Australian Government
Department of Social Services

Ref: EC22-001814

Office of the National Data Commissioner
Andrew Fisher Building
1 National Circuit
BARTON ACT 2600

By email only: information@datacommissioner.gov.au

Dear Sir/Madam

The Department of Social Services (the **Department**) welcomes the opportunity to comment on the draft *Data Availability and Transparency Code 2022* consultation paper, published in August 2022. We would like to thank you for providing further time to finalise our submission and apologise for the delay.

Attached is the Department's submission in response to the consultation paper.

The Department also endorses the submissions made by our Portfolio agencies, Services Australia and the National Disability Insurance Agency.

We would welcome a discussion on any of the matters raised in our submission.

Yours sincerely

Bronwyn Worswick
Chief Counsel and Privacy Champion
Legal Services Group
18 October 2022

Australian Government
Department of Social Services

Department of Social Services

Data Availability and Transparency Code 2022 Exposure Draft

Consultation paper response

The Department of Social Services (the **Department**) understands the *Data Availability and Transparency Act 2022* (the **DAT Act**) establishes a new, best practice scheme for sharing Australian Government data – the DATA Scheme. We also acknowledge that the DATA Scheme is underpinned by strong safeguards and consistent, efficient processes. As such, it is focused on increasing the availability and use of Australian Government data helping deliver better government services, policies and programs with people and businesses at the heart, and support world-leading research and development.

The DATA Scheme is comprised of regulations, rules, data codes and guidelines. The Commissioner must make a data code about the five data sharing principles set out in section 16 of the DAT Act, including privacy protections regarding the handling of personal information. The purpose of this consultation paper, is to seek views on the draft *Data Availability and Transparency Code 2022* (the **Draft DAT Code**), which once made, will be binding on DATA Scheme entities, including the Department.

For these reasons, we welcome the opportunity to consider the Draft DAT Code and to provide a response to the consultation paper.

The Department's view on data

The DAT Act and Draft DAT Code comes at a time when there is increasing recognition of the benefits good quality, reliable and timely data can provide. The volume and variety of data, coupled with the speed at which new data is being created, makes it a formidable information tool. Data powers an ever increasing digital economy and creates significant opportunities for the public sector.

Data access and sharing is one of our foundational themes that underpin our strategic objectives and goals. We strive to empower every person in the Department to achieve more with data and continually encourage individuals to consider how they can incorporate data and evidence into their work and utilise new data sources.

If the insights gained from data are to be at the forefront of shaping policy and practice in the Department, we need to have clear goals in place for how we will prioritise, govern and use data. This includes exploring how we can both access and share data through the DATA Scheme. Integral to an effective DATA Scheme, is ensuring there is appropriate guidance for participating entities on the core data sharing principles and privacy protection requirements. Participating in the DATA Scheme will bring it all together. If done well, we can collect the right data, organise it, analyse and share it safely and securely.

Each entity that participates in the DATA Scheme will have a stake in its success. The Department looks forward to working with the Office of the National Data Commissioner (**ONDC**) on the DATA Scheme, and in this instance, to provide feedback on the important Draft DAT Code.

General observations

The Department supports a self-assessed DATA Scheme as proposed under the DAT Act and the Draft DAT Code. While entities retain a significant amount of control over how it engages with the DAT Scheme and in the assessments they make, this is not without oversight by the ODNC nor guidance to be issued in relevant regulations, rules, data codes and guidelines.

The Department has considered all 22 questions posed in the consultation paper, but has focused its response on a few core areas where further guidance is welcomed.

Overall, the Draft DAT Code is pragmatic, appropriate and helpful to users of the DATA Scheme. To further enhance its effectiveness and utility, the Department recommends the Draft DAT Code:

- provide further and more nuanced examples, such as in relation to application of the people principle
- clarify the requirements when weighting arguments for and against serving the public interest
- more precisely define the concepts involved in projects that do not serve the public interest
- outline other mechanisms that could be applied to the data, in addition to altering or removing data
- explore how the DATA Scheme will control information that exists in the system
- clarify issues relating to sharing of data consistently with the *Privacy Act 1988* (**Privacy Act**) and appropriate safeguards
- clarify terminology.

The Department endorses the submissions made by Services Australia and the National Disability Insurance Agency and, therefore, does not duplicate comments or recommendations as made in those separate submissions.

The Department notes that in its submission, Services Australia suggests expanding section 6(4)(a) of the Draft DAT Code to include a clear reference to consideration of Indigenous data. The Department understands this has also been raised in other submissions made to the ONDC. The Department would support further consideration of this, particularly in the context of calls for First Nations Voice to be enshrined in the Australian Constitution, to enable Aboriginal and Torres Strait Islander peoples to be formally consulted on policy and legislation affecting their communities. Rather than being addressed in the Draft DAT Code, this could be explored as a separate project and consultation process with data custodians, users and Aboriginal and Torres Strait Islander peoples.

