

6 November 2020

Ms Deborah Anton  
Interim National Data Commissioner  
Office of the National Data Commissioner

*Submitted electronically*

Dear Ms Anton

### **Exposure draft of the Data Availability and Transparency Bill 2020**

Thank you for the opportunity to provide comment on the Exposure Draft of the *Data Availability and Transparency Bill 2020 (the Bill)*, Consultation paper on the draft Bill (**consultation paper**), *Accreditation Framework Discussion Paper (accreditation framework paper)* and related materials.

The Office of the Victorian Information Commissioner (**OVIC**) regulates privacy, freedom of information and information security in Victoria. My office administers both the *Privacy and Data Protection Act 2014 (PDP Act)* and the *Freedom of Information Act 1982 (Vic)*. One of my functions under the PDP Act is to make public statements on matters that affect individuals' personal privacy. The Australian Government's data sharing reforms proposed under the draft Bill provide a new, alternative authority for data scheme entities to share public sector data, including personal information. These reforms have therefore been of particular interest to my office for some time.

My office's comments relate mostly to the draft Bill, consultation paper and accreditation framework paper. Our comments will also reference relevant explanatory materials, instruments, and the Information Integrity Solutions (**IIS**) Privacy Impact Assessment on the draft Bill dated 6 September 2020 (**PIA**).

This submission is organised in two parts: one for matters that OVIC considers require legislative clarity under the Bill, and another for operational matters.

#### **1. Matters for legislative clarity**

##### **General comments**

##### Interaction with state or territory laws

1. The interaction of the Bill with existing Commonwealth, state and territory laws has the potential to raise complex legal and constitutional issues.

2. OVIC understands that clause 22 intends to override secrecy or non-disclosure provisions in other Commonwealth, state or territory laws that may present barriers to sharing of public sector data.<sup>1</sup>
3. The Explanatory Memorandum offers a useful explanation regarding the intended interaction of the Bill with privacy laws, noting '(p)rovisions relating to data handling and security are also not affected by this clause. For example, requirements relating to the handling and security of personal information under the Privacy Act's Australian Privacy Principles will continue to apply to shared data.'<sup>2</sup>
4. However, this is not immediately clear from the wording of clause 22. This is an important qualification and should be made explicit in the Bill rather than being left as a matter of interpretation.
5. OVIC therefore recommends the Office of the National Data Commissioner (**ONDC**) and relevant Commonwealth agencies further clarify in the Bill how the scheme is intended to operate concurrently with existing state and territory privacy obligations.

#### Tension between advocacy and regulatory role of the National Data Commissioner

6. OVIC expects the dual regulatory and advocacy roles of the National Data Commissioner (**Commissioner**) under the scheme to cause some tension in practice.
7. While clause 41(2) provides helpful clarity regarding the types of activities that the Commissioner may undertake in relation to their advocacy functions, the consultation paper notes that the Commissioner will have role in 'promot(ing) better sharing and release of public sector data by driving cultural change and supporting capability building among data scheme entities.'<sup>3</sup>
8. To ensure that the Commissioner can effectively regulate the scheme, OVIC suggests the ONDC reconsider the feasibility of one statutory office holder having both regulatory and advocacy functions.
9. Having both of these functions vested in the one statutory office holder may cause issues in practice – for example, OVIC is concerned about the Commissioner's ability to effectively regulate actions of data scheme entities that may have been influenced by the Commissioner's advocacy functions.

#### Entrenching privacy protections under primary legislation

10. OVIC understands that many matters are yet to be finalised under the scheme, including the accreditation criteria under the Ministerial Rules and related guidance to support the implementation and operation of the scheme.
11. OVIC always advocates for relevant privacy protections to be entrenched in primary legislation, where appropriate. This helps to place important limitations on the ability of a Minister to amend privacy requirements on an ad-hoc basis, ensuring that Parliamentary oversight and scrutiny is maintained for future amendments. All necessary privacy protections should therefore be included under the Bill, rather than subordinate instruments, such as the Ministerial Rules or regulations made under the Bill.

