



Office of the National Data Commissioner
PO Box 6500
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15 October 2019

To whom it may concern

PwC Submission to the Data Sharing and Release Legislative Reforms Discussion Paper

PwC Australia (“PwC”) welcomes the opportunity to provide comments on the discussion paper by the Office of the National Data Commissioner (“ONDC”) on its proposed legislative reforms for public sector Data Sharing and Release.

As one of Australia’s leading professional services firms, we believe we are well placed to share our perspectives on this important topic. We are a team of more than 8,000 people in Australia, working together to realise the vision to build trust in society and solve important problems. And that’s why we think this reform is so important: it provides a great opportunity to help solve some of Australia’s most important problems through better informed policy making, strengthened research and innovation and improved delivery of government services.

We believe the legislative reform outlined in the discussion paper provides a robust starting point for clear improvements in the way government data is shared and released. However, the detail is important and we’re looking forward to see how some of the key concepts will come to life in the legislation.

In particular, there is an opportunity to more prominently position ethics within the proposed framework. Ethical considerations are now coming to the forefront of conversations regarding advanced technology and use of big data, because of the unique risks they bring. As the proposed legislation will significantly change Australia’s data landscape, we believe it is important to ensure ethical considerations are at the core of the framework that will govern it.

Please find below our feedback on your discussion questions. Our team is available for further discussions or consultations in relation to the submission, and we would welcome the opportunity to work with you to collaboratively advance this important agenda. Please feel free to contact me on (03) 8603 1274 or via email at matt.kuperholz@pwc.com.

Yours Sincerely,

A handwritten signature in blue ink, appearing to read 'Matt Kuperholz', with a long horizontal flourish extending to the right.

Matt Kuperholz
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***1 Do you think the distinction between data sharing and data release is clear?
How could this distinction be clearer?***

We suggest that the distinction is clearer when using the terms data sharing and open data. 'Open data' is a well defined term used by industry and government across the world, including in Australia. The term has already been adopted by the Digital Transformation Agency and State and Territory Governments, who also operate their individual portals to make open data available to the public. Noting that it is critical to maintain and consistently use an agreed set of terminology, 'data release' may cause confusion as the public is already familiar with 'open data'.

2 What are the challenges for open release of public sector data?

Identification and consideration of the challenges for open release of public data have been well articulated in the discussion document. We believe that the approach for the ONDC to encourage the use of and adoption of the data sharing principles while avoiding further legislative complexity is logical.

We see the bringing about of a paradigm shift or cultural change within Government towards making data open where possible as the greatest challenge. Typically affecting cultural change within large organisations, in particular in Government, is a significant undertaking, requiring long term strategic planning, multiple initiatives, education, public support and high degree of leadership buy in. We suggest that this undertaking not be taken lightly and sufficient planning, resources and capability be allocated to this significant task. Agencies will need to ensure there is a baseline capability of data custodians or stewards who are dedicated and equipped to make informed decisions about data sharing and release.

In fact, we believe public perception and support to be one of the critical success factors in overcoming this challenge. Building goodwill and trust within society will be important and subsequently, being transparent with the objectives and promoting the use cases and benefits of open data will be vital (and we encourage the use of the data.gov.au website as the primary platform for this). Equally, ensuring any public concerns and objections are given due consideration and that the ONDC remains approachable will be a key aspect.

3 Do you think the Data Sharing and Release legislative framework will achieve more streamlined and safer data sharing?

We believe the Data Sharing and Release legislative framework has the potential to significantly change and improve the way government shares data - and in turn, change the way in which government develops policy, supports research, drives innovation and delivers services to all Australians.

The current arrangements underpinning government data sharing and release are at times opaque and inconsistent in the way they are applied. There is great potential to streamline the legislative framework to provide better guidance to government organisations about what they can and can't do, while at the same time provide more transparency to citizens, businesses and other organisations into how their information is being used.

We are working with a broad range of clients, including many government organisations, and have seen first hand the tremendous opportunity of more streamlined data sharing. It aligns to initiatives around the world, such as the European Union's Open Data and Public Sector Information Directive or Canada's Data Strategy Roadmap to make better use of public sector data.

