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Submission to the Office of the National Data Commissioner

In relation to the Data Sharing and Release Legislative
Reforms Discussion Paper (September 2019)

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Recommendations

Recommendation 1: That the Office of the National Data Commissioner create as a matter of urgency, an identified position for an Indigenous person to work in the team developing new Data Sharing and Release Legislation.

Recommendation 2: The creation through legislation of a National Indigenous Data Commissioner.

Recommendation 3: That the development of a whole-of-government Indigenous Data Strategy be led by the National Indigenous Data Commissioner.

Recommendation 4: The creation of an Indigenous identified position on the National Data Advisory Council.

Recommendation 5: Meaningful engagement with relevant Indigenous organisations and peak bodies to determine how FPIC principles should be incorporated into the activities of the ONDC and any new legislation.

Recommendation 6: The development of a complementary Indigenous Data Use module to be embedded within the accreditation process.

1. Introduction

This submission is made by two academics at the Centre for Aboriginal Economic Policy Research (CAEPR) at the Australian National University. CAEPR has a well-established track record in Indigenous policy research and advocacy. CAEPR has established and maintains long-term relationships with various government agencies as well as with First Nations communities throughout the world.

We welcome the work being undertaken by the Office of the National Data Commissioner (ONDC) and commend the team on their work to date. This submission is made in relation to specific issues related to Indigenous data governance.

We note that discussions in relation to Indigenous data remain ongoing with the National Indigenous Australians Agency (NIAA). However, we are gravely concerned with the lack of a detailed strategy in relation to the unique interests of Indigenous peoples, and the distinct issues relating to the use of Indigenous data. As a whole, the discussion paper highlights a stark absence of knowledge and skills necessary to understand and engage with Indigenous data issues and policy. We consider the level of engagement with the unique interests and needs of Indigenous peoples, and the risks of associated with data relating to Indigenous peoples, as wholly inadequate.

This submission addresses a number of issues that we believe are critical to safeguarding the interest of Indigenous peoples as well as putting measures in place to ensure that Indigenous peoples benefit from the proposed legislation. This submission responds to these specific areas:

- a. The unique interests of Indigenous peoples in data
- b. The need for a National Indigenous Data Commissioner
- c. The need for an identified Indigenous position on the National Data Advisory Council
- d. Data and Indigenous Consent
- e. Accreditation and Indigenous Data

2. The unique interests of Indigenous peoples in data

Indigenous peoples occupy a unique place in the global community. This is recognised through the United Nations Declarations on the Rights of Indigenous peoples (UNDRIP), which the Australian Government formally endorsed in April 2009. The needs of Indigenous peoples in Australia as elsewhere, as well as the risks and opportunities facing Indigenous peoples, are often different to

the needs, risks and opportunities of the general population. That Indigenous peoples have unique rights and interests is a well-established principle in Australian public administration. For example, both land rights legislation and the Native Title Act (1993) recognise that Indigenous peoples possess unique rights through their own laws and customs to their ancestral lands and waters. The UNDRIP provides a detailed statement of the unique collective rights of the members of Indigenous polities.

Indeed, as we write this submission, many Indigenous peoples in Victoria are voting for their representatives in the First Peoples' Assembly, a new body that will represent Aboriginal communities in the treaty process underway in that state. This new body will represent the interests of two overlapping constituencies: eleven formally recognised Traditional Owner groups whose Country lies in the state of Victoria, as well as Aboriginal and Torres Strait Islander people whose Country lies elsewhere but who are resident in Victoria. While the new Assembly will be responsible for representing Traditional Owner groups, it will do so without authoritative statistical data relating to the size, demographics or residential location of their diasporic constituents, for there are currently no authoritative data collections that provide such information.

Such a circumstance is hardly unique to Victoria. We provide this example to illustrate the circumstances that despite the publication of reams of data about the Indigenous population in reports such as the Productivity Commission's *Overcoming Indigenous Disadvantage*, there remains a distinct lack of data available to Indigenous peoples that is directly relevant to their needs and aspirations. Examples of these data include populations and demography of distinct Indigenous groups; rates of Indigenous language use at different fluency levels; information regarding lands, waters and resources; level of educational attainment among younger generations; levels of income among group members; indicators of community identified health and wellbeing to name but a few. Yet few official departments, agencies, research institutions or data collectors of other persuasions, create and collect data that reflects these needs. Certainly none do so while differentiating between members of different Indigenous polities or nations.

It is unrealistic to expect Indigenous communities and nations to foster meaningful and generational change, or to negotiate treaties or other agreements with governments, if the data required for leaders and governing bodies to make informed decisions does not exist. Yet this is precisely the situation we face today.