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<sup>1</sup> See, Explanatory Memorandum, Data Availability and Transparency Bill 2020, page 31. Available here: [https://www.datacommissioner.gov.au/sites/default/files/2020-09/Data%20Availability%20and%20Transparency%20Bill%202020\\_exposure%20draft\\_explanatory%20memorandum.pdf](https://www.datacommissioner.gov.au/sites/default/files/2020-09/Data%20Availability%20and%20Transparency%20Bill%202020_exposure%20draft_explanatory%20memorandum.pdf).

<sup>2</sup> At paragraph 198.

<sup>3</sup> On page15.

## Draft Bill and consultation paper

### Downstream use of data

12. OVIC has previously noted the difficulties in controlling the downstream uses of shared data by data scheme entities.<sup>4</sup> For example, where data may be initially shared for an authorised purpose and subsequently used for, or used to inform, a precluded purpose.
13. OVIC suggests that preventing the downstream uses of personal information, beyond what is articulated in a data sharing agreement, be a regulatory priority of the ONDC, when exercising regulatory powers under Part 5.4 of the draft Bill.
14. Future assessments of the Commissioner under Part 5.4 could focus on whether the existing oversight and transparency mechanisms – such as the data sharing agreements under clause 18 of the Bill, as well as the various registers of data sharing agreements, accredited users, and Accredited Data Service Providers (**ADSPs**) – are sufficient in preventing potential downstream uses of data shared under the scheme.

### Limited avenue for redress for individuals

15. OVIC suggests that the ONDC clarify why merits review for data sharing decisions by data custodians is not available under the draft Bill<sup>5</sup> – for example, whether this is intended to avoid duplication of existing avenues for redress.
16. Given that the scheme provides an alternative authority to share data which may include personal information, OVIC considers that decisions of data custodians to share under the scheme should be subject to the same level of scrutiny as they would otherwise be if the data were shared under another legislative authority (for example, where both merits and judicial review are possible avenues for redress).
17. With the number of different data sharing entities and regulators acting in the scheme, ensuring the continuity of avenues for redress for individuals should be a priority, for individuals to effectively exercise their information rights.

### Role of the National Data Advisory Council

18. It is positive to see that the National Data Advisory Council (**Council**) is expressly required to advise the Commissioner on a range of matters, including balancing data availability with privacy protection (under clause 60(b)).
19. OVIC notes that the Bill is silent on whether the advice of the Council needs to be taken into account by the Commissioner. While the Commissioner is a member of the Council and may be appointed Chair, OVIC is of the view that the expertise of the Council will be best utilised as a source of independent advice to the Commissioner, and it is desirable for the Commissioner to be required to take into account the advice of the Council (insofar as possible, given the operation of clause 50).

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<sup>4</sup> Refer to OVIC's *Submission in response to Data Sharing and Release Legislative Reforms Discussion Paper*, 15 October 2019, available at <https://ovic.vic.gov.au/privacy/submissions-and-reports/submissions/>.

<sup>5</sup> As noted on page 16 of the consultation paper.

## Potential role of the Council in assessing accreditation applications

20. Considering the industry and subject-matter knowledge of the ex-officio members of the Council, OVIC queries whether advising on the accreditation of entities under the scheme could be included as an express function of the Council (under clause 60), or at the very least, part of the Council's terms of reference.
21. This could serve as a further protection to ensure that the Commissioner takes into account all relevant information and risks when making a decision to accredit an entity, which is effectively allowing the entity entry into the scheme to access data many times.<sup>6</sup> For example, the accreditation framework paper notes that the ONDC will be 'guided by advice from appropriate Commonwealth agencies to ensure any risks are managed appropriately'<sup>7</sup> when considering the accreditation of foreign nationals under the scheme. Accessing the advice of the Council may also be beneficial here, to gain a holistic view to ensure any privacy risks are accounted for.
22. OVIC expects that accreditation decisions will require the Commissioner to consider competing risks related to the existing advisory functions of the Council. By including advising on the accreditation of the entities in the express functions of the Council, the Commissioner will have the legislative clarity to be able to access the expertise of the Council at every stage of the scheme, from the entry of scheme entities, to the sharing and use of public sector data.
23. OVIC recognises that there may be practical limitations to this (for example, in convening meetings of the Council to consider accreditation decisions) and therefore recommends that an advisory function of the Council in relation to accreditation decisions be included in the terms of reference when drafted.

