

**Submission by the
Office of the Information Commissioner
Queensland**

New Australian Government Data Sharing and Release Legislation

August 2018

*The Queensland Office of the Information Commissioner is an independent statutory authority.
This submission does not represent the views or opinions of the Queensland Government.*

The Office of the Information Commissioner's (**OIC**) statutory functions under the *Right to Information Act 2009 (RTI Act)* and the *Information Privacy Act 2009 (IP Act)* include assisting in achieving the goal of open and transparent government by promoting better and easier access to public sector information and improving the flow of information to the community, balanced with appropriate protections for certain information, including personal information. Through its functions, OIC supports the public sector's corporate governance and accountability framework. OIC's statutory functions under the IP Act include commenting on issues relating to the administration of privacy in the Queensland public sector environment.

OIC welcomes the opportunity to comment on the *New Australian Government Data Sharing and Release Issues Paper for Consultation (Consultation Paper)*. Opening up government data is consistent with, and an important part of, Queensland's right to information 'push model'. OIC supports strategies and initiatives, such as Open Data, that maximise disclosure of government-held information to the community and provide appropriate protections for the community's personal information.

Striking the right balance between greater data availability and use and the protection of an individual's privacy and personal data is critical to realising the benefits of data, achieving greater openness and transparency and enhancing levels of trust in government. OIC notes a legislated Consumer Data Right is being developed concurrently and led by the Treasurer, the Hon Scott Morrison MP, as part of the package of reforms to unlock the benefits of public sector data while maintaining trust and confidence in the system. Providing consumers with data portability accords with the data portability right contained in the General Data Protection Regulation (GDPR). OIC looks forward to further opportunities for consultation on the draft legislation, draft rules and technical standards to implement a legislated Consumer Data Right.

In the absence of a draft of the proposed data sharing legislation, comments are limited to the following key issues in response to the Consultation Paper:

1. De-identification

The Consultation Paper notes that for data sharing and use to be authorised under the Bill, a purpose test and data safeguards (Five-Safes framework) need to be met. The Consultation Paper states that public release of data may occur when data is appropriately de-identified.¹

Personal information is defined in the IP Act² as '*information or opinion....whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion*'. Information will be de-identified where

¹ Consultation Paper, p16

² Section 12 of the IP Act.

there is no reasonable likelihood of re-identification occurring.³ Information that has been de-identified is not personal information and will not be subject to IP Act or the *Privacy Act 1988* (Cth).⁴

In October 2017, the UN Special Rapporteur on the Right to Privacy presented to the General Assembly the interim report of the work of the Taskforce on Big Data Open Data - the first of the thematic reports to be presented to the General Assembly. As noted in the interim report, the Special Rapporteur is considering a range of recommendations regarding publication of data about individuals.⁵ Importantly, one of the recommendations under consideration is that sensitive high-dimensional unit-record level data about individuals should not be published online or exchanged unless there is sound evidence that secure de-identification has occurred and will be robust against re-identification.⁶ The interim report also notes there are numerous examples of successful re-identification of individuals in data published by governments.⁷ The recommendations contained in the final report may have implications for the public release of de-identified data. OIC also notes that there is ongoing debate about the effectiveness of de-identification due to the increased risk of re-identification as more data becomes available.

Given the current debate around the effectiveness of de-identification, OIC considers that it will be critical that decisions about the public release of de-identified data be made on a case-by-case basis, having regard to a range of factors, including the perceived level of re-identification risk for each dataset and the type and sensitivity of the data being released, as proposed under the framework and consistent with the OAIC and CSIRO Data 61 De-Identification Decision-Making Framework.⁸ We acknowledge the National Data Commissioner will work with OAIC and others to develop guidance, updated as required to deal with changes in data practice and risk. De-identification is one mechanism in a suite of tools and a broader legislative and regulatory framework to protect personal information from unauthorised use and disclosure.

2. Secondary purpose data use

The Consultation Paper proposes the adoption of a 'purpose test' to assist in determining whether data may be shared. The paper states that data sharing will be authorised if the data is to be used for the following purposes:

1. inform government policy making
2. support the efficient delivery of government services or government operations
3. assist the implementation and assessment of government policy; or
4. research and development with clear and direct public benefits.

³ <https://www.oaic.gov.au/agencies-and-organisations/guides/de-identification-and-the-privacy-act>

⁴ *Privacy Act 1988* (Cth).

⁵ http://www.ohchr.org/Documents/Issues/Privacy/A-72-43103_EN.docx. Finalisation of the report and the recommendations will be based on the international consultation as well as the incorporation of outcomes arising from letters of allegation to some countries. It is currently planned (subject to revision) that the final report will be presented to the General Assembly in October 2018.

⁶ P25 at paragraph 128.

⁷ P20 at paragraph 98.

⁸ <https://www.oaic.gov.au/agencies-and-organisations/guides/de-identification-decision-making-framework>

It is not readily apparent from the Consultation Paper what controls will be applied to prevent data being used for secondary purposes, once released for such purpose. It is also not clear what rights or controls entities sharing data under the proposed legislation will retain over the data.

While the benefits of broader data sharing are recognised, it is important to find an appropriate balance between the optimal use of data and the protection of an individual's privacy and personal information. The recent concerns expressed by the community and commentators about the secondary use of a patient's medical data under the My Health Record system highlights the importance of getting this balance right to meet community expectations.

OIC looks forward to the opportunity to further comment on the draft Data Sharing and Release Legislation, including the Privacy Impact Assessment.

3. Monitoring and oversight

The Consultation Paper states that the National Data Commissioner (NDC) will champion greater data sharing and release by providing consistent leadership and well-defined technical direction for implementing the data reforms. The NDC will promote best practice through guidance and reporting, and monitor and oversight the integrity of the system. The NDC will have the power to monitor compliance by conducting audits.⁹

OIC has similar statutory functions in relation to right to information and privacy in Queensland. The effectiveness of our audit function has been enhanced by focusing not only agency compliance with right to information and privacy legislative obligations, but identifying good practices. The latter is often identified in relation to particular areas of an agencies' performance, even where they may have other areas for improvement. However, it has been beneficial to identify and share such good practices with the broader sector. This approach would be consistent with and support the proposal for the NDC to share good news stories, lessons learned and the application of the purpose test and five safes framework.

⁹ Consultation Paper, pg20.