As this discussion paper is translated in a more concrete legislative framework, we would welcome a strong emphasis on key themes outlined in our response that we believe are increasingly important to build trust in society. This includes a strong focus on the role of **ethics and ethical decision-making** in determining what data is shared, for what purpose and under which conditions. Just because data may be able to be shared under the new framework, it doesn't mean it always should be. While the discussion paper identifies the need to consider ethical implications associated with public data sharing and uses the data sharing principles for managing and addressing potential ethical risks, we believe there is an opportunity to strengthen the role of ethical decision-making in relation to data sharing and release. Please refer to question 7 for further suggestions on how to address ethical risks.

4 What do you think about the name, Data Sharing and Release Act?

We believe that the name is descriptive of the objectives of the Act and is also in line with similar legislation in various State and Territory Governments. Keeping in mind our point around agreed terminology and our view of 'open data' being a more suitable term we would however suggest the consideration of 'Open Data and Data Sharing Act' as the title. It would also be worth considering the addition of 'Public' before the title, to ensure there is appropriate distinction with related initiatives such as the Consumer Data Right.

5 Do the purposes for sharing data meet your expectations? What about precluded purposes?

The discussion paper provides a comprehensive summary of the purposes for sharing data, including those which are precluded. It is evident there has been considerable consultation and as stakeholders have expressed concern about the appropriateness to use this legislation for compliance and assurance purposes we believe it is important to reflect this in the scope and nature of the legislation to ensure broad support and societal trust.

Data sharing and matching initiatives that support compliance and assurance activities are currently underpinned by their own legislation, with the new data sharing and release

framework to operate in parallel. It will be important however, to ensure alignment between the respective legislative frameworks. As this discussion paper introduces key themes that are aimed to strengthen public support for more streamlined data sharing, including the central role of public benefit, appropriate safeguards and a supporting governance model, it should also be considered how these important themes are applied to (new or existing) legislation that underpins activities that are not in scope of this legislation.

Moreover, it will be important to provide sufficient guidance on the demarcation between supported and precluded purposes. There is a fine line between improving service delivery and enhanced assurance and compliance activities; especially in relation to activities that are aimed to prevent non-compliance and fraud. There is a strong opportunity to use increased data sharing to help customers and businesses meet their obligations and provide more tailored and targeted services. These activities, such as sharing income information, will improve service delivery but at the same assist in preventing non-compliance. A narrow interpretation of 'assurance' activities to consider eligibility, entitlement or liability for government programs could significantly limit the potential benefits of the new legislative framework.

While the discussion paper provides a promising starting point to assist data custodians to determine under what purpose data is shared, more detailed consideration is required to ensure this is applied consistently and managed appropriately. It will also be important to understand the practical implications of this distinction. As the paper states that data shared with an entity under the Data Sharing and Release legislation cannot subsequently be used for compliance or assurance activities, this may add a layer of complexity to how entities store, use and manage data that is shared with them.

6 What are your expectations for commercial uses? Do we need to preclude a purpose, or do the Data Sharing Principles and existing legislative protections work?

The discussion paper recognises the potential tension between sharing data in the public interest and its use for commercial purposes. It is a key component of the legislation to get right as this is an important topic for many Australians.

Just like you, we believe that open data drives innovation and competition and we welcome the National Data Commissioner's commitment to champion the greater release of open data, including for commercial purposes. We believe there is great potential to continue to unlock public sector data and support private sector organisations to help solve complex challenges in society.

The purpose test and the Data Sharing Principles are the main avenues to prevent commercial uses not supported by the community. We believe that commercial uses should not be precluded and be guided by the principles and safeguards outlined in the discussion paper. Initiatives like aurin.org.au are a great example of where government, academic and commercial sectors come

together to share data and make better informed decisions. Under the new legislative framework there is a great opportunity to further broaden and extend these types of partnerships in the public interest, including researchers and private sector organisations.

Additionally, by not excluding commercial purposes, noting that the term can be interpreted in various ways, the proposed legislative framework can provide an avenue for safe and efficient data sharing with for profit organisations that regularly collaborate with the Government in shaping and delivering policy and programs. Enabling government agencies to use third parties to support them in analysing and enriching public sector data, may not only assist in realising public benefit but can assist to do so in a cost-effective way.

