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Comments on the Statutory Review of the DAT Act - Issues Paper

General Comments

The Department of Home Affairs (the Department) would like to thank the Office of National Data Commissioner and Department of Finance for providing the opportunity to comment on the Issues Paper for the Statutory Review of the *Data Availability and Transparency Act 2022* (DAT Act). Below are some of its observations and comments.

While the DAT Act was originally intended to address existing barriers to data sharing, in practice, its overlapping and stringent compliance requirements have introduced new unintended obstacles. In our experience, the Act has not significantly improved information flows between public sector bodies and accredited entities. As a result, the Department has continued to rely on pre-existing data sharing frameworks where possible. Limitations in the scope of the scheme have, in fact, hindered the Department's ability to effectively engage with the DATA Scheme, namely:

- The exclusion of national security and law enforcement-related purposes as well as operational data while understood and supported given requirements of other legislative frameworks, it does limit the DATA Scheme's applicability to the Department's core responsibilities. (Issues Paper p12). Any future consideration of expanding the Scheme to include these domains would require careful legal and policy consideration to ensure alignment with existing protections.
- The requirement for data sharing agreements to meet a range of prescriptive conditions. For example, data sharing agreements must specifically reference DAT Act, which limits the Department's ability to rely on pre-existing arrangements. Similarly, the requirement to incorporate direct references to the data sharing principles may not align with existing legal and operational frameworks. Notably, as observed in the Issues Paper, only 8 data sharing agreements have been registered under the scheme, despite the existence of over 11,000 data sharing agreements across Commonwealth entities) (Issues Paper p10).
- The Scheme's privacy protections and output requirements restrict the sharing of personal information, in particular, the conditions around the use and treatment of personal information limit data sharing to only very narrow circumstances. At this stage the Department relies on existing legal frameworks and agreements such as Memoranda of Understanding (MoU) and Letters of Exchange (LoEs) for data sharing including de-identified personal information where it is lawful and appropriate to do so. To make the DATA Scheme more operationally useful, consideration could be given to opening additional pathways for sharing personal information under tightly defined and in high-trust conditions, allowing for accredited entities with proven capability in handling sensitive data securely and ethically.
- Consideration was given to the sharing of information under the DAT Act, however most of the sharing was already happening under its existing data sharing arrangements, such as MoUs or

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LoEs. The Department is sharing (where it legally can) de-identified personal information under existing data sharing arrangements.

- The process for becoming an accredited user under the DAT Act is complex. The procedural complexity and time required to complete accreditation create a poor user experience - particularly when existing frameworks may offer a more accessible alternative. Notwithstanding these challenges, the Department intends to commence the accreditation process to enable future participation in the Scheme.
- The scope and exercise of the National Data Commissioner's powers remain unclear: While the Commissioner holds a wide range of powers under the DAT Act, the Issues Paper notes that only a limited subset of these powers has been exercised to date, for example the making of two data codes under Section 126. The Department does not have legislative expertise nor capacity to fully interpret the implications of the Commissioner's unused powers. It remains unclear whether the limited exercise of powers reflects their breadth and complexity, or simply that there has not yet been a need to invoke them.
- It is difficult to quantify the value the DATA Scheme provides to the Department. The Australian Border Force is prohibited from sharing data under Section 70(2) of the DAT Act, along with other relevant legislations which may create complexities in the sharing of sensitive operational data, which in turn would exclude a significant portion of the Department's data. In addition, the Department has not observed an uptake in the use of the Scheme's provisions. Together, these factors limit the Department's ability to realise or assess the practical benefits of the DATA Scheme.

Response to specific questions outlined in the paper

Question 1: Has the operation of the DAT Act advanced its objects?

Home Affairs response: The Department is of the view that the operation of the DAT Act has made only limited progress towards achieving its stated objects.

Question 2: Do you consider that the DAT Act achieved these objects and are there areas for improvement?

Home Affairs response: Noting that the Department is not an accredited user under the DAT Act, it would be challenging for the Department to comment on DAT Act meeting its objectives. In addition, under section 17(2)(iii) of the DAT Act, the ABF is excluded from data sharing on the basis that it is administered by the Minister responsible for the Australian Border Force Act 2015 (the ABF Act). Combined with the broader complexities associated with complying with the Act's requirements, this exclusion has contributed to a low level of uptake.

From that perspective, there is a clear opportunity to consider changes that would simplify participation and enhance the scheme's effectiveness.

Question 3: Does the DAT Act improve information flows between public sector bodies and accredited entities?

Home Affairs response: in the Department's experience, the DAT Act work has not materially improved information flows between public sector bodies and accredited entities. Instead, the Act's overlapping, and stringent compliance requirements have, in many cases, introduced additional barriers to data sharing. As a result, the Department has continued to rely on existing data sharing arrangements.

Some specific requirements that have contributed to these barriers include:

- The exclusion of national security and law enforcement-related purposes, as well as operational data.

- The requirement to enter into a data sharing agreement that complies with a number of overly prescriptive conditions. Notably, as observed in the Issue Paper, only eight data sharing arrangements have been registered under the data scheme.
- The privacy protection and output requirements for personal information which restrict sharing to only limited circumstances.

Addressing some of the above barriers may assist in improving the flow of information across public sector bodies and accredited entities and provide greater utility to the DAT Act.

Question 4: How does the DAT Act add value in the wider data sharing context?

Home Affairs response: The Department considers it difficult to quantify the value of the DAT Act provides in the broader data sharing landscape. The ABF is barred from participating under section 17(2) of the DAT Act, and the Department has not seen a significant uptake in the use of its provisions.

In addition, the requirements set out in the DAT Act are overlapping and stringent, creating and create further barriers to data sharing. The Act does not strike an effective balance between safeguards and practical ease of access, which limits its added value relative to existing data sharing arrangements.

Question 5: What changes could be made to the DAT Act or the DATA Scheme to make it more effective in facilitating access to, sharing and use of public sector data?

Home Affairs response: to improve the effectiveness of the DATA Scheme, prescriptive requirements within the Act could be streamlined to better facilitate information flows between entities.

A reconsideration of certain exemptions, particularly where protections already exist under other legislative frameworks could enable a broader range of departmental data sharing to fall within the scope of the scheme.

The Department also notes concerns around any expansion of access to public sector data to additional entities ('onsharing'). Given the sensitive nature of much of the Department's data, the need for case-by-case security classification, and existing legislative and privacy obligations, such expansion could place additional pressure on existing departmental processes and capabilities.

Question 6: Should the DAT Act be allowed to sunset?

Home Affairs response: Given the limitations identified in this submission including the exclusion of operational data, low uptake of the scheme, and the administrative complexity involved, the Department considers that allowing the DAT Act to sunset is a valid policy option. At a minimum, options to streamline the Act's provisions should be explored to reduce barriers to effective data sharing and promote the benefits of such sharing across agencies.