequate and that all of the data is still required to be shared and that appropriate retention and deletion policies are in place.”

Recommendation 15: Periodic review of Data Sharing Agreements

It is recommended that the proposed legislation provide for the periodic review, and where necessary updating, of all Data Sharing Agreements.

6.3 Ministerial Code and guidelines

Head 4(3) of the General Scheme entitled ‘*Regulation of Data-Sharing between Public Service Bodies and Applicable Safeguards and Conditions*’ proposes to give the Minister discretionary power to draw up and publish a Code of Practice (‘Code’) and Guidelines for the effective and efficient operation of the proposed legislation and to assist public service bodies in their functions under the proposals. Head 4(3)(b) states that the Code may include provisions to promote data sharing between public service bodies.

Recommendation 16: Ministerial Code and Guidelines

In Head 4(3) of the General Scheme, it is recommended to substitute “*shall*” for “*may*” thereby placing a positive obligation on the Minister to draw up and publish a Code of Practice (‘Code’) and Guidelines.

The Ministerial Code and Guidelines are referred to numerous times in Part 2 of the General Scheme entitled ‘*Regulation of Data-Sharing between Public Service Bodies – Conditions and Safeguards*’. For example, 4(2) of the General Scheme proposes that public service bodies should have regard to the Ministerial Code and Guidelines when engaging in data sharing. Head 4(3)(c) proposes that a public body service “*shall have regard to the code and any guidelines in the performance of their functions under this Act*”. Head 4(4)(f) proposes that public service bodies may only engage in data sharing if, among others, “*any conditions set out by the Minister in the code or in guidance have been complied*”.

Recommendation 17: Consultation when preparing the Ministerial Code and Guidelines

It is recommended that the proposed legislation would provide an obligation on the Minister to consult with stakeholders, in particular the Data Protection Commissioner and/or the proposed Data Governance Board (if approved by Government) when preparing the Code and Guidelines to ensure that the rights of individuals are protected.

The General Scheme is silent as to the potential contents of the Ministerial Code and Guidelines e.g. what conditions and safeguards they might provide or how in practice they will regulate data sharing between public bodies.

Recommendation 18: Advanced publication of, and consultation on, draft Ministerial Code and Guidelines

It is recommended that consideration be given to the advance publication of, and public consultation on draft Ministerial Code and Guidelines.

6.4. Standardised and scalable infrastructure

The Committee heard in evidence stated that it is necessary to have in place an infrastructure that enables data to be accessed between public bodies by authorised persons and puts in place governance controls. It was stated that:¹⁰⁶

“[a] number of matters fall from this automatically, one of which is identity in order that one can identify individuals across the system. The second matter is authorisation; one has to authorise people to access data. The third is

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authentication to make absolutely sure the authorised person is who they say they are and can access the data, that the individual whose data are being accessed also has that right and that any access is logged in order that the individual who owns the data can find out who has been using their data. These are the components of a system that provides security, privacy and, most importantly, trust.”

Dr Jennings in evidence went on to state that the creation of such an ICT infrastructure will be extremely complex unless a “standardised and scalable” ICT infrastructure is created, which will allow different public bodies to connect when ready. He stated that:¹⁰⁷

“[t]his is an IT project under the Government’s framework that is required to build an infrastructure across all Departments, with their existing proprietary and other systems. It is truly enormously complex. That is the case unless it is done in a way that is standardised and scalable so once there is a beginning in place, other Departments can simply adopt a set of rules and connect.

That is why this legislation or its replacement is really important, as it redefines the way we think about and access data, as well as privacy, with regard to the relationship between the State and the citizen.”

Dr Jennings stated that building such a scalable infrastructure could cost €1 billion; but warned that failure to build such an incremental, scalable infrastructure “would cost several billion euro over the next three, four, five or ten years if we do not do it in an incremental, scalable fashion.”¹⁰⁸

Recommendation 19: Standardised and scalable infrastructure

It is recommended that, in implementing the proposed legislation, there is a “standardised and scalable” ICT infrastructure with a set of rules that allow public bodies to connect to, once they have adopted those rules. This will help to minimise cost over-runs in the implementation of any e-infrastructure created as a result of the proposed legislation.

6.5. Data protection implementation principles

Dr Jennings in his written statement set out ten core principles that he believes ought to be adopted “before the implementation of any shared State-citizen e-infrastructure is even contemplated.”¹⁰⁹ These are:¹¹⁰

1. **Identity and opt-in** – a unique identifier for individuals and the opting in by citizens to use the identifier/system;
2. **Queries/responses through data access (not data sharing)** – data should never be shared, rather data should be accessed by responding with answers to a pre-defined, and approved, set of queries;

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3. **Authentication and access** – access to data should be restricted to those legally authorised to access it and there should be strict multi-factorial authentication of all persons with query access to data;
4. **Security (data requests and data responses)** – all data requests and data responses should be made using standardised secure communications protocols;
5. **Data logging by the requestor, responder, and centrally** – all access should be automatically logged and recorded and there should be encrypted records of all queries and requests which should be automatically reported to a central e-infrastructure body;
6. **Secure on-line portal for individuals** – there should be a citizens' portal that allows them to track State services provided to them and access details of use of, and access to, of their data;
7. **Open standards and scalable architecture** – see section [5.4](#) for more information;
8. **No exemptions for public-private-partnership (PPP) organisations and semi-state organisations** – there should be no exemptions for PPP and semi-state organisations to which the State has outsourced the provision of services that use personal data;
9. **Electronic signatures** – there should be electronic signing of contracts; and
10. **Identity for other organisations** – the unique identifier should be available for other organisations.