## **Accreditation framework paper**

### Question 2: Should individuals acting on behalf of an ADSP be accredited individually? If so, what might be appropriate arrangements?

24. To avoid any potential gaps in privacy protections, OVIC recommends that the accreditation framework provide for the separate accreditation of individuals acting on behalf of an ADSP, such as contractors engaged to perform certain functions of an ADSP.
25. The privacy risks with any sort of outsourcing arrangement within the public sector are well-documented.<sup>8</sup> Further, as the accreditation framework is designed to create a more secure environment for data sharing to occur under the scheme, OVIC has significant concerns about the potential operation of unaccredited individuals in the scheme.
26. Given that an individual acting on behalf of an ADSP may have authorisation to act and make decisions on behalf of an ADSP, OVIC recommends that the ONDC explore the feasibility of the accreditation criteria applying to such individuals.
27. Further, the ONDC should explore whether accredited individuals acting on behalf of an ADSP can be included under the register of accredited ADSPs, to offer transparency for any potential third-party participation under the scheme.

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<sup>6</sup> As noted in the accreditation framework paper, the current proposal is for entities to only be accredited once to access data many times (page 3). Available here: <https://www.datacommissioner.gov.au/exposure-draft/accreditation>.

<sup>7</sup> On page 7.

<sup>8</sup> See, for example, OVIC's guidance on *Outsourcing and privacy*, available here: <https://ovic.vic.gov.au/resource/guidelines-for-outsourcing-in-the-victorian-public-sector-accompanying-guide/?highlight=outourcing>.

Question 12: Is it appropriate to notify parties to data sharing agreements of an accredited entity's suspension?

28. OVIC considers the notification of parties to a data sharing agreement of an accredited entity's suspension to be a privacy enhancing measure. Notification will allow a party to a data sharing agreement to take steps to protect any personal information that may become compromised or otherwise affected by the actions of a suspended party.
29. Notification will also provide transparency to the affected party, who may not otherwise know that their data has become subject to a new sharing arrangement with a new set of associated risks.

Accreditation criteria under the rules

30. OVIC agrees with the point raised by IIS in the PIA that setting out the accreditation criteria in rules issued by the responsible Minister may not offer sufficient privacy and security protections.<sup>9</sup>
31. As the PIA notes, although the rules will be disallowable instruments and subject to some parliamentary scrutiny, legislative instruments like rules or regulations can be subject to change more easily, which may increase access to personal information under the scheme, and could have an impact on previously conducted risk assessments in relation to data sharing. If those risk assessments are not conducted anew following a change to the rules approved by the responsible Minister, the basis of prior decision making will be cast into doubt.
32. Further, the effectiveness of disallowance as a measure for transparency does depend on Members of Parliament having a certain level of technical understanding of the scheme and wider privacy risks.
33. Considering there is no limit on the types of organisations that may apply for accreditation under the scheme, OVIC agrees that elements of the accreditation criteria should, at the very least, align with overarching privacy protections under the *Privacy Act 1988*.
34. Our comments at points 10 and 11 outline OVIC's preference for privacy protections to be included under primary legislation, where appropriate.

**2. Operational matters**

**Draft Bill and consultation paper**

Guidance on concurrent operation of the scheme with state or territory privacy laws

35. OVIC expects that the concurrent operation of the scheme with state and territory privacy laws will cause confusion in practice, requiring public sector organisations to navigate privacy obligations arising under different Commonwealth, state or territory legislative schemes. OVIC would be glad to work with the ONDC in providing input into or producing any guidance on the intended interaction of the data sharing scheme and the privacy and information security obligations under the PDP Act.

Management of privacy complaints under the scheme

36. OVIC supports the 'no wrong door approach' to handling privacy complaints under the scheme, given the operation of various privacy regulators in the scheme.

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<sup>9</sup> On page 29 of the PIA.

37. In relation to the specific transfer powers under the draft Bill allowing the Commissioner to transfer a matter or complaint more appropriately dealt with in another jurisdiction,<sup>10</sup> OVIC can rely on existing legislative powers and procedures to address matters that fall under the PDP Act, as well as frameworks to facilitate cross-jurisdictional collaboration.
38. OVIC would be glad to work collaboratively with the ONDC and other regulators in the scheme, to ensure individuals are able to exercise their information rights.

