



Senate Finance and Public Administration Committees
PO Box 6100
Parliament House
Canberra ACT 2600

12 March 2021

Dear Sir/Madam

Re. Senate Finance and Public Administration Committee Inquiry – Data Availability and Transparency Bill 2020 (Cth)

Introduction

Thank you for the opportunity to make a submission to the Committee’s inquiry into the Data Availability and Transparency Bill 2020 (Cth) (hereafter ‘the Bill’).

Who we are

This submission has been prepared by: Dr. Megan Pricor and Associate Professor Mark Taylor. We are researchers in health law and regulation at Melbourne Law School, the University of Melbourne. More information about individual authors is available on the University of Melbourne website.

The opinions in this submission are those of the named authors and should not be taken to represent the views of the University of Melbourne. The authors are happy to provide further clarification on any area of the submission.

Summary of key points

Under cl. 13 of the Bill, a data custodian of public sector data is authorised to share the data with an accredited user only if certain conditions are met. Among these conditions is that the sharing be consistent with the data sharing principles set out in cl. 16. Subclause (2) includes as necessary elements that the sharing ‘can reasonably be expected to serve the public interest (cl. 16(2)(a)) and that any sharing of the personal information of individuals is done with the consent of the individuals, unless it is unreasonable or impracticable to seek their consent (cl. 16(2)(c)).

This submission addresses the interpretation of the term ‘public interest’ at cl. 16(2)(a), and the interpretation of cl. 16(2)(c) concerning consent for data sharing, focusing on the scope of previously-given consent and the ‘unreasonable or impracticable’ exemption.

In summary, we submit that:

- 1. The public interest test should explicitly incorporate assessment from the perspective of the data subject: data sharing should only take place when in line with reasonable individual and community expectations and not to the disadvantage of those whose data is disclosed, their family, or their community.**
 - 2. The National Data Commissioner should be required rather than merely permitted (cl. 127) to make written guidelines on the interpretation of the ‘unreasonable or impracticable’ exemption to the requirement to obtain an individual’s consent (cl. 16(2)(c)).**
 - 3. Reliance on the Guidelines for the interpretation of this phrase issued by the Office of the Australian Information Commissioner (OAIC) in relation to the *Privacy Act 1988* (Cth), in particular if they are limited to those pertaining to s 16A, may be insufficient for the purposes of the Bill.**
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4. Consideration should be given to whether greater certainty would result from the Commissioner issuing codes of practice with the status of legislative instruments, rather than guidelines lacking such force, to address these issues.
5. The National Data Commissioner should be invited to provide robust guidance for data sharing entities covered by the Bill on the interpretation of past consents and the extent to which they may apply to new uses and disclosures of data. Draft guidance should be tested against the views of stakeholders and the public.

Interpreting the term ‘public interest’

The Minister has indicated (Scrutiny Digest 3/2021 p. 13) that there is no intention to provide further explanation of the term ‘the public interest’ and that ‘the question of whether a project can reasonably be expected to serve the public interest must be made on a project-by-project basis, weighing the range of factors for and against sharing’.

We echo concern expressed (Scrutiny Digest 1/2021 p. 5) about the lack of guidance on this point and the possibility that it may permit an operation of a public interest test that cannot be appropriately reconciled with reasonable expectations of privacy. We suggest that, minimally, it should be made clear that assessment of a reasonable expectation of public interest should incorporate assessment from the perspective of data subjects and community expectations and norms. That is to say, it should be critically significant whether those whose data may be shared (when relevant factors have been ‘weighed’) have reason to expect and accept the privacy interference that sharing represents and that it not be to their unjustified disadvantage. Adopting a principle that data sharing only take place under conditions that persons have reason to both expect and accept may enable privacy interests to be appropriately reconciled with the public interest in data sharing (rather than overridden for commercial or economic interests that data subjects personally may have no reason to think justify privacy intrusion).¹ We suggest that this would be in line with the objects of the Act, in particular the object to “build confidence in the use of public sector data” (clause 3(d))

Furthermore, we suggest that it should be possible to challenge a public interest determination through the National Data Commissioner. The National Data Commissioner could then be guided in assessment of public interest by the principle that data sharing should only take place under the Act when in line with reasonable community expectations and not to the disadvantage of those whose data is disclosed, their family, or their community.

