Australian Research Data Commons

Submission to the Finance and Public Administration Legislation Committee - DAT Bill 2020

12 March 2021

The Australian Research Data Commons (ARDC) thanks the Finance and Public Administration Legislation Committee for the invitation to contribute to the inquiry into the Data Availability and Transparency (DAT) Bill 2020 provisions.

About the ARDC

The ARDC is a transformational initiative funded under the Australian Government's National Collaborative Research Infrastructure Strategy (NCRIS) enabling Australian researchers and industry access to nationally significant, data intensive eInfrastructure, platforms, skills and collections of high-quality data. In partnerships with organisations, ARDC facilitates work towards a coherent research environment to enable researchers to find, access, contribute to and effectively use data and services that maximise research quality and impact.

Value of Commonwealth Data to Research

As noted in our submission on the draft exposure Bill,[1] the ARDC strongly supports the objectives of the proposed data sharing scheme. The value of a scheme such as this to the research sector is reflected by a 2017 OECD survey that established 74% of scientists reported a 'High' or 'Very High' dependence on public sector information for research.[2] A recent analysis by the Institute for Methods Innovation confirmed that public sector data shared effectively with the research sector creates considerable societal value including to the government itself.[3] Key attributes of Commonwealth data that make it valuable to research include its coverage and authoritativeness.

ARDC Response

The ARDC acknowledges the potential of the scheme to trespass on privacy by virtue of the nature of some of the information intended to be shared. In terms of risk mitigation, the ARDC would point to a variety of mature features

[1] Australian Research Data Commons – DAT Bill Submission dated 6 November 2020.
[2] OECD 2019 Enhanced access to and sharing of data (EASD) - Reconciling Risks and Benefits for Data Re-use across Societies.
[3] https://ardc.edu.au/resource/investigating-the-link-between-research-data-and-impact/

of the research sector including ethics frameworks, grant processes, and research integrity regulation. In response to the issues raised by the Senate Standing Committee for the Scrutiny of Bills,[4] the ARDC suggests:

Use of the Scheme to be Mandatory

As stated in the Explanatory Memorandum, '(t)he Bill establishes an alternate pathway for the sharing of government data. All existing pathways and mechanisms for data sharing continue to operate unaffected as the Bill does not replace or change these arrangements'.[5]

The ARDC notes that while this approach may be pragmatic from the perspective of the government and some users, key protections in this Bill may not apply if entities do not use the scheme. Ideally, the Bill would outline a transition period (e.g. three years) after which all provisioning of and access to Commonwealth data is to be under the scheme. This would reduce the burden on individuals to understand how their data might be shared by the government whilst improving the consistency of protections applied whenever data is shared.

Government Entities to be Accredited

The safe provisioning of data is a critical step in the chain of trust necessary to share sensitive data appropriately. There appears to be no measures in the Bill addressing the risk of trespass on privacy caused by the incorrect de-identification or provisioning of sensitive data by a government entity.[6] This includes during instances of government to government sharing that may occur. The ARDC proposes that to reduce privacy risks further, all entities involved in sharing Commonwealth data should be accredited; this should include government entities.

The ARDC also agrees that key matters of the accreditation framework should be explicit in legislation.[7] This aims to prevent government from unduly increasing accreditation obligations on Accredited Data Service Providers (ADSP) and Accredited Users of the scheme, especially if it is solely to mitigate a risk originating from an act or omission by one or more government entities.

'Unreasonable or Impracticable to Gain Consent'

Members of the public can already validate or correct some public sector data themselves.[8] Likewise, services such as My Health Record[9] and the Consumer Data Right[10] allow individuals to choose what data they share with whom. Globally, there are robust personal data sharing services[11] and cooperatives[12] that allow tailored control over access to sensitive data for a variety of purposes. As such, occasions when it is 'unreasonable or impracticable to gain consent' directly from data subjects should be increasingly rare for data custodians.

Under the proposed scheme, data custodians should have an obligation to make 'reasonable efforts' to verify directly with data subjects the accuracy of the data and the approved (secondary) purposes for which it can be shared prior to that data being made available more broadly.[13] The data subject may, for example, decide to enable further access

[4] Senate Scrutiny Digest 1/21 dated 28 January 2021, pp.4-12.
[5] DAT Bill 2020 Explanatory Memorandum regarding Interaction with other Schemes, p.7, Para 22.
[6] Productivity Commission 2017, Data Availability and Use, Report No. 82, Canberra, Recommendation 6.11.
[7] Senate Scrutiny Digest 1/21 dated 28 January 2021, p.10, para 1.31.
[8] Online services such as myGov enable users to change personal data directly.
[9] https://www.myhealthrecord.gov.au/
[10] https://www.cdr.gov.au/your-rights
[11] https://mydata.org/
[12] https://www.midata.coop/en/home/
[13] Currently, the Explanatory Memorandum defines data as having exited the scheme once corrected. (DAT Bill 2020 Explanatory Memorandum regarding Clause 21, p.32, Para 191) The ARDC recommends corrections should occur as data enters the scheme

only to de-identified data or else limit the secondary purposes for which data relating to them can be accessed. The Data Commissioner should be responsible for improving over time the consent mechanisms available to data subjects as well as facilitating consistent application of consent choices of individuals across all scheme entities. As stated in our previous submission, the ARDC believes this would be best achieved by ensuring the Commissioner has an obligation under Section 41 of the Bill to provide interoperability services that are mandatory for entities to use.[14]

In cases where it remains 'unreasonable or impracticable' for the data subject to express their choice, despite the reasonable efforts of the data custodian, then data of those individuals should only be shared in a de-identified way for approved purposes of the scheme unless there are exceptions authorised by legislation.[15]

A legislated exception should be possible after a data custodian makes a request to the Commissioner (on behalf of either themselves or others) to share identifiable data for one or more approved purposes in cases where it is otherwise 'unreasonable or impracticable to gain consent' from the individuals concerned.

