

15 October 2019

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Data Legislation Team
Department of the Prime Minister and Cabinet
PO Box 6500
CANBERRA ACT 2600

Dear Data Legislation Team

Submission in response to Data Sharing and Release Legislative Reforms Discussion Paper

The Office of the Victorian Information Commissioner (OVIC) is pleased to provide a submission to the Department of the Prime Minister and Cabinet (PM&C) in response to the *Data Sharing and Release Legislative Reforms Discussion Paper* (**discussion paper**).

OVIC is the primary regulator for information privacy, information security, and freedom of information 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 and release (DS&R) reforms are of great interest to OVIC, given the proposed legislation provides a new authority for entities participating in the DS&R system to share public sector data, including personal information.

This submission focuses on some of the themes covered in the discussion paper relating to the proposed data sharing model.

Data sharing and open data release

OVIC strongly supports the new policy position outlined in the discussion paper of the proposed DS&R legislation providing a framework to only share public sector data, instead of facilitating sharing and open data release, as initially proposed in the *New Australian Government Data Sharing and Release Legislation Issues Paper* (**issues paper**).¹ In OVIC's submission to the issues paper, we identified a range of challenges with open release, particularly involving the release of information derived from personal information.² We are pleased to see this change outlined in the discussion paper.

Further, OVIC welcomes the distinction made between data sharing and data release, concepts which were previously conflated in the issues paper. However, further clarification regarding the term 'open data' may be useful. Data release is currently defined in the discussion paper as 'open data that is made available to the world at large', however without any of the additional context or explanation provided in the discussion paper, the term 'open data' may be unclear at face value. Specifying that the data is made

¹ July 2018.

² *Submission in response to the New Australian Government Data Sharing and Release Legislation Issues Paper*, 8 August 2018, available at <https://ovic.vic.gov.au/privacy/submissions-and-reports/submissions/>.

publicly available *without any restrictions on further use or disclosure* may help clarify what constitutes open data and data release.

Sharing for public benefit

Under the proposed DS&R legislation, data sharing may occur for public benefit, with the purpose test satisfied if sharing is reasonably necessary to inform or enable government policy, program and service delivery, or research and development. While a purpose test is valuable to ensure that data shared is used for the benefit of the community, it is OVIC's view that in deciding whether the purpose test is satisfied, consideration should also be given to other potentially competing public interests, such as the public interest in protecting individuals' privacy. Guidance and training provided to entities in relation to the application of the Data Sharing Principles should encourage this balancing between the public interest in reaping the benefits arising from data sharing and other public interests. Further, the DS&R legislation could include an express provision to this effect; for example, one of the objects under the PDP Act is 'to balance the public interest in the free flow of information with the public interest in protecting the privacy of personal information in the public sector'.³ OVIC suggests a similar object be included in the DS&R legislation.

The discussion paper also explores the potential for data sharing for commercial purposes. OVIC acknowledges that data sharing for research and development for commercial uses can bring benefits to the community. However, sharing for commercial purposes should be in the public interest and, importantly, meet community expectations, as noted in the discussion paper.⁴ OVIC suggests PM&C consider additional safeguards where data sharing for commercial purposes is enabled under the DS&R legislation. This may include, for example, developing additional considerations or a separate decision making framework for Data Custodians to use when determining whether or not to share data for commercial purposes, in addition to or as part of applying the Data Sharing Principles. PM&C could also consider establishing a body to review decisions to share for commercial purposes specifically.

A further issue to consider is the potential for data shared for an approved purpose to be subsequently indirectly used or linked to other unauthorised purposes, such as compliance or assurance activities. Controlling the downstream uses of data will be challenging. For example, an instance may arise where data is shared for research, and that research then informs a compliance or assurance activity. Additional oversight may therefore be required around public benefit for the uses of shared data where they may be linked to unauthorised purposes.

Privacy-enhancing measures

OVIC welcomes PM&C's approach of building privacy enhancing measures into the DS&R legislation, including setting higher protections for sensitive data in a binding Sensitive Data Code. In particular, OVIC supports specific accreditation criteria for those handling personal information. More broadly, the discussion paper notes that the DS&R model will require all entities participating in the system to be subject to equivalent legal privacy obligations, including individuals and small businesses that may be exempt from the Privacy Act. Further, State and Territory users are required to be covered by the Privacy Act or a State or Territory law that provides equivalent privacy protections to the Privacy Act, including data breach notification requirements.⁵

While OVIC supports these positive privacy measures in principle, OVIC notes that the PDP Act does not contain mandatory data breach notification requirements similar to the Notifiable Data Breaches Scheme under the Privacy Act, and queries how this requirement will operate in practice, noting Recommendation 4 of the privacy impact assessment (PIA) report prepared by Galexia in relation to the DS&R Bill and related regulatory framework recommends the Bill 'should include a mechanism for imposing a Data Breach

³ s 5(a) of the PDP Act.