7 Do you think the Data Sharing Principles acknowledge and treat risks appropriately? When could they fall short?

The Data Sharing Principles approach provides organisations a structured way to review and assess associated data sharing risks while at the same time providing the intended degree of flexibility. While the principles provide a good foundation, we feel that there are several areas which require either more detail or consideration.

First and foremost, despite ethical considerations being discussed at a high level throughout the paper we believe that there is insufficient attention or detail in relation to the unique nature of ethical risks. Identification and mitigation of ethical risks are applicable across all of the data sharing principles.

There is a great deal of activity in the technology industry today discussing ethical principles which should be applied when developing advanced technologies such as AI and machine learning, both of which are reliant on big data. One of the key pillars in PwCs Responsible AI offering is technology ethics which at its core has a set of best practice ethical principles (accountability, interpretability, data privacy, security and robustness, beneficial, fairness, human agency, lawfulness and compliance, safety). Establishing a similar subset of data ethical principles or perhaps the addition of a data sharing principle of ‘Ethics’ or ‘Integrity’ would close the gap helping to ensure consideration of risks across the ethical spectrum.

Secondly, we would welcome additional guidance to address risk in relation to data quality and accountability. The proposed legislation will make it easier for government organisations to share data. While it is clear this may have significant benefits, it will be important to ensure that the quality of the data shared is of a high standard. At the same time, the limitations of the data will need to be documented and considered when it is shared or released. While new methods to analyse, enrich and derive insights from data are rapidly evolving, they often are limited by the quality of data that they rely on.

Especially when sharing and analysing major historical and complex data sets - shaped and transformed through interactions with customers, system developments and changes to policy

or program settings - it will be vital to have a thorough understanding of the data and its limitations. Consequently, it will be important to ensure there is clear guidance and a set standard for the provision of sufficient quality metadata as part of any information shared or released. Currently there is limited reference to this in the discussion paper and as it is translated into a more concrete framework and guidance material it will be important to recognise the importance of data quality and metadata. There is an opportunity here to engage with other organisations, Standards Australia specifically, and State and Territory Governments in order to establish a nationally agreed standard and foundation of common language. This would greatly increase the ease with which to engage and collaborate with private and public sector organisations nationally.

Moreover, it will be important to ensure there is sufficient guidance on the accountability of Data Custodians, Accredited Users and Accredited Data Service Providers in relation to the data being shared. The Data Sharing Agreement is the main avenue to ensure accountability is considered and documented, but this would also have to be supported through clear and transparent data lineage as well as appropriate assurance safeguards.

Finally we believe that more discussion and clarity is required in relation to the management of data re-identification and risks associated with data breaches. As the paradigm shifts from 'need to know' to 'responsibility to share' it is likely that new security measures will be required to protect the increase in data flow across more organisations..

8 Is the Best Practice Guide to Applying Data Sharing Principles helpful? Are there areas where the guidance could be improved?

The Best Practice Guide is a robust and comprehensive resource which is well structured and easy to understand. The guide achieves its purpose in providing guidance on the practical application of the Data Sharing Principles however we have identified several areas which could be improved or explored further.

While examples have been provided at the end of each principle describing different degrees of control dictated by the level of detailed data required, we believe more information here would benefit organisations. Standardisation of language and a super set of defined controls would provide a starting point or specific direction on what is expected/the standard.

The checklist of questions also provided at the end of each principle provides a concise summary of actionable activities for data custodians to pursue to help ensure due diligence of the principle. However due to the often technical or specific nature of the questions being asked, providing advice on proposed roles or resource skill sets required to appropriately prosecute the questions would provide more comprehensive guidance.

Furthermore, we believe that introducing a standardised template to guide organisations through the proposed processes and considerations would not only aid in ensuring

comprehensive consideration of the principles but also provide a valuable document providing evidence of due diligence. By documenting all of the relevant information, consultation and engagement, risk identification and mitigation in a consistent way, the output could become a foundation which is a recognisable standard of reporting. The value of such a report could be amplified if it was adopted in a similar way or on equal footing with current Privacy Impact Assessment processes, in particular the requirement to publish in the public domain.

9 Do the safeguards address key privacy risks?

The discussion paper recognises that concerns regarding privacy and more specifically the competing views on the approach to consent require further consultation and investigation. While this topic sits very much in the realm of current privacy legislation, whether or not it remains fit for purpose or if gaps are emerging with the advancement of technology and use of data must be investigated further and resolved.

