



Law Council
OF AUSTRALIA

Office of the President

22 April 2021

Senator Claire Chandler
Chair
Senate Finance and Public Administration Legislation Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By email: fpa.sen@aph.gov.au

Dear Chair

Data Availability and Transparency Bill 2020 and Data Availability and Transparency (Consequential Amendments) Bill 2020

The Law Council of Australia appreciates the opportunity to have appeared before the Senate Finance and Public Administration Legislation Committee (**Committee**) on 20 April 2021 in relation to the Data Availability and Transparency Bill 2020 and Data Availability and Transparency (Consequential Amendments) Bill 2020 (**the Bills**).

Following on from comments made during the public hearing, the Law Council seeks to provide a supplementary submission to its written submission dated 17 March 2021. In particular, the Law Council notes the discussions regarding the uncertain scope and practical application of aspects of the proposed scheme, and the perceived reliance on yet-to-be produced guidance material that will address matters such as data sharing arrangements and the exception for obtaining consent where it is 'unreasonable or impracticable' to be obtained.

On the latter point, the Minister for the National Disability Insurance Scheme and Minister for Government Services advised the Scrutiny of Bills Committee on 4 March 2021 that an Addendum to the Explanatory Memorandum has been prepared to address concerns raised by that Committee, and that this Addendum will be tabled in the House of Representatives as soon as practicable.¹ This step is appreciated, however the Addendum would have been a useful document to have regard to during the Committee's inquiry as this is a key threshold issue under the Bills as presently drafted.

In relation to the National Data Commissioner's ability to produce guidelines and guidance material under the Bills, comments from the Office of the National Data Commissioner at the public hearing suggest that the passage of the Bills should be secured before guidelines are developed. The Law Council notes that in the absence of these guidelines being made available, there remains significant uncertainty as to how the scheme will operate in

¹ Senate Standing Committee for the Scrutiny of Bills, '*Scrutiny Digest 5 of 2021*' (17 March 2021), 36.

practical terms, exacerbating concerns of many submitters as to the proportionality of the proposed measures.

As such, the Law Council submits that the Committee should consider recommending that, where possible, exposure drafts of guidance material that is to be developed pursuant to clause 127 of the primary Bill relating to the data sharing scheme should be available for scrutiny prior to parliamentary debate on the Bills.

Further, the Law Council reiterates its earlier recommendation that guidelines developed in relation to the data sharing scheme would be more appropriately deemed a legislative instrument and therefore subject to parliamentary scrutiny and potential disallowance.² Such an approach would allow for appropriate oversight of guidelines that are likely to play a key role in how the proposed scheme operates in practice. This remains the preferred approach for reasons already outlined.

While the Law Council does not oppose the implementation of principles-based legislation that is underpinned by more prescriptive rules, it notes that it remains important that there is a degree of clarity as to the scope of those rules to allow for adequate scrutiny of the proposed scheme's practical effect and proportionality.

The Law Council would be pleased to provide any further assistance that the Committee may require. Please contact Mr Nathan MacDonald, Principal Policy Lawyer, on (02) 6246 3721 or at nathan.macdonald@lawcouncil.asn.au in the first instance.

Yours sincerely



Dr Jacoba Brasch QC
President

² Law Council of Australia, 'Submission on the Data Availability and Transparency Bill 2020 and Data Availability and Transparency (Consequential Amendments) Bill 2020' (17 March 2021), 23.