⁴ On page 27.

⁵ On page 31.

Notification requirement where the entities involved operate in a State or Territory where such a requirement does not yet exist'.⁶ OVIC would welcome further consultation on the design of the privacy coverage model.

Annual reporting on the operation and integrity of the DS&R system by the National Data Commissioner (NDC) is another welcome measure. While it does not appear that the Office of the Australian Information Commissioner (OAIC) will play an express oversight role within the DS&R system, OVIC suggests PM&C consider whether it would be appropriate or useful for the NDC to provide an annual report to the OAIC on data sharing decisions involving personal information, as a requirement under the DS&R legislation. This is similar to Victoria's data sharing model where the *Victorian Data Sharing Act 2017* requires the Chief Data Officer to report to OVIC annually on projects involving personal information. This could serve as an additional safeguard to ensure data sharing under the DS&R system that involves personal information is conducted transparently, and help maintain a constructive relationship between the NDC and the OAIC.

Role of the National Data Commissioner and National Data Advisory Council

OVIC recognises the importance of a positive culture towards data sharing for the success of the DS&R system, and agrees that the Office of the National Data Commissioner (ONDC) will play a key advocacy role in promoting cultural change across the Australian public sector. However, OVIC highlights that adequate resourcing will be needed to support the ONDC to effectively fulfil this role.

In relation to the role of the National Data Advisory Council (Council), the discussion paper does not specify whether the NDC will be required to follow the advice of the Council, or whether the Council plays a purely consultative role. As previously raised in its submission to the issues paper, OVIC suggests clarifying this relationship within the DS&R legislation.⁷

Data Sharing Principles

OVIC notes that PM&C issued a *Best Practice Guide to Applying the Data Sharing Principles* in March 2019. Detailed guidance on the proposed Data Sharing Principles is crucial to assist entities to safely and responsibly share data under the DS&R system, however OVIC suggests that a key message promoted in any such guidance should be that the Data Sharing Principles do not displace entities' obligations to adhere to privacy principles under any applicable privacy legislation; rather, it should be promoted that the Data Sharing Principles complement, not replace, privacy principles relating to information sharing under the Privacy Act or State or Territory privacy legislation.

Consent

The discussion paper notes that the proposed DS&R legislation will not require consent for sharing personal information, with responsibility instead placed on Data Custodians and Accredited Users to share personal information safely and respectfully, where reasonably required for a legitimate purpose.⁸

While OVIC recognises that consent is an important mechanism for individuals to protect their privacy by allowing them to exercise control over their personal information (in certain circumstances), OVIC is of the view, in agreement with PM&C's view, that consent may not be practical or feasible for all instances of data sharing under the DS&R model. As identified in the discussion paper, making consent a prerequisite for all instances of data sharing could have an adverse impact on the integrity of a dataset to be shared, in turn undermining the purpose and intention of this system.

⁶ Recommendation 4, Galexia Privacy Impact Assessment on the Proposed *Data Sharing and Release (DS&R) Bill* and Related Regulatory Framework, 28 June 2019.

⁷ Available at <https://ovic.vic.gov.au/privacy/submissions-and-reports/submissions/>.

⁸ Page 32 of the discussion paper.

Rather, OVIC supports a model where consent provides one avenue to permit data sharing, but is not the sole legal authority to allow entities to do so. This is consistent with consent under the PDP Act, whereby it is one of several grounds (under certain Information Privacy Principles) that permit organisations to use, disclose, and handle personal information.

Further, OVIC notes the importance of ensuring any consent obtained is meaningful. Seeking consent may appear disingenuous to the public where an entity seeks consent from individuals to share data but shares it regardless of whether or not consent is provided, under another authority provided by the DS&R legislation or another law.

This is not to suggest that OVIC believes protections for individuals are not necessary simply because consent is not an appropriate mechanism. Entities participating in the DS&R system will therefore benefit from guidance around when consent should be built into the Data Sharing Principles, and how to ensure such consent is meaningful. OVIC believes the ONDC can play a valuable role in this regard, with guidance and advice that promotes best practice around the use and appropriateness of consent. OVIC's discussion on consent in its *Guidelines to the Information Privacy Principles* may be useful for the ONDC to consider when exploring issues around consent.⁹

Thank you for the opportunity to provide a submission to this discussion paper. OVIC notes that further consultations will occur in relation to certain elements of the proposed DS&R model and the exposure draft of the legislation. OVIC will follow the progress of these reforms with interest, and looks forward to engaging once again with these consultation processes.

I have no objection to this submission being published by PM&C 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 PM&C to collate and publish submissions proactively.

If you have any questions about this submission please contact me or my colleague Tricia Asibal, Policy Officer, at tricia.asibal@ovic.vic.gov.au.

Sven Blüemmel 
Information Commissioner

⁹ See the 'Key concepts' chapter, available at <https://ovic.vic.gov.au/book/key-concepts/>.