Our key observations to the questions posed in the consultation paper follow.

Consultation questions

Questions 2 to 4

- **If yes to the above, are the requirements of what entities must do, to weigh up arguments for and against the project serving the public interest, clear and unambiguous, and is this list proper and pragmatic? In your response, please provide reasons.**
- **Is the list of projects that do not serve the public interest able to be practically applied? What, if any, further guidance is required to support entities consider when a project does not serve the public interest?**
- **Are the notes contained in this section helpful, and would this section benefit from other illustrative examples provided as notes? If yes, what examples and under which subsections?**

While the Department accepts the approach as outlined at question 1 is appropriate, we are of the view that further guidance is required on how to weigh up competing public interest factors and the types of evidence that would need to be considered.

The Draft DAT Code provides two scenarios where a data sharing project 'can reasonably be expected to serve the public interest'.

The first scenario is where the only data sharing purpose of the project is for the delivery of government services. If so, the project can reasonably be expected to serve the public interest. Unlike the second scenario below, this does not appear to include a condition to the rule. The Department has previously raised concerns with the ONDC about the interpretation and effect of this provision (section 15(1A) of the DAT Act and section 6(2) of the Draft DAT Code); as to whether those services would need to be delivered directly by the Department; or if it has the effect of applying where those services are delivered by a third party, on behalf of the Department. This has not yet been clarified.

The second scenario is less clear given the broader scope of the proposed data sharing project that the public interest test will apply to. In this scenario, the Draft DAT Code explains that where a project is for the purpose of informing government policy and programs, or research and development, the project can reasonably be expected to serve the public interest. However, this is conditional, in that it only applies if the entity concludes that the arguments for public interest outweigh the arguments against public interest. Unlike the first scenario, this one requires greater consideration for whether the project is expected to serve the public interest and is open to inconsistent interpretation and application by entities.

Section 6(4)(a) of the Draft DAT Code proposes a non-exhaustive list of factors entities must consider in determining if the data sharing purposes as outlined at section 6(3) can reasonably be expected to serve the public interest. It is not clear whether those factors are to be considered as for or against the public interest.

Section 6(5) of the Draft DAT Code outlines the types of projects that do not serve the public interest. That list is confined to four types of projects. The latter two examples, being for projects that exclusively serve commercial interests and those that are merely of interest to the public, are open to interpretation.

The Draft DAT Code seeks to establish best practice application of the data sharing principles and foster, over time, greater and consistent sharing between entities. The core of the DAT Act is making data more accessible, where there is public interest. As such, it is important that entities have clear guidance on how to assess the public interest test; what factors they must consider in weighing up whether the project does or does not serve the public interest, what those factors encompass in practice; and importantly, how to weigh up those considerations.

Even where there is a clear and non-exhaustive list of factors for a public interest test, it is often the weighting of those competing factors that entities are challenged with. For example, when considering the disclosure of information (which can include data) under the *Freedom of Information Act 1982*, agencies need to consider a list of factors favouring disclosure as prescribed in the FOI Act and a non-exhaustive list of factors against disclosure, as outlined in the FOI Guidelines issued by the Australian Information Commissioner. As seen in agency decision making, it is often the way an entity approaches a public interest test, and the degree to which they effectively weigh up competing interests, that is a challenge.

In the FOI space, agencies can refer to the FOI Guidelines and decisions issued by the Information Commissioner as to what those public interest considerations mean and how the public interest should be weighed. Similar guidance on assessing public interest in the context of the DATA Scheme and Draft DAT Code would be equally beneficial, including to provide illustrative examples as notes or in external supporting guidelines.

The proposed notes in the Draft DAT Code are very helpful. Some further examples might address some of the concerns outlined above. Potential topics include:

- what is considered for or against public interest
- how competing considerations are weighed up
- the differences between 'the public interest', 'of interest to the public' and 'merely of interest'
- how a project might, and might not, serve the public interest
- when a project can be said to only serve commercial interests or the interests of another nation
- examples of 'projects that can reasonably be expected to serve the public interest' and 'projects that do not serve the public interest'.

The above suggested points of clarification could be explained by examples or notes in the Draft DAT Code, through supplementary guidance materials, or where possible, by way of more precisely defined concepts in the Draft DAT Code.

Question 9
Are the attributes, qualifications and affiliations listed in this section appropriate and easy to understand?

In general terms, the attributes, qualifications and affiliations appear appropriate. However, we query the extent to which an entity may be able to determine whether section 10(4)(b) of the Draft DAT Code has been satisfied. That is, the entity may not be in a position to know

about the individual's contractual arrangements, or their moral or commercial expectations or personal interests.

