

**DATA AVAILABILITY AND TRANSPARENCY
REGULATIONS 2020**

EXPLANATORY STATEMENT

DRAFT SEPTEMBER 2020

Data Availability and Transparency Regulations 2020

Introduction

1. This draft explanatory statement accompanies the exposure draft of the Data Availability and Transparency Regulations 2020 (the Regulations).
2. The Department of the Prime Minister and Cabinet (PM&C) invites interested parties to provide feedback on the Regulations and explanatory statement.
3. Please note that this explanatory statement is still being developed and is intended only as a guide to assist with the interpretation of the Regulations. PM&C will undertake further editorial review post consultation once the final version of the Regulations is settled.

Background

4. The Regulations are being released for public consultation at the same time as the exposure draft of the Data Availability and Transparency Bill 2020 (the Bill) and accompanying explanatory memorandum. The legislative scheme is designed to authorise and regulate controlled access ('sharing') of Commonwealth data, with safeguards in place to manage risks and streamline processes.
5. Clause 120 of the Bill provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.
6. Clause 17 of the Bill makes provision for the exclusion of certain types of sharing from the data sharing scheme, including where prescribed by the Regulations. Clause 17(4) relevantly provides as follows:

The sharing is excluded if:

- (a) a provision of a law prescribed by the regulations for the purposes of this paragraph prohibits the data custodian, or any of the persons whose conduct is taken under section 109 to be conduct of the data custodian, from disclosing the data in the circumstances in which the sharing is done; or
 - (b) the data custodian of the data is prescribed by the regulations as an entity that must not share data in the capacity of data custodian; or
 - (c) any other circumstances prescribed by the regulations for the purposes of this paragraph exist.
7. The purpose of this explanatory statement is to explain the provisions included in the Regulations. The effect of listing a provision in the Regulations means the Bill's authorisation does not provide authority to share this data, irrespective of the data custodian: the data is completely excluded from sharing under the Bill. These provisions are contained in Regulations, which are disallowable legislative instruments made by the Governor-General and subject to Parliamentary scrutiny.

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8. Clauses 5 and 6 of the Regulations include provisions from national security and law enforcement legislation. Data may be collected intrusively, including through covert surveillance, under these laws as a reasonable, necessary and proportionate collection to achieve national security and law enforcement objectives. National security and law enforcement legislation is subject to close and frequent scrutiny, and it is appropriate to maintain the protections those laws and processes have applied. It is not considered necessary to share this data to achieve the Bill's objectives, so listing these provisions excludes the data from sharing under the Bill.
9. Clause 5 includes a list of provisions to exclude the sharing of the Commonwealth Electoral Roll under the Bill. The Electoral Roll is excluded from data sharing under the Bill given the compulsory nature of the collection of this data for the discrete purpose of maintaining Australia's political system and democracy. This exclusion avoids any perception that the Electoral Roll's management and processes permit inappropriate voting, electoral manipulation, or unwarrantedly exclude people who are entitled to vote. Ensuring confidence in the handling of the Electoral Roll is crucial to maintaining public confidence in the electoral process.
10. Clause 5 includes provisions to protect children. Data collected under the *Child Support (Assessment) Act 1989*, the *Child Support (Registration and Collection) Act 1988*, and the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* is excluded given the sensitivity of data collected under these Acts, and the risks associated with its disclosure.
11. Clause 5 includes provisions to protect sensitive health records. Sharing of all My Health Record and COVIDSafe App data is excluded through inclusion of relevant provisions of the *My Health Record Act 2012* and the *Privacy Act 1988*. My Health Record and COVIDSafe App data are excluded given recent public debate about how the community expects this data to be shared.
12. Clauses 5 and 6 include provisions relating to data collected under integrity and oversight functions. These include provisions relating to the Australian National Audit Office, the Australia Public Service Commission, the Inspector-General for the Australian Defence Force and the Inspector-General of Intelligence and Security. Agencies with integrity or oversight functions collect a range of data, including sensitive information, to process complaints and undertake investigations. Excluding the sharing of data associated with these functions from the scheme will maintain the independence of these agencies.
13. Clause 7 excludes the sharing of data collected by the Director of Professional Services Review for the purposes of Part VAA (the Professional Services Review Scheme) of the *Health Insurance Act 1973*. The intention is to protect medical information held by the Professional Services Review, and avoid prejudicing their ability to collect the data necessary to perform their functions.
14. Further details of the exposure draft Regulations are set out in Attachment A.

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15. The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.
16. The Regulations commence on the day after they are registered.

Consultation

17. The Office of the National Data Commissioner conducted extensive public consultation on the policy positions underpinning the data sharing scheme, including community expectations around exemptions for national security data and My Health Records. Targeted consultation was conducted with all Australian Government portfolios on the exclusions contained in clause 17 of the exposure draft Bill and the exposure draft Regulations.

Details of the Regulations

1 Name

Clause 1 sets out the full name of the Regulations, which is the *Data Availability and Transparency Regulations 2020*.

2 Commencement

Clause 2 provides that the Regulations commence on the day after it is registered on the Federal Register of Legislative Instruments.

3 Authority

Clause 3 provides that the Regulations are made under the Act.

4 Definitions

Clause 4 defines ‘Act’ to mean the ‘*Data Availability and Transparency Act 2020*’.

5 Prescribed provisions (Acts)

Clause 5 specifies the provisions in Acts that are prescribed for the purposes of paragraph 17(4)(a) of the Act. It includes a note to explain that if a prescribed provision prohibits a person from disclosing data, sharing that data is excluded from the data sharing scheme.

6 Prescribed provisions (legislative instruments)

Clause 6 specifies the provisions in legislative instruments that are prescribed for the purposes of paragraph 17(4)(a) of the Act. It includes a note to explain that if a prescribed provision prohibits a person from disclosing data, sharing that data is excluded from the data sharing scheme.

7 Circumstances in which sharing is excluded

Clause 7 provides that, for the purposes of paragraph 17(4)(c) of the Act, sharing is excluded in the circumstance that the data shared is data collected by the Director of Professional Services Review for the purposes of Part VAA (the Professional Services Review Scheme) of the *Health Insurance Act 1973*.