

From: [John Hancock](#)
To: YouthServiceExtensionProject@msd.govt.nz
Subject: Human Rights Commission feedback on draft Youth Service AISA
Date: Friday, 6 May 2016 4:52:00 PM

To: Ministry of Social Development

Attn: Chris O'Grady

From: Human Rights Commission – John Hancock, Senior Legal Adviser

Dear Chris

Re: Draft Youth Service Approved Information Sharing Agreement

Thank you for the opportunity to provide feedback on the draft Youth Service Approved Information Sharing Agreement ('the AISA').

Purpose and Background of the AISA

The principal purpose of the AISA is to enable the use of predictive statistical risk modelling (SRM) techniques designed to underpin an expanded Youth Service. The AISA appears to be linked to the proposed amendments to the Social Security Act brought about by the Social Security (Extension of Young Persons Services and Remedial Matters) Amendment Bill 2015 ('the Bill') that extends the Youth Service programme from current its application to 16 and 17 year olds to all 19 year old beneficiaries with children and 18 and 19 year old beneficiaries without children who are considered at significant risk of long term welfare dependency.

The Bill also amends the sanctions regime of the Social Security Act so that it applies in cases where young people fail to meet any of the new Youth Service obligations.

The Regulatory Impact Statement (RIS) to the Bill noted the intended use of SRM techniques to assess the suitability of "at risk" 18 and 19 year old Jobseeker beneficiaries for Youth Service scheme. The RIS indicated that the SRM approach makes distinctions based on age, family status and other "risk factors", thus engaging the anti-discrimination provisions of the Human Rights Act (HRA) and the New Zealand Bill of Rights Act (BORA) (although the RIS considered that the Bill did not contradict either the HRA or BORA in this respect).

In its s 7 assessment of the Bill, the Ministry of Justice considered its age and family status discrimination aspects and concluded that such discrimination was justified under s 5 of BORA on principally on the basis that the Bill only minimally impaired rights, is rationally connected to the policy objective and is likely to have a remedial effect in reducing welfare dependency.

However, as the Commission noted in its submission on the Bill, 18 and 19 year olds who are enrolled in the Youth Service programme by way of the SRM process may be subject to sanctions for failure to meet their youth service obligations, obligations that are not imposed on other adult beneficiaries aged 18 and over who receive the regular jobseeker payment. This arguably constitutes more than a minimal impairment of rights.

Furthermore, risk modelling tools are new to the social sector and raise a number of important ethical considerations. These concerns were identified by the University of Auckland Centre for Applied Research in Economics (CARE) in its 2012 research commissioned by MSD to investigate the use of predictive risk modelling in targeting early intervention and reducing child and neglect. CARE found that, in that case, implementation should be subject to:

- a full ethical evaluation
- development of an ethical framework to guide agencies in how they should respond to risk scores.
- strong engagement from front-line providers and staff
- Careful, deliberate and phased implementation

The AISA does not mention or refer to any of the above processes. It is therefore not clear whether any ethical evaluation of SRM has taken place, or is intended to take place, nor is there any indication of whether an ethical framework will be developed to guide agencies in their assessment of risk scores and subsequent responses. The Commission recommends that the ethical, engagement and implementation processes set out above are included in the AISA's operational clauses.

The Commission also notes that the AISA and its accompanying information does not appear to include any reference to the Bill, which is currently awaiting its third reading. As it appears that the AISA is contingent on the Bill's extension of the Youth Service being implemented, the Commission recommends that the AISA include some reference to the Bill, the amendments it is seeking to introduce and an indication of whether the AISA's commencement date is contingent on the Bill's enactment.

The AISA framework

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Purpose (clause 4)

The Commission notes that purpose statement set out under clause 4 omits mention of the SRM process to be used. Given the ethical implications of SRM, the Commission recommends that clause 4(2)(a) is amended to:

“Assisting the Youth Service through the use of statistical risk modelling to identify, engage and support young people...”

The Commission also recommends that the clause 4 is also amended to mandate the development of an ethical framework for agencies. Such an amendment could be included in a new clause 4(2)(c), such as the following:

“Enabling the development of an ethical framework to guide the parties in ascertaining the risk profiles of young people whose personal information is obtained under the Agreement.”

Personal information that may be shared (clause 6)

Clause 6 sets out the personal information to be shared between the Ministry of Education (MOE) and MSD (cl 6.1) and Department of Corrections (DOC) and MSD (cl.6.2). Clause 6 is

currently drafted in such a way that could be interpreted to allow broad, discretionary sharing of personal information not limited to the specific categories listed in cl 6.1 (a)-(m) and 6.2 (a)-(g).

