

27 October 2021

Digital Identity Legislation Engagement
Digital Identity and myGov Division
Digital Transformation Agency (DTA)
50 Marcus Clarke Street Canberra ACT 2601

Dear Directors

Submission to Digital Transformation Agency consultation on draft Australia's Digital Identity Legislation

Thank you for the opportunity to make a submission regarding Australia's Digital Identity Legislation. Enshrining a secure and flexible digital identity framework is a critical step in digital service transformation in Australia. We welcome the development of the legislation and support its passage, subject to amendments to improve and clarify the administration of the scheme.

This submission is made by the Technology Council of Australia (the TCA), Australia's peak industry body for the tech sector. The Australian tech sector is a key pillar of the Australian economy, contributing \$167 billion to the Australian economy annually, and employing 861,000 people. This makes the tech sector equivalent to Australia's third largest industry, behind mining and banking, and Australia's seventh largest employing sector.

With over 70 member organisations, including leading Australian software as a service and platform companies, multinational companies, and venture capital and investment advisory firms, the TCA represents a diverse cross-section of the Australian tech ecosystem.

Many of the TCA's members provide digital identity solutions or services enabled by them. As such, we strongly support the proposed expansion of the Australian Government's Digital Identity System to enable a broader range of participants, including companies and state and territory governments, to be accredited under the Scheme. This will encourage greater innovation, interoperability and security in digital service delivery and transactions. In doing so, it will accelerate the rollout of better consumer and business services.

We also support the Legislation providing strong protections for consumer privacy and protection, as this is essential to ensure the integrity of data and identity services, and to build public trust and confidence in the scheme.

TCA position on best practice regulatory design for the digital economy

The TCA believes Australia can and should be a world leader in developing and adopting new tech products and services. To do this, we need a regulatory environment that is proportionate and predictable, interoperable with other jurisdictions, and that consistently follows a set of best practice regulatory principles.

Making Australia a leader in digital economy regulation will have a direct economic benefit. Modelling by Accenture shows that economies that are leaders in digital economy regulation grow on average by 6.3% per year. Countries that are medium performers grow by 4.3%, while laggards at regulation grow by 2.9%.

Benchmarking shows Australia is currently sitting between a laggard and medium performer in our regulatory performance in the digital economy. Modernising our regulatory models is critical to meeting our jobs and growth goals.

The TCA recommends five principles for best practice policy development in the digital economy:

- **Informed and coordinated policy development:** tech regulation and policy development inherently addresses novel concepts and issues. For this to be effective it requires policy-makers to have sufficient time, stakeholder input and expertise to make informed decisions. This avoids unintended consequences due to information asymmetry.
- **Proportionate:** regulatory interventions should be proportionate and targeted towards the objectives they are seeking to achieve, while minimising unintended consequences.
- **Timely:** Premature regulatory interventions can disproportionately impact emerging business models and start-ups. Conversely, an extended period of regulatory uncertainty can see innovators look elsewhere. To balance these trade-offs regulators should be proactive in considering potential policy levers, provide appropriate room to innovate and provide industry clarity.
- **Consistency and interoperability:** the tech industry is global by nature and very few policy questions are unique to Australia. Regulation should take global frameworks into account and strive towards harmonisation and interoperability where practicable.
- **Bias for innovation and growth:** being a leading digital economy means that Australia should aim to be an economic and innovation leader by encouraging the responsible and early introduction and deployment of technologies. This must actively take the positive economic and social benefits of being a global innovator.

Our view is that the proposed Australia's Digital Identity Legislation is generally consistent with these principles. We therefore support the introduction of the draft Australia's Digital Identity legislation as both an exemplar of good practice digital economy policy development, as well as being a critical enabling reform for an expanded, secure and trusted digital identity scheme in Australia.

The main area where we believe the Scheme requires clarification is in relation to its administration. In particular, we would like to discuss with the DTA how the DTA, industry and other parties will work together as digital identity solutions are accredited and implemented via digital services and products to evaluate progress and develop further rules clarifying the Scheme's approach.

We would also be grateful to discuss how the approach in this legislation could be reflected in requirements currently proposed under other legislative reforms being progressed by the Government. This is vital to ensure a harmonised approach to regulatory models and to avoid undercutting public trust in the digital identity solutions and services supported by it, for example, where other legislation requires practices inconsistent with the privacy protections and consumer consent provisions in the draft Legislation.