Recommendation 20: Data protection implementation principles

It is recommended that in the implementation of any shared State-citizen e-infrastructure, consideration should be given to the feasibility of incorporating 'data protection implementation principles' validated by the DPC to ensure compliance with data protection law and the safeguarding of citizens' personal data.

Dr Jennings in evidence focussed on principles 1 (identity and opt-in), 2 (data access not sharing), 3 (authentication and access), 5 (data access logging) and 6 (secure on-line portal for individuals). Evidence heard relating to these principles is set out below.

Identity and opt-in

The Committee heard in evidence that a shared services e-infrastructure should be implemented on the basis of "agreement". In evidence, Dr Jennings went on to say that:¹¹¹

"[g]eneral buy-in to the use of unique identifiers can and will be achieved by the State offering compelling value propositions – better, faster, slicker, more

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convenient, more accurate and more efficient services – in order that, in due course, when public confidence in the data protection provided by the systems has been established, the identification system may be made compulsory.”

Recommendation 21: Data protection implementation principles - *Identity and opt-in*

It is recommended that the e-infrastructure underpinning the proposed legislation be implemented in a manner that complies with data protection law and that existing and new identity mechanisms also comply in this regard.

Data access not sharing

The Committee heard in evidence that “[t]he data-sharing concept underlying the Bill is fundamentally flawed” and that the proposed legislation should focus on data access and not sharing. Such data access should be provided on the basis of responses to a pre-defined and pre-approved set of queries. He stated that:¹¹²

“[a] fundamental principle to be adopted in any shared services e-infrastructure implementation is that individual personal data are never copied and shared, with consequential loss of control over access and authenticity, but are always accessed dynamically online. In addition, no general access to the underlying data may be given; rather, such access is provided so as to respond with answers to a predefined and pre-approved set of queries.”

It was stated that “[t]he sharing of comprehensive data sets is highly problematic”.¹¹³ It was explained that that under the GDPR the goal is data minimisation and that the CJEU has “a very major concern about mass sharing of data sets”.¹¹⁴

Recommendation 22: Data protection implementation principles - *Data access, not sharing*

In view of the evidence heard that the focus of the proposed legislation should be on data access and not data sharing, it is recommended that consideration should be given to exploring this alternative option in the context of revisions to the General Scheme.

Authentication and access

The Committee heard in evidence that access to data must be restricted to those legally authorised to do so and the data subjects to whom the data pertains. The identity of persons authorised to access personal data must also be authenticated. This must be done by “strict multi-factorial authentication” of all persons with query access to data. It was stated that:¹¹⁵

“The Bill, as drafted, is almost silent on the need for rigorous authorisation and authentication of every person in the public service with access to data. That is a major defect.”

**Recommendation 23: Data protection implementation principles -
*Authentication and access***

It is recommended that consideration be given to including in the proposed legislation the requirement for rigorous authorisation and authentication of every person in the public service with access to data. This will restrict access to those who are legally authorised to access personal data and help to ensure compliance with data protection law.

Data access logging

The Committee heard in evidence that all access to personal data should be automatically logged and recorded as this would enable audits to be carried out and enable citizens to track who, why and when their personal data was accessed¹¹⁶. It was stated that “[t]he Bill has no mention of the data access logging that is a central component of any trusted shared e-infrastructure”.¹¹⁷

Recommendation 24: Data protection implementation principles - *Data access logging*

It is recommended that consideration be given to including in the proposed legislation the requirement to automatically log access to data. This will enable audits to be carried out on who, why and when personal data was accessed and enable citizens to track who, why and when their personal data was accessed.

Secure online portal for individuals

The Committee heard in evidence that a vital part of any shared services e-infrastructure is the creation of a secure online portal that allows individuals to track State services provided to them and access details of use of, and access to, of their data. It was stated that:¹¹⁸

“[a] vital part of any shared services e-infrastructure is the citizens’ portal, where citizens and residents can track the State services provided and the details of the use and access to their data. Citizens’ access to their own data must be an integral part of any implementation from the beginning.”

Furthermore, it was stated in evidence that a portal that enables data subjects to access their data should be considered. It was stated that the present situation whereby people have to get a copy of their personal data from organisations will change under the GDPR. Under the GDPR people will have the right to access their personal data (in addition to the right to a copy of one’s personal data) and that it may even require the building of portals for such access. It was stated that the management and rolling out of such a portal will be “very challenging”. Significant issues with such a portal, that he identified in evidence, included security and costs issues.¹¹⁹

**Recommendation 25: Data protection implementation principles -
*Secure online portal for individuals***

In view of the evidence heard highlighting the importance of a secure online portal for individuals, it is recommended that consideration be given to creating a secure online portal for citizens. This will help to ensure the citizens' right to data access as required under the GDPR. It will also allow citizens to track State services provided to them and access details of use of, and access to, their data. Such consideration should take into account significant issues that may arise with such a portal, such as security and costs issues.

