



Australian Government

Office of the National Data Commissioner

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Dear Ms Van Halderen, Mr Smedes and Ms Gates

Re: Advice about use of the DAT Act to authorise access to the NDDA

Please see Attachment A for advice I am providing under paragraph 43(aa) of the *Data Availability and Transparency Act 2022* (the DAT Act) in response to Ms Van Halderen's request for advice about the use of the DAT Act to authorise access to the National Disability Data Asset (NDDA).

Paragraph 43(aa) of the DAT Act authorises the National Data Commissioner to advise a data scheme entity about how the data sharing scheme applies to the entity, or how it would apply to the entity in particular circumstances.

In providing this advice, I also commit to be bound by the regulatory positions outlined in it. This means the National Data Commissioner will refrain from taking any regulatory action contrary to this advice, such as seeking penalties against the NDDA partners in the event of a contravention of the DAT Act, provided the partners act in accordance with this advice and the circumstances relevant to it remain as specified.


As the Commonwealth partners for the NDDA, each of your organisations may rely upon this advice in determining how and when the DAT Act is to be used in obtaining data for, building, and providing access to the NDDA. I note that as the appointed data custodian for the NDDA under the DAT Act, the Australian Bureau of Statistics will generally be responsible for managing requests through Dataplace to access the NDDA, and ensuring that access to the asset complies with any applicable requirements.

This advice is an expression of my current understanding of the law, including the DAT Act and its subordinate legislation. As such, if I subsequently become aware that the law has been interpreted incorrectly in this advice, I may revise or withdraw this advice, in whole or in part. Were this to occur, I will not apply for the imposition of penalties to the extent that any non-compliance resulted from applying this advice in good faith.

You may disclose the contents of the advice at your discretion. The advice will not be made public nor be shared with other entities by my office, unless agreed in writing by your respective organisations. My office may draw on the regulatory principles and positions reflected in the advice to inform general public guidance.

If you would like to discuss any matters relating to this advice, please contact Taylor Black, Assistant Secretary, Sharing, Policy and Legal Branch (taylor.black@finance.gov.au, 02 6215 2231; 0431 721 211).

Yours sincerely

A handwritten signature in black ink, appearing to read 'Andrew Taylor', written in a cursive style.

Dr Andrew Taylor
Acting National Data Commissioner

13 January 2025



Australian Government

Office of the National Data Commissioner

Attachment A: The National Data Commissioner's advice under paragraph 43(aa) of the *Data Availability and Transparency Act 2022* about use of the DAT Act to authorise access to the NDDA

Questions

1. Can the DAT Act be used to authorise access to data in a linked asset like the NDDA? If so, how does the DAT Act apply to the data that is accessed?
2. Does this change depending on whether the data used to create the linked asset is supplied through different authorising pathways (for example, using DAT Act and/or non-DAT Act pathways)?
3. Based on the answers to the above, is the approach outlined in Principle 5 (conditions of access) in the [National Disability Data Asset Draft Charter](#) relating to the DAT Act correct?

Short answers

1. The DAT Act can be used to access data from a linked asset like the NDDA. Users who access the NDDA using the DAT Act must comply with all applicable DAT Act requirements, which include requirements imposed by the Australian Bureau of Statistics (ABS) as the appointed data custodian under the DAT Act through a data sharing agreement.¹ Any copies of data produced for the access, and any data produced from the user's use of the data they access, is 'scheme data' regulated by the DAT Act.
2. The use of different authorising pathways (including DAT Act and non-DAT Act pathways) to supply data to create a linked asset like the NDDA does not affect whether the DAT Act is able to be used to access data in the NDDA. That is, the DAT Act can be used for access irrespective of how the data used to create the asset was supplied.

However, the authorising pathways for supplying data to create a linked asset like the NDDA will determine whether it is mandatory or optional to use the DAT Act for access. Broadly, data supplied into the NDDA using the DAT Act and any data produced in relation to such data is 'scheme data' that can only be accessed using the DAT Act. The DAT Act is not required, but can be chosen to be used, for access to any other (non-scheme) data contained in the NDDA.

¹ The requirements imposed by the ABS may also include requirements that must be imposed because of underlying agreements with other custodians who have provisioned data into the NDDA, such as state or territory government agencies.

Where the DAT Act is used for access, any copies of data produced for the access, and any data produced from the user's use of the data they access is 'scheme data'.² If the choice is made not to use the DAT Act to access the NDDA, then any copies of the data created to facilitate the access (and any data produced from that access) are not 'scheme data' and will not be regulated by the DAT Act.