Interpreting when consent is ‘unreasonable or impracticable’

The Minister has said (Scrutiny Digest 1/2021) that the Bill’s standard of consent is that of the *Privacy Act 1988* (Cth) and that the language of ‘unreasonable or impracticable’ is drawn from s 16A of that Act. The Minister indicated that the terms should be interpreted using ‘relevant guidance on consent made by the Australian Information Commissioner’ (Scrutiny Digest 3/2021, p. 13). The Scrutiny of Bills Committee subsequently indicated that it would be helpful for the explanatory material ‘to provide specific current examples of this guidance and to describe where it may be located’ (Scrutiny Digest 3/2021 para 2.15).

We consider that there is significant risk of confusion here in regard to interpretation of these terms with reference to the OAIC Guidelines. The Guidelines that apply to s 16A of the *Privacy Act 1988* (Cth) on when it is unreasonable or impracticable to obtain consent (<https://www.oaic.gov.au/privacy/australian-privacy-principles-guidelines/chapter-c-permitted-general-situations/> at C.6) are not an obvious fit for the use of these terms in the Bill. This is because s 16A is specific to circumstances where an entity is collecting, using or disclosing personal information in the context of necessity to ‘lessen or prevent a serious threat to the life, health or safety of any individual, or to public health or safety’ (s 16A(1)). This is a narrower context than that envisaged in the data sharing scheme to be established under the Bill, which permits sharing for a very wide range of purposes related to government service delivery, informing government policy and programs, and research and development. Reliance upon the OAIC Guidelines relating only to s 16A, as appears to be indicated in the Explanatory Memorandum to the Bill (cl. 121), would be insufficient as a basis for interpretation of those terms in the new legislative context. Additional OAIC guidance on consent is available in relation to other provisions of the *Privacy Act 1988*, notably s 16B in relation to research relevant to public health or

¹ Taylor MJ and Whitton T ‘Public Interest, Health Research and Data Protection Law: Establishing a Legitimate Trade-Off between Individual Control and Research Access to Health Data’ *Laws* (2020), 9(1), 6

public safety, which may be of greater relevance to the Bill. We agree with the Scrutiny of Bills Committee's observation that the Explanatory Memorandum should include more precise reference to which OAIC Guidelines are intended to be applied in interpreting the 'unreasonable or impracticable' terms relating to consent in the Bill.

We submit that, as a minimum, the National Data Commissioner should be required rather than merely permitted (cl. 127) to make written guidelines on the interpretation of the 'unreasonable or impracticable' exemption to the requirement to obtain an individual's consent. Reliance on the guidelines for the interpretation of this phrase issued by the OAIC in relation to the *Privacy Act 1988* (Cth), in particular if they are limited to those pertaining to s 16A, may be insufficient for the purposes of the Bill.

Further, considering that there is substantial risk that lack of clarity relating to data sharing principles will ultimately undermine the Government's policy goal of promoting data sharing, we would suggest a better path to certainty for those subject to the scheme would be for the Commissioner to issue codes of practice with the status of legislative instruments, rather than guidelines, to address these issues.

The consent requirement: Re-interpreting previously-given consent

It is important to note that the principle requiring consent for data sharing may also encourage those entities seeking to share data to examine whether the consent previously given by individuals at the point of initial data collection is sufficient both in scope and duration to extend to the new proposed data use or disclosure. This re-application of past consents is envisaged at cl. 122 of the Explanatory Memorandum to the Bill. Such an approach would provide entities with a way to avoid both the need for fresh consent and the need to invoke the 'unreasonable or impracticable' exemption at cl. 16(2)(c). **Hence it will be important for the National Data Commissioner to provide robust guidance for data sharing entities covered by the Bill on the interpretation of past consents, ideally tested against the views of stakeholders and the public.**

Thank you for the opportunity to make this submission.

Yours sincerely

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