



Submission to the Statutory Review of the Data Availability and Transparency Act 2022

Introduction

The Commonwealth Department of Education (the department) welcomes the opportunity to make a submission to the Statutory Review of the *Data Availability and Transparency Act 2022* (the DAT Act).

The department has been involved in discussions surrounding the DAT Act and the DATA Scheme since before its enactment in 2022.

The department strongly supports the push for improved and streamlined data sharing across not only the Commonwealth government but also the broader Australian data landscape. The education sector contains a wide range of stakeholders across Commonwealth government agencies, state and territory bodies, non-government organisations and the private sector. Enabling better sharing of information between these bodies is critical to ensure evidence-based decision making across the entire sector.

As a result, data sharing is a priority for the department. There is a widespread understanding that enabling safe and secure access to data will inform and improve policy and program development and delivery across the entire sector.

The department is both a data custodian and an accredited user under the DAT Act but has yet to be involved in a data sharing activity using the DAT Act. While the department has been involved in negotiations to share data under the DAT Act, existing agreed pathways have been ultimately used for any eventual sharing as they are significantly more efficient at this time.

The department will continue to support the use of the DAT Act where it streamlines processes or overcomes existing policy or legislative barriers and would welcome the opportunity to participate in any further work to consider changes or refinements to the Act if the decision is made to continue its operation.

Has the operation of the DAT Act advanced its objects? How does the DAT Act add value in the wider data sharing context?

The DAT Act has played some role in advancing its objects. It has increased the emphasis on the importance and value of improving data sharing and helped drive a culture of greater sharing across the public service.

The DAT Act has helped reinforce best practice when it comes to the sharing of public sector data, especially around the importance of the Five Safes Framework/Data Sharing Principles and clear, consistent terminology around data sharing.

However, in terms of practical data sharing, the department has found that other mechanisms have been more efficient, effective and flexible. The department is involved in more sharing through mechanisms such as the Australian Bureau of Statistics' (ABS) Person Level Integrated Data Asset (PLIDA). These other channels have been better able to deal with having multiple custodians of data, at different levels of government, and a broader range of users.

In practice, the department has not yet been able to use the DAT Act to unlock further data sharing that couldn't be undertaken in another way. This relates to the framework and protections in the DAT Act, which have been designed for understandable reasons but have operated to limit its effectiveness.

Later in this submission we discuss our experience with the DAT Act and areas where modifications to the DAT Act might help it better achieve the shared objective of greater data sharing and use.

In the context of a data sharing environment with existing mechanisms which can effectively deal with the idiosyncrasies of different data sets, the DAT Act's best potential to add value is as an alternative data sharing mechanism that can unlock additional data sharing opportunities, as originally intended in its inception. The department does not support the DAT Act becoming the preferred nor only data sharing mechanism.

Does the DAT Act improve information flows between public sector bodies and accredited entities?

While the department has been a participant in the DATA scheme, it has not yet shared data under the DAT Act. The department has explored sharing data via the DAT Act several times, but in these cases using the DAT Act has been more challenging than using existing pathways for data sharing.

The department has been involved in the negotiations for the sharing of education data for the purposes of establishing the National Disability Data Asset (NDDA). The department has spent the last two years engaging in discussions with the ABS and the Department of Social Services and non-Commonwealth education bodies to use the DAT Act to facilitate data sharing for the NDDA. Sharing data via the DAT Act for the NDDA has posed several complex challenges for the department and the project leads.

Several alternatives to the DAT Act have emerged in the data sharing environment and been refined over the last few years. This includes the use of the PLIDA to facilitate access, and mechanisms such

as the Australian Early Development Census (AEDC) data access protocols. These mechanisms have been tried, tested and streamlined over time. Much of the data sharing with state and territory bodies can and does already occur via these different mechanisms.

In contrast, attempts to use the DAT Act for similar sharing have been inefficient, burdensome and ultimately unsuccessful. The department's experience has been that other mechanisms have been more effective at facilitating data sharing – whether that be because they are able to involve less administrative burden or are able to be more flexible to specific considerations in sharing public sector data (such as the interests of states and territories).

For example, the department recently received a DAT Act data sharing request for AEDC data. This data is already accessible via external providers in a timely and efficient manner. The department has an existing agreement with states and territories regarding the sharing and release of AEDC data as they are stakeholders through the AEDC national committee. Providing the data via the DAT Act scheme was a more complex, more burdensome process that would have required agreement by states and territories to change an already agreed process which was fit for purpose to meet the request.

To facilitate improvements to data flows in the education domain, the department strongly supports the DAT Act allowing non-government bodies to become accredited users. Ideally, work would be undertaken to investigate whether state and territory entities and non-government bodies could become custodians under the DAT Act or DATA Scheme, potentially via parallel legislation. This would make the DATA Scheme a more attractive mechanism for the sharing of education data, where there can be multiple custodians at different levels of government, in turn improving the efficiency and effectiveness of data sharing in the education sector.