6.6. Interoperability

Submissions to the Policy Proposals raised the issue of lack of data harmonisation across the public service and how it can act as an obstacle to data sharing.¹²⁰ Submissions also highlighted how the retention and sharing of poor quality data can not only increase costs for public bodies but can also negatively impact on the successful implementation of the proposed legislation.¹²¹

The Committee heard in evidence that “[b]efore sharing happens, there must be a clear definition and standards to allow for commentator interchange”. It was stated that:¹²²

“[i]n that context, governance models and frameworks become extremely important for interoperability. Parts of the governance standards and frameworks are matters such as common definitions, common meanings and commonality in the understanding of different business rules.”

It was highlighted how a lack of common definitions can negatively impact on potential efficiency resulting from data sharing. He explained that:¹²³

“[b]ased on experience from private sector data governance projects and successful models of implementation that I have studied and applied with clients over the years, effective cross-functional approaches to the governance of data in organisations is essential to make sure that the promise of efficiency is delivered on. I have lost track of the number of organisations I have worked with where one department's definition of a “customer” was different to that of the team sitting next to them, but I remember vividly the late nights at the end of a reporting period where everyone sat sweating the figures trying to make them match. This simple example of cross-departmental communication in an organisation is because of poor data definition. In the absence of standards for codifying the meaning of a simple term or concept, confusion reigns.”

Regarding the public sector, he went on to explain how terms such as “means”, “income” and “address” can have different meanings for different

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public bodies and the negative effects this can have. As an example he stated in evidence that:¹²⁴

“[w]hen we ask for an address from one organisation to be given to another, there must be some definition as to how that is governed and controlled to ensure there is clarity of meaning, given the potential for sub-optimal outcomes if the wrong data is applied for the wrong purpose.”

It was further stated that the proposed legislation should focus on improvement, standardisation and professionalisation of data governance functions and data protection officer functions in Departments.¹²⁵

Regarding how this difficulty of lack of standardisation could be overcome, he stated that:¹²⁶

“[w]hat is required to enable sharing to happen is a transparent layer from a business process and governance perspective where these differences can be understood before the sharing happens rather than after it has happened and a decision has been made to the detriment of a citizen or, alternatively, his or her unjustified benefit.”

Evidence was presented highlighting the fact that poor quality data is responsible for costs overruns in data management projects and can cost an organisation between 10% to 30% of turnover. It was stated that:¹²⁷

“A key root cause is a lack of clear and common definition and understanding of where data is different or means different things in different areas and contexts..”

Recommendation 26: Improvement, standardisation and professionalisation of data governance functions

It is recommended that consideration be given to providing in the proposed legislation for the improvement, standardisation and professionalisation of data governance functions and data protection officer functions in public bodies. In addition that clear and common data definitions are developed to ensure interoperability between public bodies when data sharing.

⁹⁵ Select Committee on Finance, Public Expenditure and Reform, and Taoiseach, *Debate* (22/06/2016)

⁹⁶ Oireachtas Joint Committee on Finance, Public Expenditure & Reform, and Taoiseach, *General Scheme of Data-Sharing and Governance Bill: Discussion*, evidence of Barry Lowry, at p.3 (18/05/2017)

⁹⁷ Oireachtas Joint Committee on Finance, Public Expenditure & Reform, and Taoiseach, *General Scheme of Data-Sharing and Governance Bill: Discussion*, evidence of Denis Kelleher, at p.13 (23/05/2017)

⁹⁸ Denis Kelleher (12/05/2016), *Comments on Data-Sharing and Governance Bill* submitted to the Joint Committee on Finance, Public Expenditure and Reform, *Taoiseach* (12/05/2016)

⁹⁹ Oireachtas Joint Committee on Finance, Public Expenditure & Reform, and Taoiseach, *General Scheme of Data-Sharing and Governance Bill: Discussion*, evidence of Daragh O'Brien, at p.13 (23/05/2017)

¹⁰⁰ *Ibid.*, at p.4

¹⁰¹ *Ibid.*

¹⁰² Head 7(1) of the General Scheme entitled “Memorandum of Agreement” proposes that before a public service body engages in data sharing the terms of the Data Sharing Agreement shall be set out in writing or in such other form as may be prescribed. Head 7(2) proposes to provide for the signing of Data Sharing Agreements. Head 7(3) proposes that Data Sharing Agreements will be drawn up by

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the lead agency, in consultation with other parties to the Data Sharing Agreement.

¹⁰³ Oireachtas Joint Committee on Finance, Public Expenditure & Reform, and Taoiseach, 'General Scheme of Data-Sharing and Governance Bill: Discussion', evidence of Barry Lowry, at p.3 (18/05/2017).