The Commission accordingly recommends that cl 6.1 and 6.2 are amended to delete the words “including the student’s” in order to expressly limit the types of person information shared to the specific categories identified below.

The Commission also recommends that the AISA is accompanied by explanatory information that identifies the evidential basis for the connection between the categories of personal information sought and the objective of the Youth Services policy.

Safeguards (clause 8)

Clause 8(1) provides that MOE will recommend to schools or tertiary organisations to notify students of the Youth Service policy and that their information will be shared for this purpose under the AISA.

This is not a particularly satisfactory safeguard clause. Schools and tertiary institutions are not party to the AISA, although they will be the primary sources of the personal information gathered.

The Commission accordingly recommends that clause 8 is amended to place an obligations on MOE to develop the required notification information and communications strategy and assist schools and tertiary institutions to implement them. Notification information should include the rights of students to access the personal information being shared and to make corrections, if the information is incorrect or disputed.

A similar obligation should also be included in cl 8 to require DOC to inform young people who have been under its jurisdiction of the sharing of their personal information under their AISA, as well as their right to access that information and, if necessary, seek correction.

While Clause 8 provides for the encryption of data, it omits to mention whether the personal information stored will be de-identified in order to reduce the risk of privacy breaches occurring. The Commission recommends that clause 8.5 is amended to require that personal information held in storage is de-identified, either partially or in whole.

Operational details (clause 9)

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As set out above, the Commission recommends that clause 9 is amended to include a requirement that agencies apply an ethical framework in both their creation of a risk profile and their assessment of the options available in responding to it.

Development of an ethical framework is essential, particularly given that:

- Participation in a Youth Service is not voluntary (other than for referral to an existing NEETS service).
- While the initial risk rating is based on a narrow information set, the AISA enables the risk rating to be updated with other risk factors such as offending, substance abuse, physical

and mental health barriers and so on.

- The AISA enables MSD to retain data received from MOE for research and evaluation purposes.

Adverse actions

The Commission notes that the AISA seeks to invoke s 96R of the Privacy Act 1993 in order to dispense with the normal requirement under s 96Q of the Privacy Act requiring that agencies notify individuals in writing of adverse action to be taken against them on the basis of the information shared. The rationale for this is that the initial contact with the young person will be by phone.

There is clearly potential for adverse consequences arising from information-sharing under AISA. Firstly, participation is compulsory for 18 and 19 years old beneficiaries who are streamed into the Youth Service (under clause 9 [p 8 of the AISA] it appears that they will not be given the choice between a Youth Service referral and Work and Income case management) and, secondly, non-compliance with Youth Service conditions can lead to benefit sanctions being applied.

The Commission recommends that the AISA is amended to ensure that young people subject to the AISA are notified of any adverse action that may arise as a result of their personal information being shared. This could possibly be done pre-emptively as part of MOE or DOC notification under cl 8(1).

International human rights implications

The AISA engages the right to privacy under Article 17 of the International Covenant on Civil and Political Rights and Article 16 of the UN Convention of the Rights of the Child (UNCROC), and the right to social security under Article 9 of the International Covenant on Economic Social and Cultural Rights and Article 26 of UNCROC and Article 28.2 of the UN Convention on the Rights of Persons with Disabilities. The following related UN General Comments are of particular relevance to the AISA:

- In its General Comment No 16 on the right to privacy (8 April 1988), the UN Human Rights Committee held that individuals have the right to ascertain what information is being held by public authorities, for what purpose, and have the right to correct or eliminate incorrect information held by those authorities [para 11].
- In its General Comment 19 on the right to social security (4 February 2008), the UN Committee on Economic, Social and Cultural Rights observed that qualifying criteria must be “reasonable, proportionate and transparent” [para 24].

These principles should be reflected in the implementation of the Youth Service programme and the operation of the AISA.

Furthermore (for your reference), in its List of Issues developed for the 5th periodic UNCROC review of New Zealand taking place in September 2016, the UN Committee on the Rights of the Child has asked the New Zealand Government to indicate what measures it takes to protect the privacy of the child in respect of information sharing processes under an AISA (CRC/C/NZL/Q/5, 9 March 2016 para 8(a)).

Please do not hesitate to contact me if you have any questions or require any further information.

Kind regards

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