Opening Statement of the Office of the Data Protection Commissioner

General Scheme of the Data Sharing and Governance Bill

18th May 2017

Thank you Chairman and members of the Committee for the opportunity to meet with you to discuss the provisions of the General Scheme of the Data Sharing and Governance Bill.

I would like to introduce my colleague and myself. I am Dale Sunderland Deputy Commissioner with responsibility for the Consultation function of the data protection authority. The purpose of the office's consultation role is primarily to engage with public and private entities seeking guidance from us in relation to proposed projects and initiatives that may interfere with individuals' data privacy rights. My colleague, Assistant Commissioner Cathal Ryan is the office's Head of Consultation for the public sector and health.

The Data Protection Commissioner (DPC) recognises the intended benefits of the proposed Bill and is supportive of the aims of developing more efficient and customer-centric public services. It should acknowledged that there are many existing legally robust and well-managed data-sharing arrangements in place between public sector bodies. So while it is the view of the DPC that individual primary legislative arrangements governing the processing and sharing of personal data in specific circumstances are a preferred approach on which to legally ground data sharing arrangements, we nonetheless welcome any effort to ensure consistency across the public sector in the design and implementation of data sharing arrangements that meet the requirements of EU data protection law.

We therefore accept the rationale for the proposed Bill insofar as it will provide a legal framework for public sector authorities to carry out the requisite analysis and balancing

tests that respects the EU fundamental right of individuals to have their personal data protected, treated with care and not accessed or used without good and lawful reason.

Recent European Court of Justice jurisprudence and the upcoming General Data Protection Regulation (GDPR) are definitive in directing that data-sharing arrangements between public sector bodies require legislative underpinning. One of the main objectives of the proposed Bill is to seek to underpin this fundamental requirement by providing a legal framework that mandates the greater data sharing and data linking in the public service where permissible. That legal framework, if properly constituted, will have the benefit of providing "confidence" to all public sector bodies to explore and carry out legitimate data-sharing opportunities. Furthermore, it will encourage consistency and clarity in the design, analysis and implementation of data sharing arrangements by promoting an evidence based approach to their formulation

Of itself, the sharing of data is neither good nor bad. Quite clearly, it can have benefits in some cases for the public in not having to supply the same information multiple times. In particular, we note innovations contained in the scheme such as the prescription of public sector data sets for purposes such as means testing, which will provide greater transparency and certainty to individuals on how their data is legitimately used to determine decisions in respect of access to services, as well as facilitating the public in not having to repeatedly provide their data to public bodies. It other cases, however, data sharing can lead to public bodies holding excessive and unnecessary data on individuals.

In contemplating data sharing initiatives it is important to start out with the understanding that Government does not represent one data controller under data protection law and that there can be no lawful presumption of sharing of data between separate organisations. Each government department and public body is a data controller in its own right and has its own individual responsibilities under the law. Sharing between public bodies may only occur where it is provided for by law and the core data protection principles of purpose limitation and transparency to the user are met. This fundamental principle of data protection compliance has been underscored by the ruling of the ECJ in the Bara & Oths C-201/2014

case which provided clarity on the obligations and arrangements required to be in place before implementing a data sharing arrangement.

Therefore, it must be clearly understood that the General Scheme of the Bill before the committee cannot create a new legal basis for sharing data in any given case that does not otherwise exist. In itself, this legislation will not be sufficient to validate processing of personal data to the standard required under EU law and it cannot provide a basis for automatically sanctioning public sector authorities to share personal data. Instead, what this bill seeks to do is provide a process for public sector managers to assess whether sharing can lawfully occur in respect of purpose limitation, transparency and with appropriate safeguards. It is the assessment process in the proposed Bill that is key and the outcome of that assessment will dictate if sharing of data can occur and on what basis it can occur.

I also want to emphasise that legislation on its own is not sufficient to prevail over data protection law in light of its status as a fundamental right as set out in Article 8 of the European Charter of Fundamental Rights.

