

Senate Select Committee on COVID-19 – Questions on Notice (Wednesday 6 May 2020)

Transcript reference	Topic	Question on notice
Page 9	US access to COVIDSafe app data	<p>Senator KENEALLY: Thank you for your appearance today. I will just pick up very quickly on Senator McKim's questions. If the data were being stored in Australia rather than being stored by Amazon Web Services—if it were being stored by an Australian company—you could give that guarantee, couldn't you?</p> <p>Ms Edwards: It is being stored in Australia.</p> <p>Senator KENEALLY: Sorry—if it were being stored by an Australian company.</p> <p>Ms Chidgey: We can't give complete guarantees about foreign laws. Other countries may choose to do things that—</p> <p>Senator KENEALLY: That's my point. If the contract had been given to an Australian company, you could give the guarantee that Senator McKim sought, couldn't you?</p> <p>Ms Chidgey: I don't know; we'd have to take that on notice.</p> <p>Ms Edwards: Yes. I think that's a complex legal question.</p> <p>Senator KENEALLY: You would have to take that question on notice? Surely you can answer that.</p> <p>Ms Edwards: It's a complex legal question, and we're not giving away legal advice here. What we can say is that Australian law prohibits this, and Australian law is what we're operating on in Australia. The data is here in Australia. Australian law would make it a criminal offence to have that sort of disclosure, and the government is incredibly committed to ensuring that doesn't happen. To hear a senior officer of the Attorney-General's Department say it's 'inconceivable' to think of an instance in which it would occur is really an extremely strong guarantee for the Australian public. That's what we would like to leave the committee with: that there's the most stringent of guarantees as to the security and privacy.</p> <p>Senator KENEALLY: The question I'm asking is: couldn't you give the most stringent guarantee if the contract had been given to an Australian company?</p> <p>Ms Edwards: We can't comment on what the legal impact of a foreign law might be on the difference of the ownership of a company in Australia. That's the technical issue, I think, which we're unable to answer and which Ms Chidgey offered to take on notice.</p>

AGD response:

Irrespective of any foreign law, it is a criminal offence under Australian law to disclose COVIDSafe app data to any person outside Australia (including to any US or other foreign agency). This offence attracts a penalty of five years' imprisonment, or 300 penalty units, or both.

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Senator KENEALLY: Thank you. We have already covered, in some of Senator McKim's questions, whether there's a risk that US law enforcement services or intelligence services could obtain a subpoena or a warrant to access the data. I know the answers that were given earlier. Has the Australian government sought any diplomatic assurances from the United States about its intended approach to obtaining or enforcing a warrant that relates directly or indirectly to the COVIDSafe app data? If not, why not?

Ms Edwards: I'm not aware of any, but I'll have to take that on notice because it may have happened through some other agency, or not.

Senator KENEALLY: Could you clarify: if a US authority did obtain a warrant or seek to obtain a warrant seeking the production of COVIDSafe data from Amazon, would Amazon be required to notify the Australian government?

Ms Chidgey: I'd have to take that on notice.

AGD response:

The Government has not sought diplomatic assurances from the United States in relation to this matter. It is a criminal offence under Australian law to disclose COVIDSafe app data to any person outside Australia (including to any US or other foreign agency). This offence attracts a penalty of five years' imprisonment, or 300 penalty units, or both. In addition to being liable for a criminal offence, any entity or person holding COVIDSafe app data (including a contracted service provider) who discloses COVIDSafe app data to any person outside Australia is required, under the Bill, to notify the Information Commissioner of that disclosure. Given the strong protections in the Bill – and the significant criminal penalties that attach – any additional notification obligations are not required.

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Senator KENEALLY: Given that answer and given that the parliament is going to be required to consider this legislation next week, I'm a little surprised that some of these

questions are being taken on notice, particularly the question about whether, if the US sought a warrant, Amazon would be required to notify the Australian government. I would have thought that that's something that could be answered here today. If it can't be answered at the very moment that I'm asking it, can we seek to get it answered by 4 pm? This is the only opportunity the parliament is going to have to interrogate officials about this legislation, and I think it is important that that type of information is available to parliamentarians and the public before the bill goes before the parliament. Is that something that could be answered before we finish up today?

