

WORKSHOP

on

**UNDERSTANDING REGULATORY MECHANISMS
FOR PROTECTING REASONABLE EXPECTATIONS OF
PRIVACY: MAPPING CONSENT AND FAIRNESS IN
AUSTRALIAN AND INDIAN DATA PROTECTION LAW**

hosted by

**MELBOURNE LAW SCHOOL
AND JINDAL GLOBAL LAW SCHOOL**

WELCOME ADDRESS



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JUSTICE B.N. SRIKRISHNA

Former Judge Supreme Court
of India

 **THU 29th JULY, 2021**

**2:30 PM – 4:30 PM (AEST)
10:00 AM – 12:00 PM (IST)**

MODERATORS



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PROGRAMME

10:00 AM – 10:05 AM	Welcome Address: By DR. S.G. SREEJITH , Professor and Executive Dean, Jindal Global Law School O.P. Jindal Global University
10:05 AM – 10:15 AM	About the Project: By DR. JEANNIE PATERSON , Professor, Melbourne law School, University of Melbourne DR. MARK TAYLOR , Associate Professor, Melbourne Law School, University of Melbourne DR. INDRANATH GUPTA , Jean Monnet Chair, Professor, Jindal Global Law School, O.P. Jindal Global University
10:15 AM – 10:30 AM	Inaugural Address: By JUSTICE B.N. SRIKRISHNA , Former Judge Supreme Court of India
10:30 AM – 11:55 AM	Discussion
11:55 AM – 12:00 PM	Vote of Thanks

CONCEPT NOTE

Understanding regulatory mechanisms for protecting reasonable expectations of privacy: mapping consent and fairness in Australian and Indian data protection Law

While we are increasingly becoming dependent on digital infrastructure, there are concerns about ethical data flows. Those operating digital platforms collect data about individuals and groups at an exponential level, thereby risking their privacy interests. This practice challenges existing governance mechanisms to ensure that data are only used in ways that are consistent with reasonable individual and community expectations of privacy and fairness. In particular, it challenges any reliance upon traditional mechanisms of individual 'consent' or data pseudonymisation or anonymisation to provide adequate or effective control. Both India and Australia are in the process of legal reform, or consultation on legal reform, to address these and other concerns.

In India, issues concerning fairness in data processing were comprehensively explored in the Report of the Committee of Experts, under the Chairmanship of Justice BN Srikrishna 'A Free and Fair Digital Economy: Protecting Privacy, Empowering Indians' (*'Protecting Privacy, Empowering Indians'*), submitted to the Ministry of Electronics and Information Technology, Government of India in 2018. This report took as threshold premise that, first, 'the primary value that any data protection framework serves must be that of privacy' and secondly, 'such a framework must not overlook other values including collective values' (*'Protecting Privacy, Empowering Indians'*, 10). The Committee recommended that consent in this framework should be made meaningful through form and substantive requirements (*'Protecting Privacy, Empowering Indians'*, 11). In addition, to protect data subjects, substantive obligations to ensure fair and reasonable data processing should be imposed on data processors, termed 'data fiduciaries' (*'Protecting Privacy, Empowering Indians'*, 33). This protectionist approach is picked up in the proposed Indian Data Protection Bill 2019. The Bill adopts a substantive standard of 'fair and reasonable' that appears to go beyond that previously seen in data protection legislation.

In Australia, the Federal Government launched a review of the Privacy Act 1988 (Cth) in November 2019. It has now received submissions on an Issues Paper released in October 2020, and we await a Discussion Paper in 2021. This will provide further opportunity for comment on reform proposals. The Office for Australian Information Commission (OAIC) provided a submission in response to the 2020 Issues Paper, which included 70 recommendations (<https://www.oaic.gov.au/assets/engage-with->

us/submissions/Privacy-Act-Review-Issues-Paper-submission.pdf). These included a recommendation that obligations be introduced so that the collection of personal information by a relevant entity "must be fair and reasonable in the circumstances, even if the individual consents to the collection" (Recommendation 37). The OAIC also recommended clarification that the material scope of the *Privacy Act 1988* (Cth) be extended to include "collection by 'creation', which may occur when information is created with reference to, or generated from, other information the entity holds" (Recommendation 7) and that individuals must be notified if the information is to be "anonymised and used for purposes other than those permitted for the initial collection" (Recommendation 9). The OAIC further recommends that organisations be put under a responsibility to "take reasonable steps to protect anonymised information from misuse, interference and loss, and from unauthorised access, modification or disclosure" (Recommendation 10).

It is not yet clear how responsibilities concerning 'fair and reasonable' processing are to be understood. Nor is it clear how any such responsibility intersects with consent as a mechanism for protecting consumers. Nor how far responsibilities regarding meaningful consent or 'fair and reasonable processing' extend to 'downstream' data use in aggregate, anonymised or derived form. How far may duty to process fairly and reasonably reach into, and through, the processing of data by an organisation? What might this mean in practice? To what extent are the obligations usefully conceived of as traditional fiduciary obligations? How do proposals for fiduciary obligations unpack in different scenarios?

A series of workshops considering distinct scenarios will explore approaches to balancing the elements of individual consent and fairness to protect citizens' reasonable expectations of privacy in data-driven transactions. At the end, we will be able to recommend practical pathways for legal innovation in India to support and inform law reform in Australia.

The opening workshop will unravel the theoretical underpinnings, leading to a possible standardised framework connected to fair and reasonable processing issues and the overarching framework of consent.

Consent, the lawful basis for processing personal data, is inadequate due to the imbalance between the data controller and the data subject. In fact, it isn't easy to map the different variants of consent – regular and explicit. As a support to the existing consent framework leading to the processing of personal data, jurisdictions have flagged the test of fairness. This test is tied up within the boundaries of the fiduciary relationship and ethical epistemology of fairness and reasonableness. This session aims to pave the roadmap ahead for a data controller and understand the true nature of data protection measures. In the process, the workshop will try to answer the following issues, amongst other pertinent discussions.

1. How responsibilities concerning 'fair and reasonable' processing are to be understood?
2. How such responsibility intersects with consent as a mechanism for protecting consumers?
3. To what extent are the obligations usefully conceived of as traditional fiduciary obligations?
4. Within an organisation, how far are responsibilities regarding meaningful consent or 'fair and reasonable processing' extend to 'downstream' uses of data in aggregate, anonymised or derived form?
5. How far may duty to process fairly and reasonably reach into, and through, the processing of data by an organisation to *processing by another organisation*?

"The discussions in this session will be undertaken by participants in their personal capacity, and in strictest confidence. The purpose of the discussions is to inform the research project. No recordings of the sessions will be made. Notes will be taken for the purposes of informing future research and subsequent workshops. Chatham House rules will be followed with no attribution of any comments to specific individuals or organisations."