¹⁰⁴ Department of Public Expenditure & Reform, 'Joint Committee on Finance, Public Expenditure & Reform, and Taoiseach Pre-Legislative Scrutiny of the Draft General Scheme of the Data Sharing & Governance Bill', at p.4 (18/05/2017)

¹⁰⁵ Office of the Data Protection Commissioner (2014), 'Submission of the Office of the Data Protection Commissioner (DPC) on the data-sharing and Governance Bill: - Policy Proposals' (dated the 1st of August 2014) [online] at p.2. Available here: <http://www.per.gov.ie/en/datasharing/> [accessed on 22/11/2016]

¹⁰⁶ Oireachtas Joint Committee on Finance, Public Expenditure & Reform, and Taoiseach, 'General Scheme of Data-Sharing and Governance Bill: Discussion', evidence of Dennis Jennings (representative from DRI), at pp.9-10 (23/05/2017)

¹⁰⁷ Ibid., at p.14

¹⁰⁸ Ibid., at p.15

¹⁰⁹ Dennis Jennings, 'Implementing Public Service Shared e-Infrastructure: The individual & the Irish State – The Grand Bargain' (.n.d.) at pp.1-7

¹¹⁰ Ibid.

¹¹¹ Oireachtas Joint Committee on Finance, Public Expenditure & Reform, and Taoiseach, 'General Scheme of Data-Sharing and Governance Bill: Discussion', evidence of Dennis Jennings, at p.3 (23/05/2017)

¹¹² Ibid.

¹¹³ Oireachtas Joint Committee on Finance, Public Expenditure & Reform, and Taoiseach, 'General Scheme of Data-Sharing and Governance Bill: Discussion', evidence of Denis Kelleher, at p.6 (23/05/2017)

¹¹⁴ Ibid.

¹¹⁵ Ibid.

¹¹⁶ Ibid.

¹¹⁷ Ibid.

¹¹⁸ Ibid., at pp.3-4

¹¹⁹ Ibid., at p.10

¹²⁰ For example see the submissions of: Department of Social Protection (2014), *Response of the Department of Social Protection* [online] at p. 7. Available here: <http://www.per.gov.ie/en/datasharing/> [accessed on 22/11/2016]; and National Statistics Board (2014), 'Submission to Minister Brendan Howlin, Department of Public Expenditure and Reform regarding the consultation paper 'Public Service Data-Sharing and Governance Bill: Policy Proposals'' [online] at pp. 1-2. Available here: <http://www.per.gov.ie/en/datasharing/> [accessed on 22/11/2016].

¹²¹ For example see the submissions of: Catherine Murphy TD, Stephen Donnelly TD, McGarr Solicitors (2014), 'Submission Data Sharing and Governance Bill: Policy Proposals' [online] at p. 4. Available here: <http://www.per.gov.ie/en/datasharing/> [accessed on 22/11/2016]; Creditinfo (2014), 'Submission of Creditinfo on the data-sharing and Governance Bill: Policy Proposals' [online] at p. 3. Available here: <http://www.per.gov.ie/en/datasharing/> [accessed on 22/11/2016]; and Castlebridge-Digital Rights Ireland (2014), 'Consultation on Data Sharing & Governance Bill Proposals Joint Submission from Digital Rights Ireland and Castlebridge Associates' [online] at p. 7. Available here: <http://www.per.gov.ie/en/datasharing/> [accessed on 22/11/2016].

¹²² Oireachtas Joint Committee on Finance, Public Expenditure & Reform, and Taoiseach, 'General Scheme of Data-Sharing and Governance Bill: Discussion', evidence of Daragh O'Brien, at p10 (23/05/2017) at p.10

¹²³ Ibid., at p.10

¹²⁴ Ibid.

¹²⁵ Ibid.

¹²⁶ Ibid., at p11

¹²⁷ Ibid., at p.11

7. SANCTIONS

The General Scheme is silent as to sanctions, e.g. it does not provide any specific enforcement measures for unauthorised disclosure of personal data, breaches of Ministerial Code or Guidelines, or of Data Sharing Agreements.¹²⁸

The Department in evidence explained that at present, the situations regarding sanctions for breaches relating to personal data are dealt through a disciplinary process and internal review within the relevant organisation or Department.¹²⁹ This may include fines, demotion or being dismissed from employment, if that is appropriate.¹³⁰ In addition, the Department stated that citizens can make complaints to, and complaints can be escalated and investigated at an appropriate level by, the DPC.¹³¹

In evidence to the Committee, Dr Kelleher suggested consideration should be given to creating an offence for illegally/wrongfully accessing personal data that has been processed by the State. He stated that this would push down on civil and public servants the decision as to whether they have the authority to process personal data. It was explained that:¹³²

“[t]he advantage of creating an offence is not that it will necessarily lead to a whole load of prosecutions, but that it will give public servants who are asked to transfer or process data in a particular way the authority to say that the existence of a criminal offence in this sphere means they need clear instructions on how they should process that data. The big benefit of creating an offence in this area is that it would empower public servants to raise questions about these activities.”

In evidence to the Committee Mr O'Brien stated that the access to large amounts of data by public servants must be appropriately governed with clear sanctions.¹³³ He explained that the GDPR only deals with offences and administrative sanctions at the organisational level and that:¹³⁴

“there is a gaping hole at the level of the individual person being asked or put under pressure to do a thing. If people in such circumstances had something to point to, they would be able to say that they will carry a personal liability at criminal or civil level if they do that thing without appropriate authorisation or control.”

It was further stated by Mr O'Brien that the only comparable model is the criminal offence for unauthorised disclosure of taxpayer information in the [Taxes Consolidation Act 1997](#).¹³⁵ It was suggested that a provision akin to that “would be a valuable addition to the Bill”.¹³⁶

The issue of penalties or sanctions for misuse of personal data was also raised in submissions in the Policy Proposals.¹³⁷

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Recommendation 27: Sanctions

It is recommended that consideration be given to creating an offence for illegally/wrongfully accessing personal data that has been processed by the State.