Ms Edwards: I don't think we can do it by 4 pm because, if we had to seek legal advice or other advice from the United States, the time zones and so on would defeat us, at the least. That is actually a complex question, and I think we've said we think it is inconceivable that it would come to pass. We can take on notice to provide you with what we can, but we couldn't commit to doing it by 4 pm today.

Senator KENEALLY: With the greatest of respect, I understand that it's your view that it's inconceivable that it would come to pass, but Senator Paterson did raise a legitimate example of a terrorist situation—and we can think of other types of situations, whether it be drug importation or paedophilia—where we understand that Australian intelligence and law enforcement agencies are barred from accessing this data by Australian law. These are legitimate questions. The government has chosen to contract with an American based company that is covered by American law as well as Australian law, and I think these are fundamental questions that should be able to be answered as soon as possible. Your opinion is just your opinion, with the greatest of respect.

Ms Edwards: I hear that, Senator. We'll take on notice to provide you with what we can, but we can't do it by four o'clock today; they are complex legal issues. But I would go back to one point, which is that one of the key things we've done here to ensure the privacy and security of the data is to collect very little data. What will be in the national data store and go to state and territory officials, and what's on your phone, will never be any more than your name, if you choose to give it, your age range and the digital handshakes of people, without any geolocation. So there's very little data in there to start with. This is one of the key design elements, which I think we have to remember. But we'll take your questions on notice.

AGD response:

Please refer to AGD's response to the above question.

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Senator KENEALLY: In the short time available to me, I want to go back to my question about Amazon and whether they'd be required to report a warrant. I appreciate that you've taken it on notice and that you're going to come back to me. Could I also ask you to consider whether the government would consider making that a provision of the legislation—that is, make it a requirement that Amazon Web Services, if they were to be served with a warrant, would have to notify the Australian government.

Ms Chidgey: We can take that on notice. But what I would say is that it's a criminal offence to provide any access to that data, so there couldn't be a stronger protection than that.

Senator KENEALLY: In Australia?

Ms Chidgey: To any other country. Any access to the data is a criminal offence under the determination and will be under the legislation.

Senator KENEALLY: But Amazon are governed by American laws as well.

Ms Chidgey: They're governed by this law, and it would be a criminal offence to provide any access to that data.

Senator KENEALLY: That seems to contradict what you said to Senator McKim, when you couldn't give a 100 per cent guarantee.

Ms Chidgey: I can give a guarantee that it is a criminal offence under Australian law.

Senator KENEALLY: So Amazon would be in a really difficult circumstance there, wouldn't they? They'd have a warrant from a US agency, yet they would be potentially committing a crime under Australian law if they complied with it.

Ms Chidgey: I think we've said that we think it's inconceivable that that situation would arise—

Senator KENEALLY: Again, that is your opinion.

Ms Chidgey: but it is a criminal offence under Australian law.

Senator KENEALLY: I appreciate that, and I can understand the limited circumstances. I don't mean to labour the point. You may say that it's inconceivable.

That is your opinion. You haven't given us any evidence that the government has sought a diplomatic assurance or that you've put any provision in the law to require the report of a warrant request. These are legitimate questions for parliamentarians to be asking, and I would appreciate it if you could come back to us on notice on those two points.

AGD response:

Please refer to AGD's response to the above question.

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Legal advice received by AGD from the Australian Government Solicitor.

Senator McKIM: Secondly, back on the legal advice, you've given evidence that that was sought. I understand you've said that you're not in a position to waive privilege. I understand why you would say that, but I do want to ask you: could that advice please be provided to the [inaudible]. The reason I'm doing that is that, if you wish not to, you'll need to make a claim of public interest immunity, and I'm interested in understanding what harms the department thinks would occur if that legal advice were to be provided. If you wish to make that claim, that's fine; we can accept that on a temporary basis.

Ms Edwards: We missed a few words from what you were saying. I think I got the gist, but because it's a very important question I'll just check: you're asking us to reconsider the provision of legal advice?

CHAIR: That's right.

Senator McKIM: To table—

Ms Edwards: To table the—

Senator McKIM: I'm asking you to—

Ms Edwards: We'll take it on notice and refer the issue about whether a public interest immunity claim should be made.

AGD response:

The Attorney-General intends to claim public interest immunity in relation to this advice.