TCA comments on specific provisions in the Draft Legislation

It is evident from the consultation materials and draft Legislation that significant consideration has gone into the design of Australia's Digital Identity Legislation. We commend the DTA for this approach.

Provisions we support

The TCA supports the overall proposed Scheme and the proposed legislative model for enacting it.

In particular, we support the approach of allowing multiple identity solution providers to participate and interoperability between solutions. Choice and interoperability are critical for service designers utilising digital identity solutions. They make it more likely digital identity solutions are adopted. They also make those solutions more accessible to a broad range of citizens and businesses, which encourages participation in the digital economy and limits inequity in service access.

We also strongly support the approach to privacy and consumer consent protections proposed in the draft Legislation and TDIF, particularly the requirement for consumers to give express consent to having their identity verified or authenticated. We also support:

- Prohibition on sharing restricted attributes data obtained in the course of verifying or authenticating a person's identity to other entities, including for law enforcement purposes
- Mandatory deletion of biometric information of individuals
- The prohibition on data profiling
- Ensuring data is held for the shortest time, and only where necessary
- Ensuring digital identity information must not be used for prohibited enforcement purposes.

We would like to discuss with the DTA how this privacy model will be reconciled with other current and proposed laws that apply to services that may use digital identity solutions but which include mandatory requirements that may breach these principles.

For example, the Australian Government currently has before the Parliament legislation to introduce a Sharing Economy Data Reporting Scheme. This will require any provider of an electronic distribution platform to report every six months to the Australian Tax Office on detailed personal information for users of the platform that earn any income via the service. This information includes the user's full name, birthdate, email address, bank account details and net and gross income. The ATO proposes to use this information to calculate individuals' income and tax liabilities and pre-populate their tax return. The legislation will apply to a broad range of providers, including sites that enable appointment bookings with

medical practitioners or personal care service providers, marketplaces for services and freelancers, as well as sites for people seeking to find employment.

Currently, these sites do not collect or validate the personal information required by the scheme. They also do not validate the accuracy of data, which is problematic if the data is used by the ATO to calculate individual income and tax positions as incorrect or partial data can cause errors in calculation, as Robodebt and issues with the initial calculation of JobKeeper show. A digital identity solution could be very useful in this context to provide and promote greater surety about the authenticity of users of the sites, and accurate data. However, at present the Bill does not include a provision to require consumers to give express consent to the service provider for that data to be reported to the ATO as the reporting is a mandatory requirement for platforms. As the reporting scheme applies to all data and all users on the sites, it would not meet the test for providing information to an enforcement agency because neither the provider nor the ATO would have grounds in the case of most individuals for believing that they had committed an offence. Rather, the data is sought to determine if that is likely.

We believe the approach suggested in the Digital Identity Legislation is superior because it takes a more considered approach to consumer protections and privacy.

We therefore recommend an audit to evaluate where existing and proposed laws related to activities likely to use a Digital Identity solution would be inconsistent with the legislation's consumer protection and privacy principles so that other models can be reconciled with it.

Areas where we suggest clarification

The proposed Scheme sets a framework for digital identity solutions but enables specific rules about the Scheme to be made via disallowable instruments. It also proposes the establishment of an independent Oversight Body, and Advisory Board and Advisory Committees.

In theory, we support a model that allows a consultative and iterative approach to developing the detail of the scheme. This enables the Scheme to accommodate technological and service model evolution, and also to deal with any practical matters that arise during implementation.

However, for this to work, it will require a genuine consultation model that enables the key providers of solutions and service providers to provide feedback on their experience with the model. It will also require any proposed rules to be co-designed - in keeping with the current approach - and to be consulted in a timely way, and in a reasonable timeframe, with affected parties. We would welcome the opportunity to meet with the DTA and discuss how this approach can be ensured in practice.

Relatedly, the Scheme provides the power for the Trusted Digital Identity Rules to prohibit the holding, storing, handling or transferring of such information outside Australia. In practice, rules around data storage can be challenging to apply for many Australian and international service providers that may integrate a digital identity solution into their software and / or service and that operate globally. Should any such rules be mooted, they would require extensive consultation on the instances where they apply and how they would be implemented to ensure they are workable.

Thank you for the opportunity to make this submission. We would be pleased to discuss the comments in our submission with the Digital Transformation Agency.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Kate Pounder", is centered on the page. The signature is written in a cursive style with a small flourish at the end.

Kate Pounder

CEO

Tech Council of Australia