We also consider that the example to section 10(4) should be more nuanced. The example effectively states that a scholarship with *any* foreign university would be a relevant affiliation that *always* detracts from the individual's appropriateness to access data. There may however, be circumstances where a scholarship provided by a foreign university would be advantageous and not automatically be an exclusionary ground for the person's access to the data.

Question 11
Is this section adequate in clarifying what are reasonable standards?

Section 16(6) of the DAT Act requires the entity to apply reasonable security standards, which includes considering the type and sensitivity of the data, to control the risks of unauthorised use. Section 11 of the Draft DAT Code requires the entity to assess the sensitivity and risks of sharing, collecting or using data and consider whether the security standard is proportionate to these risks.

The Department suggests that it would be preferable for section 11 of the Draft DAT Code to impose more specific requirements (such as requiring the entity to actively manage risks etc., by implementing mitigation strategies).

We also note section 11(3) of the Draft DAT Code, which states that some accredited entities that are not Commonwealth entities, are required to comply with Commonwealth security standards. This paragraph could be clarified with an example to explain when the section may apply and who decides when it will apply. For example, whether the section applies where Universities undertake research on sensitive issues (such as defence capabilities, and in this role, need to comply with the protective security policy framework).

Question 16
One of the objects of the Act is to enable the sharing of data consistently with the Privacy Act and appropriate safeguards. Does this part of the draft data code strike the right balance between holding data custodians accountable to seek consent, and providing data custodians with an exception to collect consent in circumstances where it is genuinely unreasonable or impracticable to seek consent? How could the draft data code be improved to achieve the right balance? For example, could the National Health and Medical Research Council waiver of consent guidelines be used here?

Question 17
Is this part of the draft data code adequate in providing further clarification for what considerations should be taken into account when determining whether it is necessary to share personal information to properly deliver a government service? How could this section be improved?

Question 18
Does this part of the draft data code provide an adequate list of factors for data custodians to consider when determining whether the public interest justifies the sharing of personal information without consent? Would this section benefit from an example provided in a note, and if so, can you suggest one?

The Department accepts the proposed content in the Draft DAT Code concerning consent. However, we offer the following observations, particularly in how the requirements around consent as proposed will work in practice.

By way of example, section 16(1)(a) of the Draft DAT Code involves consideration of the resources of the data custodian, to be taken into account in considering whether the data custodian is required to contact an individual to seek consent. It is not clear if this would mean that a smaller entity, with fewer resources, or an entity with undeveloped practices, would avoid the requirement to obtain consent.

Section 16(1)(b) of the Draft DAT Code also involves consideration of whether the proposed sharing is authorised by any other law. It is not clear if 'any other law' includes or excludes laws that are overridden by the use of the DAT Act. If the answer is that it includes 'overridden' law, consent would not be required for policy, research and statistical analysis in the Social Services portfolio because provisions in some portfolio legislation do not require consent in these situations.

We also note section 16(2) of the Draft DAT Code that states if seeking consent would be excessively burdensome in all of the circumstances, then it may be unreasonable or impractical to seek consent. In those circumstances, it is not clear how the entity is meant to assess what 'all of the circumstances' entails or means. Further, it is also unclear what the consequences may be, if the entity fails to consider what 'all of the circumstances' would be. In addition, the difference between excessively burdensome, burdensome, inconvenient, or time-consuming may be question of degree depending on the resources of the relevant data custodian.

Further clarification around the interaction between section 16(1) and (2) of the Draft DATA Code would be beneficial. Section 16(1) sets out a range of situations where it may be unreasonable or impracticable to seek an individual's consent. Section 16(2) appears to be an alternative to the considerations in section 16(1), where the only consideration is that it is excessively burdensome 'in all the circumstances'. It may be helpful if more objective tests or an explanation of the operation of the various tests was explained in further detail. In addition, while there are a range of tests outlined, there is no guidance on the threshold for those tests. For example, how the likely impact on the individual should be taken into account and what 'excessively burdensome' means when applied to facts.

The Department would support the Draft DAT Code incorporating examples of where public interest would justify the sharing of personal information without consent. Some examples could include situations where prompt action is required to address, manage and respond to natural disasters, emergencies or pandemics and the like.

Question 22

What additional topics could the data code include to assist the establishment or integrity of the DATA Scheme?

The Department supports the Draft DAT Code as related to the remaining questions. We do however, note that there is always benefit in establishing further guidance and examples either within the Draft DATA Code as a definition, a note, or externally as supporting guidelines.

By way of one example, section 9 of the Draft DATA Code makes an assumption that accredited government bodies automatically comply with the People Principle as set out in section 16 of the DAT Act, and therefore only applies to universities. It is not clear why a distinction has been made between government bodies and universities, when conflicts of interest could arise for either. The Draft DATA Code would benefit from further clarification on this distinction.