

6 November 2020

## SUBMISSION TO DATA AVAILABILITY AND TRANSPARENCY BILL 2020 EXPOSURE DRAFT

*Submitted online*

The Consumer Policy Research Centre (CPRC) welcomes the opportunity to respond to the Office of the National Data Commissioner's (ONDC) consultation on the Data Availability and Transparency Bill 2020 Exposure Draft.<sup>1</sup>

CPRC is an independent, non-profit, consumer think-tank that aims to create fairer, safer and inclusive markets by undertaking research and working with leading regulators, policymakers, businesses, academia and community advocates. Data and technology issues are a research focus for CPRC, including emerging risks and harms and opportunities to better use data to improve consumer wellbeing and welfare.

We note that the proposed draft Bill establishes a new scheme for sharing public sector data with accredited users (including other government agencies, NGO's, businesses and universities). CPRC holds the view that such a scheme has the potential to generate benefits for Australians – in relation to government service delivery, informing policy and programs and research and development purposes – if sufficient steps are taken to ensure this is done safely. In this context, Appendix 1 outlines our views regarding how the scheme proposes to uphold the public interest and safeguard consumers from risks. These views align with and build on the evidence outlined in CPRC's submission to the Data Sharing and Release Legislation July 2018 Issues Paper.<sup>2</sup>

We would welcome opportunities to further engage on these matters. For any questions or further discussion of our submission or research, please contact Andrew Thomsen, Senior Research and Policy Manager, at [andrew.thomsen@cprc.org.au](mailto:andrew.thomsen@cprc.org.au).

Yours sincerely,



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<sup>1</sup> ONDC, "Consultation on the Data Availability and Transparency Bill 2020", (September 2020), <https://www.datacommissioner.gov.au/exposure-draft/dat>

<sup>2</sup> CPRC, "Submission to New Australian Government Data Sharing and Release Legislation: Issues Paper July 2018)" (August 2018), <https://cprc.org.au/publications/submission-to-new-australian-government-data-sharing-and-release-legislation-issues-paper/>

# Appendix 1 – CPRC response to consultation and draft Bill

## 1. Upholding the public interest

CPRC understands that the “Project Principle” in the draft Bill requires that the public interest is described in the data sharing agreements between scheme participants. We appreciate that “public interest” can be interpreted broadly and subjectively, and that the ONDC will provide guidance to help scheme participants articulate and evaluate how the public interest is served by a project across “multiple domains”<sup>3</sup>. To help ensure adequate clarity and definition in descriptions of the how the public interest is served, CPRC considers that accredited users should also stipulate – and data custodians and accredited service providers should also evaluate – the following specific domains:

- How the data sharing purpose meets community values and expectations – thereby helping to foster trust in the new data sharing scheme. As we’ve previously noted in our submission to the Issues Paper – in this context of community values and expectations it may also be beneficial to draw on the recommendations of experts in a particular field, and experts in ethics and human rights.
- The distributional impacts likely to materialise for specific consumers or communities. For example, does a data sharing purpose constitute a “data for good” initiative that supports inclusion and equality, or is sharing of data more likely to create or amplify regressive distributional impacts by delivering benefits only to particular segments of the community.
- What specific economic value will be created from the data, to which parties that value accrues and whether any arrangements need to be put in place to ensure the Australian public receives fair and affordable access to any commercialisation of new products and services to be developed from public data as an input. Consideration should also be given to whether the data sharing could exacerbate the market power of parties receiving the data – to the overall detriment of consumers and competition in the long-term.

We also consider it would be reasonable for all scheme participants to stipulate how they’d expect public benefit/s to be measured – including in relation to the scale of benefit, and how benefits would be spread across the public and their own interests. Ensuring scheme participants are considering these factors will help to uphold transparency and accountability within the scheme. And while we firmly agree with the view that consent must not be over-relied on or used as the only privacy protection – we do consider that information about the public interest could help individuals to make a meaningful and informed choice about sharing their data if and when it is appropriate to seek such consent.

