



Submission to the Senate Finance and Public Administration Legislation Committee

Data Availability and Transparency Bill 2020 and the Data Availability (Consequential Amendments) Bill 2020

March 2021

Introduction

The Office of the National Data Commissioner (ONDC) appreciates the opportunity to make a submission to the Senate Finance and Public Administration Legislation Committee's inquiry into the Data Availability and Transparency Bill 2020 (the Bill) and the Data Availability and Transparency (Consequential Amendments) Bill 2020.

The ONDC has developed the Bill in close consultation with stakeholders over the past two years in response to the recommendations of the Productivity Commission's 2017 *Data Availability and Use Inquiry* (the Productivity Commission Inquiry).

The ultimate intent of this Bill is to improve how Australia shares public sector data to deliver better services, evidence-based policy and world class research and innovation. Adopting a principles-based approach to data sharing, the Bill:

- enables and regulates controlled access to ('sharing of') public sector data that is held or created by the Australian Government
- establishes and specifies the functions and powers of the National Data Commissioner (the Commissioner) as an independent regulator of the scheme, who will drive cultural change and best practice data sharing
- establishes the National Data Advisory Council (NDAC) to advise the Commissioner on best practice data sharing, ethical data use, community expectations and international developments; and
- will be supported by guidance, resources and tools to support consistent, safe and transparent data sharing.

The Bill establishes a scheme for controlled access to public sector data, which leverages existing frameworks for specific aspects of data management, rather than repeating or replacing them. This approach allows the data sharing scheme to fit neatly into the existing architecture of the national data

system, minimising duplication and ensuring tailored protections are preserved. When sharing under the Bill, entities will continue to have responsibilities under applicable frameworks, in particular the *Privacy Act 1988*, the *Archives Act 1983*, the *Foreign Influence Transparency Scheme Act 2018* and the Australian Government's Protective Security Policy Framework.

Through this submission, the ONDC highlights the critical nature of these reforms and outlines the layers of safeguards and transparency built into the proposed data sharing scheme.

The need for reform

In 2018, the Australian Government committed to reform the way it shares public sector data to realise the benefits of greater data availability and use identified by the Productivity Commission Inquiry. This recognised improved data sharing is key to the Government's vision for streamlined and efficient service delivery, as well as supporting economic and research opportunities and improving the evidence base to guide policy decisions.

While the Australian Government already shares data for a range of important and valuable projects, currently, the process of sharing data can be cumbersome and result in the application of inconsistent safeguards. Establishing data sharing arrangements can involve consideration of complex secrecy provisions in legislation and protracted negotiations, and the controls and protections included in these data sharing arrangements can vary from case to case.

The Review of the Australian Public Service observed that to most effectively support successive governments and the Australian community, the APS needs to use integrated datasets.¹ This will allow for the better use of data to support policy decisions, improve and tailor services, facilitate risk-based regulation and conduct targeted evaluations.²

The events of 2020 further demonstrate how critical the data sharing reforms are, with temporary measures for the exchange of public sector data across government agencies integral to the government's response to both the devastating bushfire season and the COVID-19 pandemic.

The Australian Government's vision is that Australians are able to experience this seamless approach to government service delivery every day, not just in times of crisis. The new data sharing scheme will fulfil Australians' needs to receive more effective services and better-informed policies.

The Bill is central to these reforms, and addresses the Productivity Commission's recommendations. The data sharing reforms aim to shift from the current practice where, to the extent that data is shared at all, the sharing happens under diverse arrangements and frameworks, to a new model of sharing under the Bill that is consistent, risk managed and regulated. This new approach is based on transparency and is designed to instil confidence among agencies and the public in safe data sharing.

¹ Department of the Prime Minister and Cabinet, 'Our Public Service, Our Future. Independent Review of the Australian Public Service (2019), 173.

² Ibid.

Cultural change and best practice will be championed by the National Data Commissioner to ensure that better sharing of public sector data will create economic, social and environmental benefits for all Australians. The effective use of public sector data can facilitate the development of new products and services, enhance outcomes for both consumers and businesses, and boost innovation.

In addition to the economic benefits, the data sharing reforms will result in long lasting benefits for the broader Australian community – including saving lives.³ Some of the best health researchers in Australia use health datasets from the United Kingdom due to an inability to access similar datasets in Australia.⁴ The Productivity Commission has noted some Australian researchers have waited up to eight years for access to data, in areas of life-saving significance.⁵ The Bill will help to address these issues faced by Australian researchers by establishing a safe, secure and streamlined avenue for data access.

Bringing Australia in line with best practice

There is a longstanding global trend towards removing barriers to data sharing across public sectors and improving consistency in how government agencies share data. However, in its 2017 Inquiry, the Productivity Commission observed that Australia was falling behind when compared to similar jurisdictions. In particular, government agencies and researchers in countries such as the United States, New Zealand and the United Kingdom are able to access powerful datasets to enhance government policy making and service delivery and support broader research and innovation.

