

Data Availability and Use inquiry
Productivity Commission
GPO Box 1428
CANBERRA CITY ACT 2601

19 DEC 2016

Dear Commissioners

Submission in relation to the Draft Report

Thank you for the opportunity to provide comments on the Productivity Commission's *Data Availability and Use Inquiry* Draft Report.

I am pleased that the Commission recognises the importance of a strong privacy and data protection framework to Australia's data future. Community acceptance and trust in the handling of personal data by governments and business, built through genuine safeguards, meaningful transparency, and effective management of risk is vital for the implementation of any reforms. Privacy is not a barrier to improving data availability and use, but an essential component of a robust and sustainable system.

The proposed framework has the potential to provide better access to data for business, government and research while at the same time providing enhanced privacy protections for individuals. In particular, a central source of guidance and expertise in the form of the proposed National Data Custodian (NDC) and Accredited Release Authorities (ARAs) may help to alleviate the pressure on agencies and data custodians, who are increasingly called upon to share and release data, but may lack the skills and resources to do so effectively.¹

However, great care must be taken when balancing privacy rights against collective (and in particular, commercial) benefits.

De-identification

The Draft Report calls for better practical guidance on de-identification and for the Office of the Australian Information Commissioner (OAIC) to be afforded a power to certify, at its discretion, when entities are using best practice de-identification processes.²

While there is a need for better practical guidance on de-identification, it is important to note that de-identification is a complex, context specific exercise, the efficacy of which is the subject of real and continuing academic debate.³ Further, as the draft report notes, assessing the risk of re-identification is virtually impossible, as we cannot know what information or technology may be available to attackers in the future.⁴ As researchers at the University of Melbourne recently

¹ See, eg, Productivity Commission, *Data Availability and Use Inquiry Draft Report*, page 257.

² Productivity Commission, *Data Availability and Use Inquiry Draft Report*, Draft Recommendation 5.1, page 200.

³ See, eg, Yves-Alexandre de Montjoye et al, 'Unique in the shopping mall: On the reidentifiability of credit card metadata' (2015) 347 *Science* 536; David Sanchez et al, 'Comment on "Unique in the shopping mall: On the reidentifiability of credit card metadata"' (2016) 351 *Science* 1274-a; Yves-Alexandre de Montjoye, 'Response to Comment on "Unique in the shopping mall: On the reidentifiability of credit card metadata"' (2016) 351 *Science* 1274-b.

⁴ Productivity Commission, *Data Availability and Use Inquiry Draft Report*, page 198.

demonstrated in relation to de-identified MBS and PBS data, re-identification is always a risk, particularly when data is made public.

It should be noted that my office is currently preparing a consultation document on de-identification. Although our work is far from being finalised, the weight of independent research shows that the 'release and forget' approach to open data that has been adopted by most Australian governments is misconceived.

Similarly, a regime for 'certified best practices' risks over-simplifying de-identification processes. Given the complex, context-specific and unreliable nature of de-identification processes and the difficulty of clawing back published data once released, this may do more harm than good. Further, it is unclear how such a regime would interact with OAIC's other regulatory functions. Would compliance with certified best practice provide immunity from liability if the data was subsequently re-identified? In most other contexts, compliance with best practice is indicative, but not determinative of whether an organisation has met the required standard of behaviour. It does not seem appropriate for the OAIC to mix regulatory and endorsement roles.

It is important that any guidance or certification regime does not treat de-identification as a straightforward, push-button solution to privacy risks. Effective de-identification requires expertise and a deep understanding of both the data in question and the external information environment. It cannot be reduced to a compliance check-box.

Finally, given the rapid pace of development in technology and analytical methods, it is essential that research into the science of de-identification is encouraged. Academics, industry and civil society should all be engaged to help develop more robust methods of de-identification and to explore other means of unlocking value in restricted data without compromising privacy. The best way to improve the security of de-identification procedures is to encourage scrutiny from as many angles as possible.

Comprehensive right

Draft Recommendation 9.2 proposes a new 'Comprehensive Right' for consumers to access digitally held data about themselves. The report highlights the importance of informed, meaningful consent and canvasses some options for making privacy policies and terms and conditions more readily understood. However, the proposed Comprehensive Right does not include a right to be informed about how Consumer Data is used.

The Draft Report also notes that:

*'While the changes proposed aim to enable consumers to exercise more control over the collection and use of data on them, the onus remains on individuals to make responsible choices about whom they provide personal information to in the first place and for what purposes.'*⁵

Just as consumer information is essential to the efficient operation of any market, access to information about how one's data is being used or disclosed is a precondition to being able to exercise any rights of control (under the Comprehensive Right or otherwise). Given the proposed framework's reliance on individual choices to shape the Consumer Data market and the necessity of consumer trust and acceptance to the success of any reforms, the Commission should also consider strengthening consumer rights to information about how their data is used and disclosed,

⁵ Productivity Commission, *Data Availability and Use Inquiry Draft Report*, page 18.

and to develop recommendations about how this can be achieved. Experience suggests that consumers cannot possibly manage the complexity or demands of meaningful consent.

The VPDSF

The Draft Report highlights risk assessment and security as important but does not offer substantial detail on how these should be managed.⁶ It also notes that there is no overall policy framework for data security in Australia, and that there is limited Australian guidance on implementing an approach to data security that will balance the need for protection with appropriate access to data.⁷

On 28 June 2016, I published the Victorian Protective Data Security Framework, which provides the overall scheme for managing protective data security risks in Victoria's public sector. The framework was developed to help Victorian public sector organisations:

- identify information and determine ownership,
- assess the value of information,
- identify and manage protective data security risks,
- apply security measures,
- create a positive security culture, and
- mature their protective data security capability.

While still in its infancy, the VPDSF is an example of a proportionate and risk managed approach to security that empowers government business to function in an efficient, effective and economic manner. The Commission may wish to consider the VPDSF as an example of an overall policy framework for managing data security in the Australian context.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'David Watts', with a long horizontal flourish extending to the right.

DAVID WATTS

Commissioner for Privacy and Data Protection

⁶ Productivity Commission, *Data Availability and Use Inquiry Draft Report*, page 221–4.

⁷ Productivity Commission, *Data Availability and Use Inquiry Draft Report*, page 257.