¹²⁸ Under s.10(9) of the *Data Protection Acts* as amended by s.19 of the *Data Protection Act 2003* the DPC may issue an enforcement notice directing that certain steps are taken to ensure compliance with the Acts. Failure to comply with the enforcement notice is a criminal offence. The penalty on summary conviction is a maximum fine of €3,000. The penalty on conviction on indictment is a maximum fine of €100,000, or €3,000 where the accused enters a plea of guilty upon arraignment.

The GDPR will provide increased penalties for breaches of its data protection obligations and requirements. Article 83 of the GDPR provides general conditions for the imposition of administrative fines by supervisory authorities for breaches of certain data protection laws. At the maximum end these can be up to €20,000,000 or in the case of an undertaking 4% of total worldwide annual turnover for the previous year (whichever is higher). However, the GDPR leaves it to the discretion of the Member State if, and to what extent public authorities should be subject to administrative fines. Recital (150) of the preamble of the GDPR states that “[i]t should be for the Member States to determine whether and to which extent public authorities should be subject to administrative fines”. Article 83(7) of the GDPR states that “each Member State may lay down the rules on whether and to what extent administrative fines may be imposed on public authorities and bodies established in that Member State”.

In addition, Article 82 of the GDPR provides a right to compensation for data breaches resulting in material and non-material damage e.g. humiliation or distress. Thus, individuals may be able to sue public bodies for data breaches, including breaches concerning data sharing under the proposed legislation.

¹²⁹ Oireachtas Joint Committee on Finance, Public Expenditure & Reform, and Taoiseach, ‘*General Scheme of Data-Sharing and Governance Bill: Discussion*’, evidence of Barry Lowry, at p.12 (18/05/2017).

¹³⁰ *Ibid.*

¹³¹ *Ibid.*, at p.10

¹³² Oireachtas Joint Committee on Finance, Public Expenditure & Reform, and Taoiseach, ‘*General Scheme of Data-Sharing and Governance Bill: Discussion*’, evidence of Dennis Jennings, at pp.7, 8 & 13 (23/05/2017)

¹³³ Oireachtas Joint Committee on Finance, Public Expenditure & Reform, and Taoiseach, ‘*General Scheme of Data-Sharing and Governance Bill: Discussion*’, evidence of Daragh O’Brien, at p.11 (23/05/2017)

¹³⁴ *Ibid.*, at page 13

¹³⁵ Section 815A of the [Taxes Consolidation Act 1997](#) (as inserted by s.77 of the [Finance Act 2011](#)) introduced criminal sanctions for unauthorised disclosure of taxpayer information.

¹³⁶ Oireachtas Joint Committee on Finance, Public Expenditure & Reform, and Taoiseach, ‘*General Scheme of Data-Sharing and Governance Bill: Discussion*’, evidence of Daragh O’Brien, at p.13 (23/05/2017)

¹³⁷ For example see the submissions of: Office of the Data Protection Commissioner (2014), ‘*Submission of the Office of the Data Protection Commissioner (DPC) on the data-sharing and Governance Bill: - Policy Proposals*’ (dated the 1st of August 2014) [online] at p.5. Available here: <http://www.per.gov.ie/en/datasharing/> [accessed on 22/11/2016]; Castlebridge-Digital Rights Ireland (2014), ‘*Consultation on Data Sharing & Governance Bill Proposals Joint Submission from Digital Rights Ireland and Castlebridge Associates*’ [online] at p.12. Available here: <http://www.per.gov.ie/en/datasharing/> [accessed on 22/11/2016]; Revenue Commissioners (2014), ‘*Submission of the Revenue Commissioners on the data-sharing and Governance Bill: Policy Proposals*’ [online] at p.2. Available here: <http://www.per.gov.ie/en/datasharing/> [accessed on 22/11/2016]; Association of the Data Protection Officers (2014), ‘*Submission of the Association of Data Protection Officers*’ [online] at p.3. Available here: <http://www.per.gov.ie/en/datasharing/> [accessed on 22/11/2016]; and Department of Social Protection (2014), ‘*Department of Public Expenditure and Reform Policy Paper on Data Sharing and Governance Response of the Department of Social Protection*’ [online] at p.10. Available here: <http://www.per.gov.ie/en/datasharing/> [accessed on 22/11/2016].

8. TRANSPARENCY

A core aim of the GDPR is transparency.¹³⁸ For example, the first processing principle in Article 5 of the GDPR is that personal data must be processed lawfully, fairly and in a transparent manner.¹³⁹ When viewed in the context of privacy and data protection, transparency enables citizens to enforce their privacy and data protection rights. Transparency can also build trust and promote accountability.¹⁴⁰

The Department of Justice and Equality in evidence stated that:¹⁴¹

“[p]rovisions in the proposed data sharing and governance Bill will help to promote greater transparency and ensure that individuals are aware of sharing arrangements between public authorities and bodies. This will help to facilitate effective exercise of their data protection rights.”