3. The statement in Principle 5 (conditions of access) in the National Disability Data Asset Draft Charter (that data will be protected, and access determined, by the DAT Act) can hold true in respect of access to the NDDA under any option for supplying data to build the NDDA, either because the DAT Act is required to be used to authorise access, or because it is chosen to authorise access.

Discussion

Sharing data and outputs under the DAT Act

The DAT Act can be used to authorise sharing of (which includes access to) public sector data held by a data custodian with an accredited user. For this to occur, the sharing must be authorised by a data sharing agreement that is registered by the National Data Commissioner.³

Any copies of data produced for the purposes of being shared, and any data produced from the accredited user's use of the data (referred to as 'output' under the DATA Scheme), is 'scheme data' regulated by the DAT Act.⁴ Output ceases to be scheme data when it validly 'exits' the data scheme.⁵

Output that is scheme data can be shared by an accredited user if the user has been appointed as the custodian of the output, and the original data sharing agreement (under which the user produced the output) authorises the sharing.⁶ Sharing of such output is authorised by the DAT Act in the same way as other data held by a data custodian,⁷ and further output from any related projects also becomes scheme data.⁸

If output is shared in an unauthorised way, the sharing is a scheme 'data breach'.⁹ Scheme data breaches are subject to requirements relating to mitigation and notification, and failures to comply with those requirements can result in civil penalties.¹⁰

The National Disability Data Asset

The NDDA brings together de-identified information about people with disability from Australian, state and territory government agencies. The NDDA is to be used for

² Under the DAT Act, data produced from the use of data that accessed through the DAT Act is referred to as 'output'.

³ See section 13.

⁴ See the definition of 'scheme data' in section 9.

⁵ See section 20E.

⁶ See section 20D.

⁷ See section 13.

⁸ See the definition of 'scheme data' in section 9.

⁹ See section 35.

¹⁰ See sections 36 to 38.

research and analysis, with insights used to improve programs and services for people with disability.¹¹

The NDDA is supported by the Australian National Data Integration Infrastructure (ANDII), which provides the underlying infrastructure for the asset.¹² This includes a 'National Linkage Spine' and 'National Linkage Map' that bring together personal information from a variety of sources providing population level coverage. The infrastructure facilitates matching records for individuals across different datasets and assigns de-identified person identifiers to unique records to enable the creation of linked datasets like the NDDA.

Broadly, there are three stages involved in building and providing access to the NDDA. These are:

1. Data supplied from multiple sources to the ABS and the Australian Institute of Health and Welfare (AIHW).
 - a. This includes data already held by those agencies that is repurposed, as well as other data supplied from other government agencies (Commonwealth, state and territory).
2. The ABS and AIHW uses the supplied data to build the NDDA, including through creating supporting infrastructure (ie the ANDII).
 - a. Using DAT Act terminology, this involves using the supplied data to create related 'output' that is included in the NDDA, as well as 'output' that comprises the 'National Linkage Spine' and 'National Linkage Map' for the ANDII.
3. The ABS is assigned as the custodian of the NDDA. Access to the NDDA (including to specific 'output' contained in it) is then requested from the ABS by other parties.

The DAT Act will apply to the ABS and AIHW's use of data to build the NDDA under the second stage where the DAT Act was used to authorise the supply of that data under the first stage. Similarly, the options available to the ABS to authorise access to the NDDA by other parties under the third stage will depend on how data was supplied into the asset under the first stage.

Options for accessing the National Disability Data Asset

The DAT Act has been used to authorise the supply of all data to the ABS and AIHW from Commonwealth agencies (including repurposing of data held by ABS and AIHW) for 'Release 1' of the NDDA.¹³ This includes data originating from state and territory agencies provisioned to the Commonwealth using other (non-DAT Act) pathways, and then supplied to the ABS and AIHW for the purposes of the NDDA through the DAT Act.

Under this 'exclusive' DAT Act data supply option, the DAT Act must be used for all access to the NDDA. This is because all data contained in the NDDA under this option is 'scheme data' for the purposes of the DAT Act, either because it was supplied into the

¹¹ <https://www.ndda.gov.au/about-ndda>

¹² <https://www.abs.gov.au/about/data-services/data-integration/integrated-data/national-disability-data-asset>

¹³ For example, registered agreement DSR-02467 authorises the sharing of de-identified and transformed PLIDA modules of analytical data into the DATA Scheme to create the NDDA.

asset using the DAT Act or is scheme ‘output’ (being data produced from the ABS or AIHW using the supplied data to create the NDDA). Scheme data can only be accessed using the DAT Act unless it has otherwise ‘exited’ the DATA Scheme.¹⁴

In addition to the approach taken for Release 1 of the NDDA, it is open to the NDDA partners to use other legal authorising pathways to supply data into the NDDA.