A concept we support, while it does not resolve differing views regarding consent, which is an actionable step towards consensus is transparency. As discussed at some length in the paper there are many circumstances where the Government does not require consent for the use of data which is 'authorised by law' in accordance with the Privacy Act 1988. We propose that in either circumstance where consent is or is not required that the respective rationale or reason be presented to the general public in an easily accessible fashion communicated in simple language. Our work with Government clients and internally has clearly shown that once the appropriate level of understanding and transparency is achieved trust and the social contract with the public is significantly strengthened.

10 Are the core principles guiding the development of accreditation criteria comprehensive? How else could we improve and make them fit for the future?

Echoing previous comments, we believe that the accreditation core principles (skills and capability to protect, manage and use data; privacy standards if handling personal information; and effective governance to manage and use data) provide a solid foundation for assessing both Users and Service Providers suitability for accreditation. We have however yet again identified the exception that there is an absence of ethical consideration.

The Data Sharing Principles Best Practice Guide does mention that where Data Custodians deem necessary they may request that project approvals include consideration by a formal ethics committee. It is our view that the unique ethical risks associated with big data and technologies it feeds (machine learning, advanced analytics/AI) requires embedded ethical consideration for all accreditation activities. Embedding an ethical 'assurance' component into the accreditation process will provide several benefits namely;

- Provide further confidence to the ONDC that accredited organisations operate and function ethically

- Provide Users and Service Providers clear understanding of ethical expectations
- Aid in the early identification and mitigation of ethical risks
- Clearly identify those organisations which do require the oversight of a formal ethics committee
- Help to avoid the unnecessary onerous and often time consuming process of gaining project approval from an ethics committee

There is currently little information as to which ethics committees would be utilised, whether a committee would be established for this specific purpose or if an appropriate body already exists. We suggest that more detail be provided regarding the parameters dictating the need for projects to undergo ethical review and the process to be followed when doing so.

11 Are there adequate transparency and accountability mechanisms built into the framework, including Data Sharing Agreements, public registers and National Data Commissioner review and reporting requirements?

We support both the concept of public registers of accredited users and accredited data service providers as well as the publication of the proposed mandatory terms of the Data Sharing Agreements Who, What, Why, How and When. We believe these initiatives are a forward step towards providing sufficient information to meet public expectations regarding transparency and accountability.

The discussion document identifies ongoing consideration of the level of detail in data sharing agreements to be published, our suggestion is there be two layers of easily accessible information. Firstly, the proposed mandatory terms discussed above and secondly full disclosure of the agreements upon request. To further bolster trust, the social contract, the credibility of the ONDC and the data sharing initiative we suggest that attention also be paid to the channels by which these reports are released and equally the language used as both must be easily accessible to the general public.

12 Have we achieved the right balance between complaints, redress options and review rights?

In general, we would agree that the right balance appears to have been achieved. Given the objectives of the Data Sharing and Release Act, it would make sense for Data Custodians to make considered decisions around data sharing and the associated parameters themselves and for the ONDC to focus on driving cultural change. This will be more cost effective but in the long term it should prove to be a more sustainable option as well as it is focused on improving culture.

At the same time, it is important to allow an avenue for merits review and judicial review of decisions made by the ONDC. This will ensure that a consistent and justifiable approach is taken for all decisions and will go a long way in establishing trust and transparency in the community.

13 Have we got our approach to enforcement and penalties right for when things go wrong? Will it deter non-compliance while encouraging greater data sharing?

We support the general approach to enforcement and penalties and agree that education should be the primary response mechanism for accidental breaches with minor impacts. Making this loud and clear is critical to enable the desired cultural change and boosting the confidence of Data Custodians to make effective use of their data.

However we encourage a dynamic approach and application of common sense, and as you state, to consider each case in its individual context with regard for risk. It will be important to be wary of anyone willing to exploit the system, especially with hopes of leniency in the early stages, as that will lead to the community losing trust. As such, it would also be beneficial to carry out periodic reviews of the enforcement approach, to evaluate the landscape and then adjust behaviour accordingly.

14 What types of guidance and ongoing support from the National Data Commissioner will provide assurance and enable safe sharing of data?

Please refer to our response to questions 1 to 13 for examples of guidance and support we suggest the ONDC to consider.