The DPC in evidence stated, in the context of the GDPR, that:¹⁴²

“[i]t is essential that there be transparency for the public and the individual on how their data are being used, the purposes for which they are being used and how they will be kept. That is an essential core aspect of meeting compliance requirements under data protection law.”

The DPC went on to state that:¹⁴³

“[a] fundamental part of data protection law is that the individual is fully aware of what data bodies hold about them, how they are using it, how they are protecting it and we are not convinced there is enough transparency into how Government itself is sharing data and for what purpose it is being used.”

Publication of Data Sharing Agreements and Assessments

Head 8 of the General Scheme entitled *‘Publication of Memorandum of Agreement’* concerns the publication Data Sharing Agreements entered into by public service bodies under the Bill. However, Head 8(4) of the General Scheme provides that “the Minister shall cause to have published a full list of all memoranda of agreement [Data Sharing Agreements] entered into”.

Recommendation 28: Publication of Data Sharing Agreements

It is recommended that the proposed legislation provide for the publication of Data Sharing Agreements (in their entirety as distinct to a list of Data Sharing Agreements). This will enable citizens to view the content of such Data Sharing Agreements, including the purpose for the collection and processing of personal data.

Head 4(6)(g) of the General Scheme entitled *‘Regulation of Data-Sharing between Public Service Bodies and Applicable Safeguards and Conditions’* requires that where assessments are carried out, if any, it is added as an

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appendix to the Data Sharing Agreement. The DPC in evidence recommended that:¹⁴⁴

“in the interests of transparency to the public a provision in the Bill for the publication of the results of any screening assessment or privacy impact assessment.”¹⁴⁵

Recommendation 29: Publication Screening Assessments and Privacy Impact Assessments

It is recommended that consideration be given to including in the proposed legislation a provision requiring the publication of any screening assessments or Privacy Impact Assessments that have been carried out.

Certificate under Head 8(6)(a) of the General Scheme

Head 8(6)(a) of the General Scheme proposes that where the publication of the Data Sharing Agreement or Privacy Impact Assessment would prejudice:

- the safety, administration of justice (including immigration);
- the work of An Garda Síochána;
- the Criminal Assets Bureau; and
- the Irish Prison Service;

the Minister may, subject to the consent of the Minister for Justice and Equality, issue a certificate setting out instances or classes of data sharing that will not be subject to Head 8.

In a written statement, DRI (Dr Jennings) disagreed with this provision. It was stated that:¹⁴⁶

“[t]he public has a right to know what data access agreements are in place that relate to all these matters. Obviously neither the public, nor the individuals involved, will be informed about the particular records accessed.”

Recommendation 30: Exception under Head 8(6)(a) to the publication of certain Data Sharing Agreements or Privacy Impact Assessments

It is recommended that consideration be given to qualifying the exception in Head 8(6)(a) that Data Sharing Agreements or Privacy Impact Assessments relating to certain justice or criminal matters be published. The Committee is of the opinion that there is merit in publishing the existence of such Data Sharing Agreements or Privacy Impact Assessment and any parts that do not contain sensitive information.

¹³⁸ Transparency has many different definitions. In the context of administrative law (which has at its heart public administration), Fisher defines transparency as “the decision to make visible, or provide access to, the resources on which an exercise of public or private power may be based” (see Elizabeth Fisher (2010), *Transparency and Administrative Law: A Critical Evaluation*. Current Legal Problems (2010) 63 (1): 272 at p. 274)

¹³⁹ For other examples see Article 12 of the GDPR requiring data controllers, among other things, to provide information in a “concise, transparent, intelligible and easily accessible form, using clear and plain language”. Also, Article 26 of the GDPR provides that where two or more data controllers jointly determine their responsibilities they must do in a transparent manner.

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When viewed in the context of privacy and data protection transparency enables citizens to enforce their privacy and data protection rights.

¹⁴⁰ See Elizabeth Fisher (2010), '*Transparency and Administrative Law: A Critical Evaluation*'. *Current Legal Problems* (2010) 63 (1): 272, at p. 277.

¹⁴¹ Oireachtas Joint Committee on Finance, Public Expenditure & Reform, and Taoiseach, '*General Scheme of Data-Sharing and Governance Bill: Discussion*', evidence of Seamus Carroll (official from the Department of Justice and Equality), at p.6 (18/05/2017)
Oireachtas Joint Committee on Finance, Public Expenditure & Reform, and Taoiseach, '*General Scheme of Data-Sharing and Governance Bill: Discussion*', evidence of Dale Sunderland, at p.8 (18/05/2017)

¹⁴³ *Ibid.*, at p.20 (18/05/2017)

¹⁴⁴ *Ibid.*, at p.5

¹⁴⁵ Head 9 concerns a requirement to carry out a screening assessment, and depending on the outcome of that screening assessment a privacy impact assessment must be carried out, prior to data sharing under the Bill. In addition, Article 35 of the GDPR requires, in certain situations, data controllers to carry out privacy impact assessments.

¹⁴⁶ Dennis Jennings, '*Notes on the Draft General Scheme of Data-Sharing and Governance Bill*' at p.3 (6/04/2017).