The legislation should require the request to be referred to an independent body responsible for weighing the interests of data subjects against the requested purpose(s).[16] An example of such a body might be a Human Research Ethics Committee approved by the National Health and Medical Research Council.[17] If access is recommended by this body, the data custodian then makes the data available to participating entities in accordance with normal arrangements of the scheme and any specific conditions stipulated by the independent body.

Co-Regulation of the Scheme

While the Committee for the Scrutiny of Bills raised an issue with there being a separate mechanism for privacy complaints under the Scheme,[18] the ARDC notes there may also be value in more clearly mirroring the co-regulation framework of the Consumer Data Right scheme.

If co-regulation of the scheme were adopted, individuals would know to approach the Office of the Australian Information Commissioner (OAIC) whenever they had a privacy complaint, regardless of the scheme to which it is related. In contrast, participating entities would engage primarily with the Office of the National Data Commissioner (ONDC) for matters related to the improved sharing of Commonwealth data. Therefore, the ONDC would have a role similar to that of the Australian Competition and Consumer Commission under the Consumer Data Right scheme.[19]

Approved Purpose - Research and Development

The ARDC supports the continued inclusion of 'research and development' as an approved purpose of the scheme. The ARDC agrees with the Senate Standing Committee for the Scrutiny of Bills that the scope of each purpose should be detailed further in legislation.[20] Preferably, this would mirror or reference an existing definition, such as that used by Treasury to categorise budgetary expenditure for Research and Development purposes.[21]

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and before it is shared with users (other than an ADSP assisting government entities such as through the provision of an accredited Consent Management services for the purpose of correcting data and gaining consent).

[14] Australian Research Data Commons – DAT Bill Submission dated 6 November 2020. pp. 5-6.

[15] Productivity Commission 2017, Data Availability and Use, Report No. 82, Canberra. Recommendation 6.16.

[16] Productivity Commission 2017, Data Availability and Use, Report No. 82, Canberra. Recommendations 7.1 and 7.2.

[17] https://www.nhmrc.gov.au/research-policy/ethics/human-research-ethics-committees

[18] Senate Scrutiny Digest 1/21 dated 28 January 2021, p.8, para 1.21.

[19] https://www.cdr.gov.au/about

[20] Senate Scrutiny Digest 1/21 dated 28 January 2021, p.6, para 1.15.

[21] OECD Frascati Manual 2015: Guidelines for Collecting and Reporting Data on Research and Experimental Development. The Measurement of Scientific, Technological and Innovation Activities, Ch 2. https://doi.org/10.1787/9789264239012-en.

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Public Interest Test

Publicly funded research in Australia is already highly regulated to ensure it is in the public interest, including: a research agenda reflecting the policy priorities of government; a budget approved by parliament; a strategy and funding guidelines issued by a responsible Minister; a competitive grants process administered by the public sector; and, oversight by an independent ethics committee as well as a host institution with reputational 'skin in the game'.

The ARDC would hope this scheme recognises that approved publicly funded research projects have already been assessed to be in the public interest. The Bill should not enable data custodians to re-evaluate the public interest of a research project, as this risks duplicating already mature processes that are trusted by the public.

A Data Catalogue to be Mandatory

In our submission on the exposure draft of the Bill, the ARDC recommended strongly that data custodians should have to make all data they control publicly findable in a data catalogue, regardless of whether it is the subject of a data sharing agreement.[22] The ARDC continues to view inclusion of this as a legislated obligation on data custodians as essential for the proper functioning of the scheme.[23] Additionally, the Commissioner should report to parliament any publicly funded data that custodians have sought to be exempt from making findable via a catalogue.[24]

In terms of the focus of this inquiry, it is important to note that a public facing data catalogue (which lists datasets including the data elements and the data custodian but does not necessarily make the data accessible) is a prerequisite for stakeholders to identify both potential benefits as well as risks that may result should that data be shared. These risks will not always be immediately obvious to government entities,[25] and so this mechanism should be mandatory, enabling both individuals and experts alike to offer advice on potential risks if the data were shared.

Proposed Data Sharing Agreements as Public Notices

Further to making the public aware of datasets that are potential candidates for sharing under the Scheme, the ARDC recommends that data sharing agreements should be posted publicly prior to any sharing actually occurring under that agreement. The aim is to identify issues related to the specific context of sharing and the entities involved. To achieve this, the ARDC recommends Section 33(1) be amended to ensure the proposed data sharing agreement is available as a public notice for at least 30 days prior to any data being shared under that agreement.

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[22] Australian Research Data Commons – DAT Bill Submission to the ONDC on the draft exposure Bill dated 6 November 2020.
[23] Suggested to be under Part 6.4 – Data Sharing Scheme Instruments.
[24] Productivity Commission 2017, Data Availability and Use, Report No. 82, Canberra. Recommendation 6.1.
[25] https://www.abc.net.au/news/2016-09-29/medicare-pbs-dataset-pulled-over-encryption-concerns/7888686