information and privacy commission
new south wales

[redacted]

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Ms Deborah Anton
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Office of the National Data Commissioner
PO Box 6500
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Submitted via www.datacommisioner.gov.au

Dear Ms Anton

DATA AVAILABILITY AND TRANSPARENCY EXPOSURE DRAFT BILL 2020

The purpose of this correspondence is to provide a submission on the Data Availability and Transparency Exposure Draft Bill 2020 (the Bill).

Governments produce and hold an enormous quantity of data, including a large amount of personal, health and sensitive information. There has been a shift in recent decades to view this government-held data as a public resource that can be utilised to deliver a range of tangible benefits, including targeted program development and improved service delivery.

Government-held data is also a valuable resource for researchers, academics and commercial entities.

About the Information and Privacy Commission

The Information and Privacy Commission NSW (IPC) oversees the operation of information access and privacy laws in New South Wales.

The Information Commissioner has responsibility for overseeing the information access rights enshrined in the *Government Information (Public Access) Act 2009* (GIPA Act). These rights are realised by agencies authorising and encouraging proactive public release of government information; and by giving members of the public an enforceable right to access government information.

The Privacy Commissioner has responsibility for overseeing and advising NSW government agencies on compliance with the *Privacy and Personal Information Protection Act 1998* (PPIP Act) and the *Health Records and Information Privacy Act 2002* (HRIP Act). The PPIP Act and HRIP Act establish the Information Protection Principles and Health Privacy Principles which govern the collection, use and disclosure of personal and health information by NSW government agencies and, in the case of the HRIP Act, private sector health care providers.

Objects clause

Section 3 of the Bill provides that the objects of the Act are:

- to promote better availability of public sector data
- enable consistent safeguards for sharing public sector data
- enhance integrity and transparency in sharing public sector data
- build confidence in the use of public sector data, and
- establish institutional arrangements for sharing public sector data.

The objects of the Bill would be strengthened by an explicit reference to privacy and the protection of personal information, and the balancing of privacy with other interests. We note that this is currently reflected in the explanatory memorandum to the Bill but is not explicitly included in the wording of section 3.

Relationship with Privacy Act 1988

Greater clarity is required in the Bill as to its relationship with the *Privacy Act 1988* (Cth). The Bill will create a scheme which authorises the sharing of government held information, including personal information, but does not provide any guidance as to how the scheme will interact with the requirements under the Privacy Act.

It appears that the scheme will authorise release of personal information regardless of whether the disclosure falls within one of the specific exemptions provided for under Australian Privacy Principle (APP) 6 of the Privacy Act. Given the very broad nature of the permitted purposes under the Bill, this would effectively appear to nullify the operation of APP 6 in respect of disclosure by Australian government agencies in a broad range of circumstances.

Public interest

Section 16 establishes the data sharing principles and provides at subsection 16(1)(c) that "a description of how the public interest is served by the sharing is to be set out in the data sharing agreement". We note that the Bill does not provide any guidance on how the public interest is to be determined or the factors that should or should not be considered in making this determination.

A clear definition or test for determining the 'public benefit' would enhance the Bill and provide valuable assistance to agencies in determining when data sharing will be in the public interest.

To date, a clear definition of public benefit has not been developed either via legislation or common law that would provide a clear and simple benchmark for determining the public benefit in sharing government data. The better approach would be to include a public interest test within the legislation setting out the factors to be considered both in favour of and against sharing of government data.

The public interest is both a framework for decision making and a tangible demonstration of the dominance of public interest factors in favour of the decision. Accordingly, application of the public interest test must be demonstrated by government in its decision-making – it cannot merely be asserted. In demonstrating an application of that test decision makers must apply a robust and consistent framework. That framework is best expressed in legislation with the scrutiny of parliament.

Part 2 Division 2 of the GIPA Act provides a useful model of a public interest test for assessing when government information should be released. Section 12 of the GIPA Act provides a non-exhaustive list of possible public interest considerations in favour of disclosure, while section 14 provides an exhaustive table of public interest considerations against disclosure. These are the only considerations against disclosure that agencies may consider in applying the public interest test. These legislative provisions are supported by guidance published by the Information Commissioner to assist agencies to undertake a comprehensive and robust determination of the public interest.

Precluded purposes

Section 15(2) of the Bill establishes that data may not be shared for the following purposes:

- an enforcement related purpose
- a purpose that relates to, or prejudices, national security, or
- a purpose prescribed by the rules.

Stakeholders attending the roundtable consultation on the Bill have consistently expressed the view that data sharing should not be used for the purposes of compliance or assurance processes. While the Bill provides a definition of an 'enforcement related purpose', it is open to interpretation as to whether this definition would encompass compliance and assurance processes. The Bill would be improved by providing a definition of 'enforcement related purpose' that explicitly includes compliance and assurance as precluded purposes.

