**ALBA TALK 11TH JUNE 2014**

**DATA SHARING AND PUBLIC AUTHORITIES**

**What is data sharing?**

* Usually refers to sharing information about identifiable individuals – including anonymised/de-identified/pseudonymised information.
* Both public and private bodies will share information that they hold about individuals – but discussion and debate on data sharing has tended to focus on the public sector.
* Can involve sharing of information *within* an organisation (see e.g. *GDC v Savery* [2011] EWHC 3011 Admin) or *outside* an organisation.
* Where information is shared outside an organisation, this may be on a limited basis, or by way of publication to the world at large
* Usually when organisations say they want advice on data sharing, it is because they are public sector bodies wishing to share information on a regular basis with other bodies (which may be public/private/voluntary sector)

**Why has data sharing been seen as difficult/problematic?**

* Public authorities hold an increasing amount of information about individuals
* We get better and better at manipulating and analysing data (“big data”)
* Increasing emphasis on inter-agency working: e.g. use of MASH arrangements for child safeguarding; Troubled Families Programme; MAPPA arrangements for management of sexual/violent offenders.
* Emphasis on “joined up” approach within organisations rather than operating in “information silos”. E.g. local authorities have used their Council Tax records to populate customer relationship management databases used by the whole organisation.
* High-profile public enquiries – e.g. Bichard (2004), Laming (2003, 2009).
* But at the same time public authorities can fall foul of the law for excessive disclosure: e.g. *H & L v A Local Authority* [2011] EWCA Civ 403.
* The law is widely regarded as complex/confusing, and there is not a single source of law.

**Debate on information sharing: some milestones**

* Thomas/Walport report (2008)
* Labour Government reform proposals (Coroners and Justice Bill introduced in 2009 – proposal for “information sharing orders” subsequently abandoned).
* Law Commission scoping paper (2013)
* What next?

**Legal analysis in relation to information sharing: general considerations**

* In many contexts there are specific statutory gateways for information sharing
* But these can be misleading: a specific gateway may not be necessary for lawful data sharing; where it exists, it may not be sufficient for lawful data sharing
* Difficulties may be specific to particular kind of information.
* Can we use our Council Tax records to populate a CRM database? Cf Local Government Finance Act 1989 Schedule 2.
* Can we use benefits information to identify children entitled to free school meals? Cf section 123 of the Social Security Administration Act 1992.
* Data Protection Act 1998 (“DPA”) likely to be relevant if the information to be shared is “personal data”; but this concept is notoriously difficult to apply
* Human Rights Act 1998 (“HRA”); Article 8 likely to be relevant even in cases where there is an express statutory power (or duty) to share

**The Law Commission’s analysis**

Discussion of legal framework under 4 main headings:

* Powers to share information
* DPA issues
* HRA/Article 6
* Breach of confidence

**When does the DPA apply to information sharing? The concept of personal data**

Definition of personal data: DPA section 1(1)

When does information *relate to* an individual?

*Durant v FSA* [2003] EWCA Civ 1746

*Edem v Information Commissioner* [2014] EWCA Civ 92

When is an individual *identifiable*?

* Are we talking about identification by the data controller or by others?
* What if the party disclosing can identify, but the recipient can’t?

See *Common Services Agency v Scottish Information Commissioner* [2008] UKHL 47*; Department of Health v Information Commissioner* [2011] EWHC 1430

**The problem of anonymisation and pseudonymisation**

ICO guidance: Anonymisation Code of Practice (2012)

The ICO guidance distinguishes between information that is suitable for publication, and information that can safely be shared on limited terms

What is it saying about the latter? That it isn’t personal data, but needs tight controls to ensure that it stays out of the DPA? Or that it is personal data, and needs tight controls to comply with the DPA?

Compare Article 29 Working Party on Anonymisation (05/2014)

**A practical example: criminal records**

There is a statutory scheme for sharing information about criminal convictions (and also “soft intelligence”): Police Act 1997, Part V. Information is provided to prospective employers in specified situations, by way of DBS checks (formerly CRB checks)

System can only be understood against the background of the rules about “spent convictions”

Rehabilitation of Offenders Act 1974: certain convictions treated as “spent”.

But Exceptions Order 1975 allows individuals to be asked about spent convictions in prescribed circumstances

Police Act 1997 provides a mechanism for disclosure of *all* convictions in specific cases.

Court of Appeal decision in *R (ota T) v Chief Constable of Greater Manchester and others* [2013] EWCA Civ 25

* Police Act 1997 incompatible with Article 8
* Exceptions Order incompatible with Article 8

Supreme Court hearing, December 2013: judgment awaited

Good illustration that an express statutory basis for information sharing may not be sufficient to ensure that it is lawful

But - practical problem with all of this – widespread availability of information online.

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