For instance, the United Kingdom's *Digital Economy Act 2017* (DEA) aims to improve public services through the better use of data. The DEA is supplemented by statutory codes of practice and data protection principles, similar to what will be established under Australia's new data sharing scheme. The DEA has allowed data sharing between public authorities to help individuals and households with complex needs, who interact with multiple agencies.⁶

New Zealand is also a world leader with its principles-based approach to data access and use of data integration for research and analysis. New Zealand has long supported government agencies to integrate and share their data, culminating in establishment of the prototype Integrated Data Infrastructure (IDI) in 2011 and its expansion in 2013. The IDI brings together data from government agencies, Stats NZ surveys and non-government organisations to support research and inform government policy decisions. Researchers have been able to use the IDI for research to improve outcomes for New Zealanders. For instance, researchers from the University of Otago utilised IDI to study the long-term outcomes for premature babies, with the insights allowing parents and doctors to make decisions regarding appropriate treatment and care.⁷

³ Productivity Commission 2017, *Data Availability and Use: Overview & Recommendations*, Report No 82, Canberra, 5.

⁴ Ibid, 5.

⁵ Ibid, 5.

⁶ UK Government, Lee Pope and Paul Blake, 'Transforming frontline services through better data sharing' (13 February 2019) Civil Service Quarterly, available <<https://quarterly.blog.gov.uk/2019/02/13/transforming-frontline-services-through-better-data-sharing/>>

⁷ Stats NZ, 'How integrated data is helping New Zealanders' (25 July 2018) available <<https://www.stats.govt.nz/integrated-data/integrated-data-infrastructure/how-integrated-data-is-helping-new-zealanders/>>

In Australia, the States of New South Wales, South Australia and Victoria have also taken active steps to remove barriers to data sharing across the public sector by putting in place data sharing legislation of their own over the last 6 years.⁸ A mandatory five year review of the NSW legislation is underway, with the public consultation process open for submissions.⁹

The Bill will help bring Australia in line with international and domestic best practice by establishing a principles-based framework for Commonwealth data to enable data sharing for government service delivery, policy development and research purposes.

An ongoing conversation with stakeholders

The ONDC developed the Bill and its underlying policy positions through extensive co-design and engagement with the public service and stakeholders across academia, private sector and civil society.

An issues paper was released in 2018, followed by a discussion paper in 2019, to test policies with the Australian public and seek input to refine positions. These papers were supported by 76 public roundtables – attended by more than 600 people across Australia – to consider policy evolutions and strengthen safeguards. Further consultation was undertaken on the Exposure Draft Consultation Paper (ED). We adapted our consultation process to ensure it was COVID safe, with a webinar and targeted discussions with key groups. A total of 275 submissions were received across the Bill’s Issues Paper, Discussion Paper and ED, with copies of public submissions available on the ONDC website. The ED Consultation Paper received 1,905 unique downloads from 14 September 2020 to 31 December 2020. This high level of stakeholder and public engagement demonstrates the interest in these reforms.

Taking a collaborative approach has enabled the ONDC to understand the concerns and expectations of the community and key stakeholder groups and to refine policy positions accordingly. In particular, the original scope of reforms and focus of the legislation was changed from ‘data sharing and release’ (‘release’ meaning open data to the public at large) to focus on data sharing and transparency, in response to stakeholder feedback on which aspects of the national data system are most in need of reform.

Core aspects of the sharing scheme have been refined in response to stakeholder input, such as the authorised data sharing purposes and the nature and level of detail of safeguards that ensure secure sharing. Engaging with the public and stakeholders early and closely on the development of the data sharing reforms has helped to shape the legislative scheme and fosters greater trust in government management and use of data.

From the outset, privacy was integral to the development of the data sharing scheme and has been carefully considered at each stage of the legislative process. When developing the Bill, the ONDC adopted a ‘privacy by design’ approach to identify, minimise and mitigate privacy impacts wherever possible. Three independent Privacy Impact Assessments (PIAs) have been undertaken to identify strengths and weaknesses in the early policy positions and planned legislative framework, and the draft

⁸ [Data Sharing \(Government Sector\) Act 2015 \(NSW\)](#); [Public Sector \(Data Sharing\) Act 2016 \(SA\)](#); [Victoria Data Sharing Act 2017 \(VIC\)](#).

⁹ NSW Government, ‘Improving how we share data’ (2021) available <<https://www.haveyoursay.nsw.gov.au/data-sharing>>

Bill itself. This approach reflects the ONDC's commitment to ongoing, proactive management of privacy. Privacy safeguards were also strengthened in response to guidance and advice from NDAC and privacy experts, including the Office of the Australian Information Commissioner.

How the Bill works to allow secure sharing

The Bill establishes a new data sharing scheme which will serve as a pathway and regulatory framework for sharing public sector data. The new scheme is an alternative to existing arrangements, which will continue to be available. The data sharing scheme contains robust safeguards to ensure sharing occurs in a consistent and transparent manner, in accordance with community expectations.

A sharing project can be initiated by the Commonwealth body sharing its data – the data custodian – or the prospective user of data. Each party to a sharing arrangement needs to have capacity to undertake the sharing: the data custodian must have the data, while the prospective user must first be accredited by the Commissioner for their capacity to manage public sector data accountably and securely.