Data Sharing Principles

Section 16 of the Bill establishes the data sharing principles. These are modelled on the "Five Safes" framework and provide a risk-based approach to making decisions about data sharing decisions. The 'project principle' established under subsection 16(1) provides non-exhaustive illustrative examples of matter that should be considered under this principle.

The remaining principles, however, do not include any examples or guidance as to their application. The scheme established by the Bill would be strengthened if a similar approach was adopted for each of the data sharing principles.

Data minimisation

It is noted that the Bill includes a number of privacy safeguards to protect the integrity of personal information, for example the provision concerning consent under subsection 16(1)(b).

The privacy safeguards of the scheme could be strengthened if the Bill included a specific data minimisation provision which required a data custodian to consider whether access to identified data is reasonably necessary in the circumstances.

This could take the form of a provision providing that only de-identified data is to be shared unless it can be demonstrated that the project cannot be achieved using de-identified data.

Health Privacy Principle (HPP) 11 contained in Schedule 1 of the *Health Records and Information Privacy Act 2002 (NSW)*, provides an example of this approach. HPP 11 provides that health information must not be disclosed for a purpose other than the purpose for which it was collected unless …

(f) ***Research***

the disclosure of the information for the secondary purpose is reasonably necessary for research, or the compilation or analysis of statistics, in the public interest and—

(i) either -

(A) that purpose cannot be served by the disclosure of information that does not identify the individual or from which the individual's identity cannot reasonably be ascertained and it is impracticable for the organisation to seek the consent of the individual for the disclosure, or

(B) reasonable steps are taken to de-identify the information, and

(ii) the information will not be published in a form that identifies particular individuals or from which an individual's identity can reasonably be ascertained, and

(iii) the disclosure of the information is in accordance with guidelines, if any, issued by the Privacy Commissioner for the purposes of this paragraph, or …

Regulatory guidance

The Bill takes a high-level principles-based approach to data sharing. This has the advantage of establishing a data sharing scheme which is flexible and capable of adapting to changes in the data systems and platforms used by government.

However, as has been demonstrated by other principles-based schemes, government agencies will require guidance and assistance from the regulator as to how to apply the scheme in practice. There are a number of elements under the Bill which will require the development of clear guidance to support the effective and successful implementation of the data sharing scheme. At a minimum this should include guidance in relation to:

- the relationship between the data breach provisions of the Bill and the *Privacy Act 1988*
- how to apply the purpose test and the scope of the 'permitted purposes' under the Bill
- the operation of the consent provision under section 16, including the type of data sharing that will require consent and the circumstances that will justify proceeding without consent
- ethics processes under section 16, including the appropriate ethics processes and frameworks to be applied, the circumstances when a project should be referred to an independent external ethics committee and how this requirement will interact with existing provisions concerning ethics processes in privacy legislation.

Accreditation Framework

The Accreditation Framework will control entry into the Bill's data sharing scheme to accredited user and service providers. We note that the criteria for accreditation will be established in Ministerial Rules and are not included in the draft Bill. The proposed categories for accreditation criteria set out in the discussion paper are appropriate, covering data governance, security and privacy, as well as technical skills and capabilities.

Australian organisations can apply to be an Accredited User or an Accredited Data Service Provider but must demonstrate an appropriate level of Australian ownership to be eligible. The test for what constitutes 'an appropriate level' is still being developed.

In determining this test, data governance issues should be considered closely, especially in relation to where data will be hosted, how it will be accessed and kept secure, how the right of access by citizens will be secured and whether organisations could have obligations under overseas laws to disclose any personal information they hold.

Office of National Data Commissioner

Chapter 4 of the Bill establishes the functions of the National Data Commissioner as an independent statutory officer.

We note, however, that no provision has been made for the establishment of a separate independent office to support the Commissioner to fulfill their functions under the Bill. Instead the consultation paper provided with the Bill indicates that the Commissioner will be supported by staff allocated by the Secretary of the Department responsible for the Bill (currently the Department of the Prime Minister and Cabinet).

As a regulator, it is important that the Commissioner is supported by a separate office and has full control of their budget and staff. This will increase public confidence in the independence of the Commissioner and will reduce the potential for conflicts of interest to arise that may impede their ability to fulfill their functions. The establishment of a separate independent office to support the Commissioner would be a preferable approach.

Conclusion

The sharing of government-held data between public sector agencies and with appropriate third parties can support more informed policy making, program management and evaluation, research and service planning. Sharing data safely and with full consideration of the privacy issues involved can facilitate better policy decision-making and more efficient service delivery for citizens and business.

The Information Commissioner and Privacy Commissioner support the development of a comprehensive scheme to authorise and regulate the sharing of data at the National level.

As an independent regulator with expertise in information access and information management, data governance, data sharing and privacy, the Commissioners welcome the opportunity to make a submission on the Exposure Draft Bill.

Yours sincerely

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