We would question whether voluntary guidance is the most appropriate and proportionate regulatory tool for influencing scheme participants to adequately describe the public interest they are serving. Given upholding of the public interest is the absolutely fundamental objective of the data sharing scheme, we consider it would be appropriate for consideration of and compliance with any guidance to be mandated under the draft Bill.

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<sup>3</sup> The draft Bill consultation paper notes that evaluating public interest of a project needs to cover multiple domains that scheme participants need to take into account, such as potential benefits and risks to: individuals, businesses, population groups including vulnerable communities, the economy, public health, the environment, and overall social wellbeing.

## 2. Ensuring safeguards are appropriate

We appreciate that the draft Bill is principle-based legislation and therefore the framing of how consumers will be safeguarded is currently broad, with more detail still to be provided in rules, guidelines and guidance. Below we offer suggestions on where additional detail would be particularly valuable so that stakeholders can better understand how consumers and the broader public interest will be safeguarded:

- *How the process of sharing data between data custodians, accredited service providers and accredited users will be monitored and audited so these parties are accountable for matters like upholding “public interest” and complying with ethics requirements:*

While we understand that these types of considerations are likely relevant to Recommendation 2 of the Privacy Impact Assessment and the Accreditation Framework Discussion Paper – more information on how ongoing monitoring and auditing will work in practice would be helpful for understanding how potential risks to Australians<sup>4</sup> will be managed.

- *How risks of individual or collective consumer harms will be limited through a risk-based approach to approving data sharing propositions:*

We consider that in the formative stages of the scheme it would be prudent to be cautious and focus on lower risk data sharing propositions. This will allow for expertise and capability across government agencies and other scheme participants to be developed ahead of progressing potentially riskier propositions. Another benefit of focussing on lower risk propositions initially – and then building up the scheme in a controlled manner – is that it provides time to build understanding of where more detailed, prescriptive safeguards might be required. For example, if the de-identification of personal data does not provide sufficient privacy protection when it is shared for a certain purpose, this may need to be precluded by way of a prescriptive rule. Equally if there are circumstances where – in order to manage privacy risks – it becomes apparent data should only be shared if it is de-identified, it would be helpful if this were made clear in rules. Getting the balance right between principles-based obligations – and more specific, prescriptive rules – will be important for ensuring the interests of Australians are protected.

- *How will existing laws and regulations be relied upon to protect consumers:*

We note that the draft Bill consultation document states that “*layers of safeguards will protect identified personal information from misuse, particularly where businesses may seek to profit from this data*” and in this context, any data shared under the Bill will also be subject to the standards set in the Privacy Act 1988 and the Australian Competition and Consumer Law. The Australian Competition and Consumer Commission’s (ACCC) Digital Platforms Inquiry found that these consumer protection laws need to be strengthened.<sup>5</sup>

CPRC continues to stress to government the need for urgent reforms that introduce an Unfair Trading Prohibition and General Safety Provision into the Australian Consumer Law (ACL), as well as reform of the Privacy Act. While we appreciate that these reform

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<sup>4</sup> Risks raised in CPRC’s previous submission to the Data Sharing and Release Legislation Issues Paper included (but are not limited to): potential biases in datasets that leads to discriminatory profiling and outcomes; inaccurate data leading to individuals being excluded from services; and, the risk of de-identified data being re-identified. See: CPRC, “Submission to New Australian Government Data Sharing and Release Legislation: Issues Paper July 2018” (August 2018), 1-2.

<sup>5</sup> The ACCC stated that “to enable consumers to make informed and genuine choices, to increase the accountability of entities handling user data, and to provide the ability for consumers to exercise some control over their user data [the] ACCC considers that the most efficient way to make these changes is to amend the existing privacy law and extend protections under consumer law.” See: ACCC, “Digital Platforms Inquiry – Final Report”, (June 2019), 23, <https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf>

issues are outside of the scope of this ONDC consultation – we consider that the current “layers of safeguards” are inadequate and need to be strengthened. Over-reliance on these safeguards before they are reformed is likely to be to the detriment of consumers and the overall data-sharing scheme. Further clarity on where the ONDC considers the ACL and Privacy Act are being relied upon to protect consumers – and how the effectiveness of these laws will be monitored – would be welcomed.