#### Matters that relate generally to compliance or enforcement of laws

39. The Bill offers a range of protections to prevent data being used for law enforcement purposes, including by defining some Commonwealth intelligence and integrity agencies as 'excluded entities' under clause 11(3) and including 'enforcement related purposes' under 'precluded purposes' under clause 15(2).
40. As a further protection on an operational level, OVIC encourages the ONDC to consider offering guidance to data scheme entities on what is meant by 'matters that relate generally to compliance with or enforcement of laws' in practice (under clause 15(4)), to allow decision makers to interpret the data sharing purposes appropriately, when considering these matters.
41. The draft Explanatory Memorandum<sup>11</sup> does offer clarity on this point, however, OVIC recommends such terms be further described in supporting guidance for decision makers.

#### Public interest test

42. It is pleasing to see that the project principle under the data sharing principles requires a description of how the public interest is served under data sharing agreements.<sup>12</sup>
43. Just as the concept of public interest is further articulated in the consultation paper (on page 19), OVIC recommends that decision makers have access to comprehensive guidance on matters that need to be balanced when considering whether data sharing is in the public interest.

#### ADSP-enhanced data

44. OVIC considers that the term 'ADSP-enhanced data' will need to be further clarified in guidance. After reviewing the Bill alongside the draft Explanatory Memorandum, OVIC is of the view that decision makers will require a base level understanding of what privacy risks may emerge when undertaking complex data sharing or integration activities, to effectively participate in the scheme.
45. OVIC notes that there will be instances where data custodians must engage an ADSP for complex data integration, to more appropriately manage privacy risks. However, defining the 'data services' to be provided by an ADSP under a data sharing agreement<sup>13</sup> will require a certain level of technical understanding by data custodians, for data sharing agreements to truly serve as a transparency mechanism.
46. OVIC expects that the implementation of the scheme will need to be supported by complementary efforts in increasing data literacy across the public service, to better understand privacy risks and obligations under the scheme. Related to IIS' recommendation in the PIA for a public awareness

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<sup>10</sup> Under clause 93.

<sup>11</sup> At point 115, page 23. Available here: [https://www.datacommissioner.gov.au/sites/default/files/2020-09/Data%20Availability%20and%20Transparency%20Bill%202020\\_exposure%20draft\\_explanatory%20memorandum.pdf](https://www.datacommissioner.gov.au/sites/default/files/2020-09/Data%20Availability%20and%20Transparency%20Bill%202020_exposure%20draft_explanatory%20memorandum.pdf).

<sup>12</sup> Under clause 16(1)(c).

<sup>13</sup> In accordance with clause 18 (item 8) of the draft Bill.

campaign about the data sharing scheme,<sup>14</sup> OVIC suggests the ONDC consider aiming education and awareness campaigns within the public sector as well, to upskill the public sector in the responsible sharing of public sector data.

## General comments

### Data breach notification obligations

47. OVIC supports requirements for data scheme entities to notify the Commissioner of data breaches involving non-personal information, that are likely to result in serious harm (under clause 37).
48. OVIC's revised Victorian Protective Data Security Standards, issued under the PDP Act, include a requirement for Victorian public sector organisations to report any incidents that have an adverse impact on the confidentiality, integrity or availability of public sector information with a business impact level of 2 (limited) or higher.<sup>15</sup> This requirement extends to all public sector information, beyond just personal information.

Thank you again for the opportunity to comment on the draft Bill, Consultation paper and related materials. I have no objection to this submission being published without further reference to me. I also propose to publish a copy of this submission on the OVIC website, but would be happy to adjust the timing of this to allow you to collate and publish submissions proactively.

Yours sincerely



Sven Bluemmel  
**Information Commissioner**

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<sup>14</sup> See, IIS PIA, page 66. Available here: <https://www.datacommissioner.gov.au/sites/default/files/2020-09/Privacy%20Impact%20Assessment%20exposure%20draft%20Data%20Availability%20and%20Transparency%20Bill%202020.pdf>.

<sup>15</sup> For more information, see OVIC's guidance on the Information security incident notification scheme, available here: <https://ovic.vic.gov.au/resource/ovic-information-security-incident-notification-scheme-v1-0/>.