The Bill will authorise sharing of public sector data by a data custodian with an accredited entity, where it is consistent with the data sharing purposes and principles, and a data sharing agreement is in place. Key aspects of data sharing agreements will be published for transparency.

Data Sharing Purposes

As a first step, the project must meet the data sharing purpose test.¹⁰ The Bill authorises sharing for three purposes: delivery of government services; informing government policy and programs; and for research and development. These purposes were informed by extensive consultation with stakeholders.

Sharing will not be authorised if it is for a precluded purpose, or another exclusion applies. The Bill precludes sharing for law enforcement investigations and operations, and for national security purposes. The Minister may also prescribe additional precluded purposes in Rules to circumscribe the scheme; however any expansions to the permitted purposes may only occur through amendment to the primary legislation.

Certain types of sensitive data, such as COVIDSafe app and My Health Record data will also be excluded from the scheme by Regulation in recognition that some data should be handled under dedicated frameworks.¹¹

Data Sharing Principles

The data sharing principles (DSPs) must be applied to every data sharing project to demonstrate how the public interest is served by the project and to mitigate the risks of sharing data.¹² The principles work together to manage the five aspects of the sharing process: project, people, settings, data, and

¹⁰ Clause 15.

¹¹ Ibid, cl 13(1).

¹² Clause 16.

outputs. Applying the principles requires consideration of factors such as the users and intended use(s) of shared data, ensuring the data is shared in a controlled environment tailored to the data type and sensitivity, and adhering to ethical frameworks for human research. Controls set to manage risk within each principle can be dialled up or down to suit the overall needs of each project.

Data Sharing Agreement

After satisfying the above criteria, entities must document how the data is being shared and used in a data sharing agreement, including articulating how the project serves the public interest. Data sharing agreements are a key governance and transparency measure that support greater consistency and clarity of obligations. The Bill specifies mandatory terms that must be included in data sharing agreements. To support accountability and transparency, accredited entities and the mandatory terms of data sharing agreements will be included in publicly accessible registers.¹³ These registers will provide the Australian public with information about what data is being shared and why, who is accessing data, and how it is being safely shared.

The ONDC developed a draft data sharing agreement template to help government agencies produce agreements to confidently share data in a way that is safe, consistent, and transparent. The data sharing agreement template had 2,037 unique downloads from 31 March to 31 December 2020. ONDC is currently updating this template to align with the requirements of the Bill.

Sharing with oversight

If these requirements are met, the data is able to be shared under the Bill, despite any other law which would otherwise prevent sharing. The requirements and safeguards of the Bill stand in place of those in other laws, to facilitate sharing while ensuring it occurs securely. Entities participating in the data sharing scheme have ongoing responsibilities under the Bill to operate appropriately and accountably. In particular, when handling personal information entities must maintain privacy coverage and comply with the Privacy Act or an equivalent law.

To ensure accountability through oversight and redress, the Bill will establish the Commissioner as an independent statutory office holder charged with overseeing the data sharing scheme. As regulator, the Commissioner has oversight of the scheme and is empowered to monitor, investigate and enforce compliance with the Bill by data scheme entities. The Commissioner will work with entities to build data capability and promote best practice data sharing and use.

The Commissioner's regulatory functions ensure integrity of the data sharing scheme. Core aspects of the function include: accreditation of users and data service providers, handling complaints of data scheme entities, assessing and investigating compliance with the legislation, and overseeing data breach management. The Commissioner will have the power to cooperate with, and transfer matters to, other regulators, supporting a 'no wrong door approach' that ensures issues are brought before the right

¹³ Ibid, cl 130.

regulator. Voluntary compliance will be supported through capability building measures, such as regular assessments and recommendations.¹⁴

These powers are designed to enable a graduated enforcement approach that identifies and responds proportionally to address non-compliance. To this end, the Commissioner has a range of enforcement powers to compel compliance, ranging from issuing infringement notices, to accepting enforceable undertakings to seeking civil penalties. The Bill also includes criminal offences for the most serious types of breach.

If something goes wrong, a range of redress measures including complaints and administrative or judicial review are available. Data scheme entities may complain to the Commissioner about possible breaches of the legislation through the dedicated complaints mechanism, which triggers the Commissioner's powers to investigate and resolve the matter. Persons affected by a regulatory decision made by the Commissioner may, in most cases, seek internal and external merits review.

Individuals with concerns about the data sharing scheme will have access to existing complaints and administrative review processes. This approach is in keeping with the intent for this scheme to align with other applicable frameworks, without duplicating them, as well as with community expectations. This allows the ONDC to provide tailored mechanisms for the data sharing scheme, while also leveraging existing avenues.

Maintaining trust with the Australian community is fundamental to realising the full potential of the data sharing scheme. This is why the Bill will ensure that data sharing arrangements are published and are underpinned by strong safeguards, privacy, and security protections.

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¹⁴ Ibid, cl 99, 111.