Broadly, there are two alternatives available. The first is for other authorising pathways to be used in combination with the DAT Act (for example, to supply new data sets into the NDDA in addition to the data already supplied using the DAT Act). The second is for a completely different legal authorisation to be used to create future versions of the NDDA in its entirety. Under this approach, the DAT Act would not be used to authorise the supply of any data into the asset.¹⁵

Under either option, if the data being accessed is *not* data or output from data supplied into the NDDA using the DAT Act, then the data being accessed would *not* be scheme data. As such, the ABS (as the data custodian for the asset) could choose to use the DAT Act to authorise access to the (non-scheme) data, or choose to use any other applicable authorising pathway.

This choice would always be available under the alternative involving completely different (non-DAT Act) legal authorisations. This is because there would be no ‘scheme data’ contained in the asset requiring the DAT Act to be used for access.

Under the alternative involving a combination of legal authorising pathways, the DAT Act would need to be used to access any data (and output from that data) supplied using the DAT Act. The choice to use the DAT Act would be available for all other data (being data supplied using non-DAT Act pathways and data produced from using the supplied data to create the NDDA).

The following simplified examples illustrate when the choice would be available under the alternative involving a combination of legal authorising pathways:

Example 1 – access to data supplied

Three copies of datasets are supplied to the ABS and AIHW to create the NDDA – datasets A, B & C. Dataset A is supplied using the DAT Act, and datasets B & C are supplied using non-DAT Act authorisations.

Because it is supplied using the DAT Act, dataset A is ‘scheme data’. This means the DAT Act must be used to authorise access to dataset A by other parties through the NDDA.

Datasets B & C are *not* scheme data as they were supplied into the NDDA using non-DAT Act legal authorisations. As such, access to them by other parties through the NDDA can be provided through any applicable legal authorisation (which includes the DAT Act).

If access involves a combination of datasets, any combination involving access to dataset A must use the DAT Act. This would be the case for access to dataset A, to datasets A & B, to datasets A & C, and to datasets A, B & C.

If access does not involve dataset A, then the DAT Act is not required to be used, but can be used voluntarily. This would be the case for access to dataset B, to datasets B & C, and to dataset C.

¹⁴ For the purposes of this advice, it is assumed that the data that is sought to be accessed from the NDDA has not exited the DATA Scheme– that is, a legal authorising pathway is required to access the data.

¹⁵ Note, this approach would require existing data and related outputs under Release 1 to be resupplied and recreated using different (non-DAT Act) legal authorisations.

Example 2 – access to output from data supplied

Following on from example 1, in creating the NDDA, the ABS and AIHW use datasets A, B & C to produce the following datasets (these are referred to as ‘outputs’ under the DAT Act).

- A1 – produced solely from dataset A.
- AB1 – produced from datasets A & B.
- ABC1 – produced from datasets A, B & C.
- B1 – produced solely from dataset B.
- BC1 – produced from datasets B & C.
- C1 – produced solely from dataset C.

Datasets A1, AB1 and ABC1 are ‘scheme data’ because they were produced using data supplied to the ABS and AIHW through the DAT Act (being dataset A). This means the DAT Act must be used to authorise access to datasets A1, AB1 and ABC1 by other parties through the NDDA (or any combination of datasets that includes them).

Datasets B1, BC1 and C1 are not scheme data as they were produced from data supplied using non-DAT Act legal authorisations. As such, access to datasets B1, BC1 and C1 can be provided through any applicable legal authorisation (which includes the DAT Act).

The National Disability Data Asset Draft Charter

Principle 5 in the [National Disability Data Asset Draft Charter](#) states that:

Data will be protected under the Privacy Act 1988 and Data Availability and Transparency Act 2022. If someone doesn’t meet legal requirements under either of these Acts, they will face penalties. We will only give people access to data under strict conditions. If they don’t meet these conditions, we will take away their access.

Insofar as it relates to the DAT Act, this statement will be true to the extent that the DAT Act is used to authorise access to the NDDA. As noted above, access through the DAT Act is mandatory in cases relating to data supplied into the asset using the DAT Act. It is also optional in cases relating to data that was supplied using other (non-DAT Act) legal authorising pathways.

Note we have interpreted the statement in Principle 5 as relating to conditions of access, and not more generally to the use of data supplied to the ABS and AIHW for the purposes of building and maintaining the NDDA. The DAT Act will only apply to the use of supplied data by the ABS and AIHW to the extent that DAT Act was used to supply the data. If a combination of authorising pathways is used to supply the data being used to create the NDDA, the ABS and AIHW must comply with any applicable DAT Act requirements on the use of data supplied using the DAT Act, but not for the use of data supplied using other (non-DAT Act) legal authorisations.