Does the DAT Act improve information flows between public sector bodies and accredited entities?

The department has identified several areas where changes would improve the DAT Act or the DATA Scheme.

Expansion of participants

To facilitate data sharing in the education sector the DATA Scheme should be expanded further to allow greater participation by states, territories and non-government bodies. In education, this is particularly relevant as non-government school students comprise 40% of the student population in Australia. The participation by these bodies would significantly improve access to public sector data and could promote reciprocal data sharing for the education sector.

Expanding the ability of more bodies to not just participate, but also to be custodians of data would improve the utility of the DATA Scheme for education data. This is especially relevant for education, where there are different custodianship arrangements for different data sets.

Accreditation

The accreditation process for the DAT Act is burdensome with significant effort and time required. The department took several months to become an accredited user. While due diligence for

accreditation is required, the assessment of safe people on a project-by-project basis may render a burdensome initial accreditation process as duplicative.

If the DAT Act is expanded to allow non-government organisations and smaller organisations with limited resources, the accreditation system will need reform to further promote data sharing.

Simplification and provision of further practical guidance

The DAT Act framework is complex, with a significant number of requirements that must be met before data sharing can occur under the DAT Act. There is limited guidance and no case law to assist the department to interpret provisions or navigate associated issues.

Review of consent provisions and the public interest test

The DAT Act may serve as a useful framework in cases where consent (express or implied) cannot clearly be relied upon to facilitate data sharing, and where portfolio legislation cannot authorise the sharing.

However, the ability to share data under the DAT Act in the absence of consent is limited.

Under the DAT Act the bar to share data without obtained consent is high. This includes, for example, where there is a need to establish that it would be unreasonable or impractical to seek relevant individuals' consent.

There is also hesitation around relying on those provisions in the DAT Act where there is uncertainty around how far they extend and the appropriateness of utilising them in view of reputational and social licence considerations. These concerns should not be taken as a cultural resistance to sharing. The department wants to share more but its ability to push further on data sharing is limited by the legal advice it receives about what it can and can't do with regard to the DAT Act.

The department recognises the need to place appropriate constraints around sharing data containing personal information. However, it supports any further review of whether those provisions are achieving the right balance and/or further guidance for data custodians to assist decision making around these matters. Simplifying the public interest test in the DAT Act may facilitate more fruitful conversations around the effective use of the DATA Scheme.

Timeframes

The department would welcome clarity around model data sharing request timeframes. While this may not need to be codified in legislation, more regular practical guidance on the handling of requests would be welcome.

The DAT Act should be an additional, complementary pathway, not the only pathway for data sharing

In broader efforts to encourage data sharing, the department recommends that the DAT Act be maintained as one of the mechanisms for data sharing, with existing data sharing options allowed to remain in place.

Resolving the issues noted above would improve the operation of the DAT Act. However, even if those issues are resolved it is likely that the DAT Act will not always be the most efficient or appropriate legislation under which to share data.

Where there are existing mechanisms to share data, such as PLIDA, it can be more efficient and effective to allow these to continue, with the DAT Act working as a complement. Requiring existing mechanisms to be brought under the DAT Act would divert valuable and scarce data governance resources from finding ways to promote more data sharing to instead trying to fit existing effective arrangements into a different legislative framework.

Should the DAT Act be allowed to sunset?

The DAT Act plays a useful role in setting expectations that data will be shared and driving a culture of data sharing. However, major reforms to the DAT Act are required if the Act is to achieve the benefits that the Australian community desires. The department would welcome a taskforce or working group to consider changes or refinements to the DAT Act if the decision is made to continue its operation.

Since the *Data Availability and Use Productivity Commission* inquiry report in 2017, other pathways to sharing data have significantly improved. This has lessened the need to rely upon the DAT Act to facilitate data sharing as a sole pathway.

The department reiterates that it considers the best use of the DAT Act is as an alternative and complementary pathway to facilitate data sharing where existing legislative mechanisms are unable to easily facilitate it. The department does not support the DAT Act being the preferred or only mechanism for data sharing.

Additional comments on Dataplace

The operationalisation of the DATA Scheme should be improved to further facilitate data sharing under the DATA Scheme. The department has found Dataplace, as the primary platform for data sharing under the Scheme, particularly burdensome. Reducing these burdens would allow for more efficient use of the limited resources within the data sharing landscape.

There is no easy way to initially communicate through the system before commencing a request in Dataplace. Establishing direct contact between requestors and the Data Custodian on Dataplace would assist with issues such as refining the scope of requests or identifying the correct data before a request is submitted. This would help cut down on requests that can be more appropriately scoped or facilitated through other mechanisms. Further guidance on the platform on how to effectively manage requests would also be supported by the department.

The department would also support more streamlined registration of data sharing agreements outside of the DATA Scheme into Dataplace. Currently the process for doing so is complex and time intensive.

In addition, processing and actioning requests in Dataplace can be quite time consuming. Routine procedures are often overly onerous.