APPENDIX 1

Orders of Reference

a. Functions of the Committee – derived from Standing Orders [DSO 84A; SSO 70A]

- (1) The Select Committee shall consider and report to the Dáil on—
 - (a) such aspects of the expenditure, administration and policy of a Government Department or Departments and associated public bodies as the Committee may select, and
 - (b) European Union matters within the remit of the relevant Department or Departments.
- (2) The Select Committee appointed pursuant to this Standing Order may be joined with a Select Committee appointed by Seanad Éireann for the purposes of the functions set out in this Standing Order, other than at paragraph (3), and to report thereon to both Houses of the Oireachtas.
- (3) Without prejudice to the generality of paragraph (1), the Select Committee appointed pursuant to this Standing Order shall consider, in respect of the relevant Department or Departments, such—
 - (a) Bills,
 - (b) proposals contained in any motion, including any motion within the meaning of Standing Order 187,
 - (c) Estimates for Public Services, and
 - (d) other mattersas shall be referred to the Select Committee by the Dáil, and
 - (e) Annual Output Statements including performance, efficiency and effectiveness in the use of public monies, and
 - (f) such Value for Money and Policy Reviews as the Select Committee may select.
- (4) The Joint Committee may consider the following matters in respect of the relevant Department or Departments and associated public bodies:
 - (a) matters of policy and governance for which the Minister is officially responsible,
 - (b) public affairs administered by the Department,
 - (c) policy issues arising from Value for Money and Policy Reviews conducted or commissioned by the Department,
 - (d) Government policy and governance in respect of bodies under the aegis of the Department,
 - (e) policy and governance issues concerning bodies which are

partly or wholly funded by the State or which are established or appointed by a member of the Government or the Oireachtas,

- (f) the general scheme or draft heads of any Bill,
 - (g) any post-enactment report laid before either House or both Houses by a member of the Government or Minister of State on any Bill enacted by the Houses of the Oireachtas,
 - (h) statutory instruments, including those laid or laid in draft before either House or both Houses and those made under the European Communities Acts 1972 to 2009,
 - (i) strategy statements laid before either or both Houses of the Oireachtas pursuant to the Public Service Management Act 1997,
 - (j) annual reports or annual reports and accounts, required by law, and laid before either or both Houses of the Oireachtas, of the Department or bodies referred to in subparagraphs (d) and (e) and the overall performance and operational results, statements of strategy and corporate plans of such bodies, and
 - (k) such other matters as may be referred to it by the Dáil from time to time.
- (5) Without prejudice to the generality of paragraph (1), the Joint Committee appointed pursuant to this Standing Order shall consider, in respect of the relevant Department or Departments—
- (a) EU draft legislative acts standing referred to the Select Committee under Standing Order 114, including the compliance of such acts with the principle of subsidiarity,
 - (b) other proposals for EU legislation and related policy issues, including programmes and guidelines prepared by the European Commission as a basis of possible legislative action,
 - (c) non-legislative documents published by any EU institution in relation to EU policy matters, and
 - (d) matters listed for consideration on the agenda for meetings of the relevant EU Council of Ministers and the outcome of such meetings.
- (6) Where a Select Committee appointed pursuant to this Standing Order has been joined with a Select Committee appointed by Seanad Éireann, the Chairman of the Dáil Select Committee shall also be the Chairman of the Joint Committee.
- (7) The following may attend meetings of the Select or Joint Committee appointed pursuant to this Standing Order, for the purposes of the functions set out in paragraph (5) and may take part in proceedings without having a right to vote or to move motions and amendments:

- (a) Members of the European Parliament elected from constituencies in Ireland, including Northern Ireland,
 - (b) Members of the Irish delegation to the Parliamentary Assembly of the Council of Europe, and
 - (c) at the invitation of the Committee, other Members of the European Parliament.
- (8) A Select Committee appointed pursuant to this Standing Order may, in respect of any Ombudsman charged with oversight of public services within the policy remit of the relevant Department or Departments, consider—
- (a) such motions relating to the appointment of an Ombudsman as may be referred to the Committee, and
 - (b) such Ombudsman reports laid before either or both Houses of the Oireachtas as the Committee may select.

b. Scope and Context of Activities of Committees (as derived from Standing Orders) [DSO 84; SSO 70]

- (1) The Joint Committee may only consider such matters, engage in such activities, exercise such powers and discharge such functions as are specifically authorised under its orders of reference and under Standing Orders; and
- (2) Such matters, activities, powers and functions shall be relevant to, and shall arise only in the context of, the preparation of a report to the Dáil and/or Seanad.
- (3) The Joint Committee shall not consider any matter which is being considered, or of which notice has been given of a proposal to consider, by the Committee of Public Accounts pursuant to Standing Order 186 and/or the Comptroller and Auditor General (Amendment) Act 1993; and
- (4) any matter which is being considered, or of which notice has been given of a proposal to consider, by the Joint Committee on Public Petitions in the exercise of its functions under Standing Orders [DSO 111A and SSO 104A].
- (5) The Joint Committee shall refrain from inquiring into in public session or publishing confidential information regarding any matter if so requested, for stated reasons given in writing, by—
 - (a) a member of the Government or a Minister of State, or
 - (b) the principal office-holder of a body under the aegis of a Department or which is partly or wholly funded by the State or established or appointed by a member of the Government or by the Oireachtas:

Provided that the Chairman may appeal any such request made to the Ceann Comhairle / Cathaoirleach whose decision

shall be final.