The ECJ held in *Digital Rights Ireland C-293/2012* that any legislative measure enacted (involving the processing of personal data) must meet a proportionality test and be appropriate for attaining the legitimate objectives pursued by the legislation at issue and does not exceed the limits of what is appropriate and necessary in order to achieve those objectives.

Therefore, in addition satisfying data protection requirements such as lawful basis for processing, purpose limitation, and data minimisation, each data sharing arrangement envisaged under this Bill will require a careful balancing test to justify why the right to data protection should cede - in a proportionate manner - to the legitimate interests of the State. For each data sharing arrangement, it will be necessary to demonstrate that it is legitimate, proportionate and necessary in the public interest for the data concerned to be shared between two or more public bodies.

While the DPC welcomes the safeguards and process safeguards set out in the proposed Bill, we believe it would benefit from the addition of further provisions underpinning the responsibilities of public sector bodies in carrying out adequate and robust data protection assessments.

We believe that the Bill would benefit from the inclusion of a requirement for a Statutory Instrument (SI) to legally underpin each data sharing arrangement. An SI would supplement the assessments carried out and the publication of a comprehensive Memorandum of Understanding. In our view, it would crucially provide public bodies with the additional legal and administrative certainty to pursue legitimate sharing of personal data within a framework that provides for the proper data protection assessments to be undertaken and the necessary safeguards applied.

The DPC has been very proactive in raising awareness of the requirements for lawful data sharing arrangements. Following the seminal decision of the European Court of Justice in the case of Bara & Oths C-201/2014 we published detailed guidelines in January 2016 incorporating the findings of that judgment in order to assist public sector bodies in devising compliant sharing arrangements. A copy of our guidance has been provided to the Committee. We 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 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. Similarly, the provisions of the Bill must comply with the new General Data Protection Regulation that comes into effect on the 25th May 2018, as well as being consistent with the General Scheme of the Data Protection Bill published last week by the Tánaiste and Minister for Justice and Equality.

We welcome the provisions of the Bill to provide for screening tests and Privacy Impact Assessments. Such assessments will be mandatory for certain data processing arrangements under the GDPR and should not be viewed as merely a step in a process. If conducted properly they will lead and contribute to conclusions as to whether or not the data sharing is appropriate and lawful in a given case. As I have already mentioned, it is incumbent upon all

data controllers to take a detailed evidence based approach that interrogates the objectives and data protection issues arising and appropriately substantiates why data protection rights of an individual must cede - in a proportionate way - to legitimate interests of the public body concerned. We also note for example that the Bill provides a specific legal basis in certain instances such as under Head 15 - Public Service Organisation and Employee Data**.** However, it is not clear what assessments have been carried out to inform this Head and the safeguards that will apply to the sharing of such data. In the interests of transparency to the public we would also recommend that, along with the publication of the MoU, provision be made in the Bill to publish the results of any screening assessment or Privacy Impact Assessment.

It is our understanding that the Bill is not intended to provide a legal basis for large structural government projects which would will still need specific primary legislation provision for any data-sharing that would be required (for example, to build a database that would form the basis for a billing database). However, the General Scheme is not sufficiently clear in this regard and we would recommend that provisions be included to clarify the scope of the legislation and the data sharing arrangements to which it applies. For the avoidance of any doubt, we would also recommend that further clarity be provided on the agencies and bodies that will fall under the scope of the Bill.

We would also expect to see significantly more detail to provide clarity in terms of how the governance (control, access, identification of data controller) and security arrangements (IT-led, encryption, firewalls, data transfer protocols) are to be dealt with. We would also 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.

In summary, the DPC accepts the rationale of the General Scheme of the Data Sharing and Governance Bill to support lawful sharing of personal data where justified. However, as I have outlined, we believe further enhancements are necessary so that the Bill will achieve its intended objective by providing a robust legal framework whereby public sector bodies have the authority and clarity to confidently engage in legitimate data sharing initiatives.