Data design, collection, storage and dissemination practices that exist today operate with limited or no input from Indigenous peoples. The result of this erasure from data structures is that Indigenous peoples rely on data that has been collected *on* or *about* rather than *for* or *with* Indigenous peoples. This results in data collections which are often not of relevance to Indigenous peoples, in which Indigenous peoples may be invisible, or which may be inaccessible to Indigenous governing bodies and organisations. This constrains self-determination and impedes the ability of Indigenous communities, organisations and governance bodies to shape prosperous futures. Indigenous data governance addresses these issues.

Indigenous data governance matters because the interests of Indigenous peoples are not always identical to the interest of the general population. We note that the Minister in his foreword refers to the importance of 'maintaining trust with the Australian community' (p. i). Trust in governments collection and use of data is especially low among Indigenous peoples. If this is to be rectified, principles of Indigenous data governance must be embedded throughout the data reform agenda.

Indigenous data governance refers to the right of Indigenous peoples to autonomously decide what, how and why Indigenous data are collected, accessed and used. It aims to ensure that data on or about Indigenous peoples is collected and used in ways that reflect their priorities, values, cultures, worldviews and diversity (Maiaam nayri Wingara, 'Indigenous Data Sovereignty Communique', 20 June 2018).

3. Structurally embedding Indigenous Data Governance

Indigenous data governance as a concept is entirely absent from the *Data Sharing and Release* Discussion Paper. This reflects a public-sector wide lack of expertise on the topic. The sections addressing 'Indigenous data' (pp. 7 and 15) are vague and without substance.

We acknowledge that the ONDC has a partnership with the NIAA. However, this is not enough. We are of the firm belief that the ONDC requires Indigenous data governance principles embedded within the office *structurally*, from the outset, and as part of its own governance, in order to meaningfully address and embed Indigenous data governance into its daily business. Indigenous data governance must be embedded into the institutional architecture of the ONDC for it to be woven throughout new policies and any new legislation. The establishment of the ONDC provides a unique opportunity to establish such capacity with the arms-length independence from the Australian Government that is required to build confidence among Indigenous communities.

Given the timelines to which the ONDC is working, we believe it is imperative that the Office create, as a matter of urgency, an identified position for a suitable-qualified Indigenous person to work with the team developing new Data Sharing and Release Legislation. There is now a considerable body of expertise relating to Indigenous Data Governance within Indigenous organisations such as *Maiam nayri Wingara* and the Indigenous Data Network. These networks of expertise should be urgently drawn-on as the new Data Sharing and Release Legislation is developed.

Recommendation 1: That the Office of the National Data Commissioner create as a matter of urgency, an identified position for an Indigenous person to work in the team developing new Data Sharing and Release Legislation.

4. Appointment of a National Indigenous Data Commissioner

The creation of a National Data Commissioner has been a key step progressing an agenda of more effective use of data. To promote the needs of Indigenous peoples, their communities and nations through embedding Indigenous data governance across the public sector and in legislation, we believe that new data sharing and release legislation should create a 'National Indigenous Data Commissioner'.

The objectives of a National Indigenous Data Commissioner should be to:

- Advocate for the needs of Indigenous peoples in relation to data
- Have the knowledge to identify and codify culturally sensitive data
- Ensure that sufficient protections exist that safeguard culturally sensitive data
- Provide advice to governments and the public sector
- Monitor the use of Indigenous data
- Oversee the accreditation of people or agencies wanting to access Indigenous data
- Facilitate Indigenous communities and organisations' access to government data about themselves
- Provide a line of accountability to key Indigenous leaders and peak bodies on Indigenous data matters

By creating and maintaining key partnerships, the National Indigenous Data Commissioner would be accountable to Indigenous leaders who represent the interest of community and Indigenous organisations. Just as the National Data Commissioner is identified as 'a champion for cultural

change in data use' (p. 13), so too could a National Indigenous Data Commissioner be a champion for cultural change in data use as it relates to Indigenous peoples, communities and nations.

Recommendation 2: The creation through legislation of a National Indigenous Data Commissioner.

5. The development of an Indigenous Data Strategy

The Discussion Paper references the partnership between the ONDC and the NIAA in developing a 'whole-of-government Indigenous Data Strategy' (pp. 7 & 15). We welcome the development of such a strategy. However, we have significant concerns that developing a whole-of-government Indigenous Data Strategy *after* the introduction of data sharing and release legislation will greatly limit the opportunities for such a strategy to achieve its desired goals. Ideally, such a strategy would inform the development of the new legislation. As the timeframes for the introduction of data sharing and release legislation are set out in the discussion paper and seem quite rigid, we entreat the importance of the creation through legislation of a National Indigenous Data Commissioner. The first task of the National Indigenous Data Commissioner would then be the development of the whole-of-government Indigenous Data Strategy.