- (6) It shall be an instruction to all Select Committees to which Bills are referred that they shall ensure that not more than two Select Committees shall meet to consider a Bill on any given day, unless the Dáil, after due notice given by the Chairman of the Select Committee, waives this instruction on motion made by the Taoiseach pursuant to Dáil Standing Order 28. The Chairmen of Select Committees shall have responsibility for compliance with this instruction.

APPENDIX 2

Members of the Joint Committee on Finance, Public Expenditure and Reform, and Taoiseach

Deputies:

John McGuinness T.D. (FF) (Chairman)

Peter Burke T.D. (FG)

Michael D'Arcy T.D. (FG)

Pearse Doherty T.D. (SF)

Michael McGrath T.D. (FF)

Paul Murphy T.D. (Ind)

Seán Sherlock T.D. (Lab)

Senators:

Gerry Horkan (FF) (Vice-Chairman)

Paddy Burke (FG)

Rose Conway-Walsh (SF)

Kieran O'Donnell (FG)

APPENDIX 3

List of witnesses

Department of Justice and Equality:

- Mr. Seamus Carroll
- Noreen Walsh

Department of Public Expenditure and Reform

- Mr Barry Lowry
- Ms Evelyn O'Connor
- Mr Owen Harrison
- Mr Pat Keane

Office of the Data Protection Commissioner

- Mr Dale Sunderland
- Mr Cathal Ryan

Digital Rights Ireland Limited

- Mr Dennis Jennings
- Mr Daragh O'Brien
- Mr Antoin O Lachtnain

Expert Witness

- Mr Denis Kelleher, Barrister-at Law

APPENDIX 4

Links to Official Meeting Transcripts

Transcripts of relevant Committee Meetings can be accessed at the following links:

18 May 2017 - Meeting of the Joint Committee on Finance, Public Expenditure and Reform, and Taoiseach: (Minister for Finance, Michael Noonan)

<http://oireachtasdebates.oireachtas.ie/Debates%20Authoring/DebatesWebPack.nsf/committeetakes/FPJ2017051800002?opendocument>

23 May 2017 - Meeting of the Joint Committee on Finance, Public Expenditure and Reform, and Taoiseach:

<http://oireachtasdebates.oireachtas.ie/Debates%20Authoring/DebatesWebPack.nsf/committeetakes/FPJ2017052300002?opendocument>

APPENDIX 5

Figure 1: Outline of the General Scheme of the Data Protection Bill

Part 1: [GENERAL PROVISIONS] (Heads 1 - 3)

Part 1 is composed of three Heads concerning the short title (Head 1), definitions and interpretation (Head 2) and definition of “data-sharing” (Head 3).

Part 2: Regulation of data-sharing between public service bodies - conditions and safeguards (Heads 4 - 6)

Head 4 proposes a legal basis for data sharing between public service bodies, or their agents, and provides a framework for the regulation of data sharing between public service bodies, including providing the Minister for Public Expenditure and Reform ('the Minister') with discretionary power to draw up and publish a Code of Practice and Guidelines for the operation of the proposed legislation.

Head 5 concerns the designation of a lead agency to oversee matters relating to data sharing under a memorandum of agreement between public service bodies under the proposed legislation.

Head 6 proposes the Minister may, by regulation, direct public service bodies to provide him or her with information concerning the sharing of data between the public service bodies or their agents, regardless of whether it was carried out under the proposed legislation or otherwise.

Part 3: Governance and transparency (Heads 7 - 9)

Heads 7 and 8 concerning transparency proposes to require public service bodies (before engaging in data sharing) to enter into an agreement, in particular a written memorandum of agreement ('Data Sharing Agreement') and for the publication of those Data Sharing Agreements.

Head 9 concerns a requirement to carry out a screening assessment and depending on the outcome of that screening assessment, a privacy impact assessment, prior to data-sharing under the proposed legislation.

Part 4: Organisation of public service data (Heads 10 - 12)

Head 10 proposes the Minister may, by regulation, prohibit the use of specified physical documents by public service bodies where the information can be obtained by way of data sharing.

Head 11 proposes the Minister may, by regulation, require the collection of categories of information by public service bodies and to specify the format of the information.

Head 12 concerns the sharing of public service identity data and the sharing of data to verify the identity of persons ('identify verification') between public service bodies.

Part 5: Sharing of certain types of personal data (Heads 13 - 17)

Head 13 proposes a legal basis for public service bodies to share data for the purposes of “means data”.

Head 14 proposes a legal basis for public service bodies, or a prescribed person, to share data for the purposes of verifying a person’s educational status.

Head 15 concerns the provision of public service employee information, including PPSN, grade, salary or public service organisation information, including number of employees, details of organisation’s income and expenditure to the Minister.

Head 16 proposes a legal basis for the sharing of business data, including registered business name and address, income tax and value added tax registration number and the company’s registration office registration number, between public sector bodies.

Head 17 proposes that the Minister may designate, by order, a public service body database as a base register.

Part 6: Open data (Head 18)

Head 18 proposes the Minister may, by regulation, set open data standards and practices to be applied by public service bodies.

Schedule

The schedule proposes a list of commercial semi-state bodies and subsidiaries that will be exempt from the definition of “public service body” in the proposed legislation. At present the schedule does not provide a detailed list of such bodies.