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## **Comments and Feedback to the Office of the National Data Commissioner on the Exposure Draft - Data Availability and Transparency Code 2022**

Thank you for the opportunity to comment on the *Exposure Draft of the Data Availability and Transparency Code 2022 (Draft Data Code)*, made under section 126 of the *Data Availability and Transparency Act (Cth) 2022 (DAT Act)* and the accompanying Consultation Paper (**Paper**).

The DAT Act establishes a new scheme for sharing Australian Government data and the Draft Data Code seeks to provide pragmatic guidance about how the DAT Act's data sharing principles and privacy protections are to be applied. The Paper invites response to any or all of 22 questions about proposed content and practical application of the Draft Data Code.

### NDIA response

The National Disability Insurance Agency (**NDIA**) is supportive of the proposed framework set out in the Draft Data Code. The framework is generally consistent with the NDIA's current approach, practices and processes for data sharing, and provides a common framework to better align the approach taken by public sector agencies.

In reviewing the Draft Data Code, the NDIA has considered its practical application in the NDIA context, including application to data subject to secrecy provisions in the *National Disability Insurance Scheme Act (Cth) 2013 (NDIS Act)*.

### Secrecy provisions in the NDIS Act

There are provisions at Part 2.8 of the DAT Act that govern the DAT Act's relationship with other laws. Section 23 provides that authorisation under the DAT Act for a data custodian to share public sector data has effect despite anything in another law of the Commonwealth, or a law of a State or Territory.

A significant amount of data held by the NDIA is subject to secrecy provisions in sections 60 to 67G of the *National Disability Insurance Scheme Act (Cth) 2013 (NDIS Act)*.

In light of the information protection provisions in the NDIS, the NDIA sees the Draft Data Code as an important instrument to guide the application of the provisions of the DAT Act which override those provisions. This is because where the sharing of information is compliant with the requirements of the DAT Act, applied in accordance with the Draft Data Code, the data sharing will be permitted.

The Draft Data Code does not provide detailed guidance about applying the data sharing principles and privacy protections in the context of data that would otherwise be subject to secrecy provisions. This includes consideration of secrecy provisions when balancing

public interest considerations under the project principle. The NDIA is of the view that there would be benefit to doing so, to provide practical guidance to Agencies in applying the DAT Act and Draft Data Code appropriately, and to support public trust in sharing data that might otherwise be protected by such secrecy provisions.

### The project principle - approach to weighing arguments for and against a project serving the public interest

The project principle in the DAT Act requires entities to be satisfied the project can reasonably be expected to serve the public interest, and that relevant ethics processes are observed. The Draft Data Code provides guidance on applying the project principle, including the requirement that a data sharing project is reasonably expected to serve the public interest. This guidance is helpful, however the Draft Data Code is mostly silent about circumstances where two entities may disagree about where the balance of the public interest lies. Assumedly the decision ultimately rests with the data custodian, but there may be benefit in making this clear in the Draft Data Code.

The Paper recognises that consideration of the public interest and the balancing of factors for and against the public interest is standard practice in a number of Commonwealth legislative regimes. Nonetheless, balancing public interest considerations is often a challenging task, and there is an opportunity to provide further guidance in the Draft Data Code about this decision making process in the context of data sharing, particularly where parties may reach different conclusions about where the balance lies.

### Data sharing for the purpose of delivery of government services – illustrative examples and notes

The Draft Data Code confirms that if the data sharing purpose is for the delivery of government services (s15(1A) of the DAT Act), the project can reasonably be expected to serve the public interest. The Paper asks, at question 4, whether this section of the Draft Data Code would benefit from other illustrative examples provided as notes.

In the NDIA's context, a helpful illustrative example would be one that provides clarity about whether government services include government funded services. For example, the sharing of data with providers in remote and very remote markets in Australia for the purposes of delivering the National Disability Insurance Scheme, and if granularity of the level at which data might be shared in that context. We would be happy to provide more details about this example if that would be helpful.

### The 'reasonable person' test

In the context of the data principle of appropriate protection, that data sharing must be reasonably necessary, the Paper asks if guidance on the 'reasonable person' test is adequate (question 14).

The Paper explains that this element of the data principle requires entities to consider whether a reasonable person, who is properly informed, would conclude the data proposed to be shared, collected and used in the project is reasonably necessary to achieve the project's data sharing purpose or purposes. This is an objective test. The inclusion of the phrase, 'a reasonable person who is properly informed,' is intended to clarify the reasonable person test in this context involves a person who has baseline data literacy. That is, the person has the ability to read, understand, create and communicate data as information.

The Draft Data Code does not define a 'reasonable person' in the way set out in the Paper. A shared understanding of a 'reasonable person' is important because the data industry is unfamiliar to most people. Including a definition would mitigate the risk of the proper application of the test being misunderstood by some parties.

#### Assessment of individuals' skills and qualifications

The Paper refers to data custodians having policy guidance of their own about the skills and qualifications required for individuals that receive data, as well as the technical details of the data exchange and hosting. This is consistent with the NDIA's current practice, however in reality there are challenges around managing risks of who receives and uses data once it is provided to another entity. This means risk may remain in connection with the data in some circumstances. The NDIA would welcome further support and guidance to implement and manage such controls.

#### **Invitation to discuss comments**

Thank you again for the opportunity to comment on the Exposure Draft of the Data Availability and Transparency Code 2022 and the accompanying Consultation Paper.

If you have any questions about the comments provided, please contact [REDACTED]  
[REDACTED] [REDACTED]