An Indigenous Data Strategy would be utilised by all Australian Government agencies, for the collection, sharing and release of data relating to Indigenous peoples. An Indigenous Data Strategy should provide a framework for embedding Indigenous Data Governance principles across government, and would also set out the National Indigenous Data Commissioner's approach to ensuring that agencies' conduct is consistent with these principles. It is crucial that such a strategy is developed by the National Indigenous Data Commissioner, whose unique line of accountability to key Indigenous leaders and peak bodies, will reflect Indigenous priorities and data governance principles.

Recommendation 3: That the development of a whole-of-government Indigenous Data Strategy be led by the National Indigenous Data Commissioner.

6. Identified Indigenous position on the National Data Advisory Council

The National Data Advisory Council is a critical mechanism to ensure the National Data Commissioner has sufficient support and expertise to carry out their responsibilities. However, we have concerns that in these governance structures, the needs of Indigenous peoples will once again be overlooked.

To ensure that the unique needs and interests of Indigenous peoples are not overlooked, we recommend that the National Data Advisory Council have an Indigenous identified position.

This position must be Indigenous identified, that is, filled by an Aboriginal or Torres Strait Islander person. This position would also need the requisite skills to provide high-level advice relating to Indigenous data. The skills and knowledge required include:

- Knowledge of Indigenous data sovereignty
- Knowledge in Indigenous governance
- Extensive networks with Indigenous leaders and peak organisations
- International networks in Indigenous data sovereignty and governance

The depth of knowledge that such a person would bring would add significant value to the overall National Data Advisory Committee. It also ensures that the views of Indigenous peoples are embedded in the overall data governance structures in government and the public service.

Recommendation 4: The creation of an Indigenous identified position on the National Data Advisory Council.

7. Consent

'States shall consult and cooperate in good faith with Indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources...'

United Nations Declaration on the Rights of Indigenous Peoples, article 32(2)

Indigenous peoples have the right to have their Free, Prior and Informed Consent (FPIC) obtained on activities affecting them as peoples. **Free** means that consent is given without coercion, intimidation or manipulation; **Prior** means that consent must be sought before every significant stage of a project and that Indigenous peoples have sufficient time to understand the information received, seek advice and if required, negotiate; **Informed** means that all parties must share information regarding the potential environmental, social, cultural and economic impacts, that information is provided in a clear and easily understandable manner that facilitates informed decision making and; **Consent** means that Indigenous peoples must have the option to support or reject proposals they receive.

FPIC is detailed in a number of international legal conventions including UNDRIP, International Labour Organisations (ILO) Convention 169, United Nations International Covenant of Civil and Political Rights (ICCPR) and the Committee on the Elimination of All Forms of Racial Discrimination (CERD). In Australia, FPIC is embedded in the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) 'Guidelines for Ethical Research in Australian Indigenous Studies' (GERAIS) as well as the National Health and Medical Research Council's (NHMRC) 'Ethical conduct in research with Aboriginal and Torres Strait Islander Peoples and communities: Guidelines for researchers and stakeholders'. Taken together, there is now a clearly defined and well established need to obtain consent in a culturally appropriate and sensitive manner on projects and activities relating to Indigenous peoples.

Currently, FPIC as a concept is notably absent from the Discussion Paper. More worryingly is the lack of acknowledgement and engagement at any level of the unique considerations of obtaining consent from Indigenous peoples and communities. There are clearly Indigenous-specific considerations regarding consent to access and use data about Indigenous peoples, communities and nations.

We acknowledge that there are no simple answers to the consent question. Embedding FPIC as it is currently understood and applied by researchers or companies working with Indigenous groups may be impractical. Nevertheless, we believe there is an imperative to acknowledge that consent for data collection and dissemination is different when speaking about Indigenous peoples' data. We urge the ONDC to engage with relevant Indigenous organisations and peak bodies in a meaningful way to determine what an appropriate approach to FPIC might look like in the context of the activities of the Office.

Recommendation 5: Meaningful engagement with relevant Indigenous organisations and peak bodies to determine how FPIC principles should be incorporated into the activities of the ONDC and any new legislation.

8. Accreditation

We are supportive of the accreditation process that has been proposed in the Discussion Paper (p. 29). However, we believe that the skills, capabilities and knowledge required to protect, manage and use data relating to Indigenous peoples are different to those for the general population. Consequently, we suggest that an additional Indigenous Data Use accreditation module may be required to ensure that data users accessing data about Indigenous peoples are appropriately trained. This would complement, not replace, the proposed accreditation process.

An Indigenous Data Use accreditation module may include training about the unique risks of working with Indigenous peoples and principles of Indigenous data sovereignty. The accreditation module should be developed by Indigenous people with expertise in Indigenous Data Governance.

Recommendation 6: The development of a complementary Indigenous Data Use module to be embedded within the accreditation process.