



ABS House  
45 Benjamin Way  
Belconnen ACT 2617

**Australian Statistician**

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A decorative graphic consisting of several overlapping triangles in shades of blue, yellow, green, and orange, arranged in a stylized, abstract pattern.

Ms Gayle Milnes  
National Data Commissioner  
Department of Finance  
One Canberra Avenue  
FORREST ACT 2603

Dear Ms Milnes

The Australian Bureau of Statistics (ABS) welcomes the opportunity to respond to the *Data Availability and Transparency Code 2022* Exposure Draft (the “draft data code”). The ABS supports the proposed draft data code and provides the following response to the questions raised in the associated consultation paper.

## **Data sharing principles**

The ABS supports the inclusion of the data sharing principles in the *Data Availability and Transparency Act 2022* (the Act) and the draft data code. The data sharing principles are based on the Five Safes Framework, an international multi-dimensional standard for managing disclosure risk which is applied by the ABS in the provision of access to microdata under the *Census and Statistics Act 1905* and subordinate legislation.

The draft data code provides that the entity sharing, collecting, or using the data must be satisfied that the project is consistent with the data sharing principles (section 5). As a general point, more clarity is required on which ‘entity’ is the decision maker on whether the requirements of each principle are satisfied or whether all relevant entities must be satisfied.

## **Project principle: project reasonably expected to serve the public interest**

1. *Is the approach to weigh arguments for and against the project serving the public interest appropriate? If not, how else could entities assess whether a project for the purpose of informing government policy and programs, or research and development, serves the public interest?*

The approach to weigh arguments for and against the public interest is appropriate.

The consideration of all eight elements of subsections 6(4)(a) could be onerous for data custodians and may reduce or slow the sharing of data. The ABS supports further guidance and/or tools to assist data custodians to streamline this assessment. For example, the ABS uses an assessment tool, based on the Five Safes Framework, for proposed projects that provide researchers with access to ABS-held microdata.



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A threshold model is used to weigh up the project benefits against disclosure risks to determine whether the project should proceed. This same model could apply to weighing up public benefits and disbenefits.

The ABS supports the draft data code specifying that where the only data sharing purpose is the delivery of government services, the project can reasonably be expected to serve the public interest.

**2. If yes to the above are the requirements of what entities must do, to weigh up arguments for and against the project serving the public interest, clear and unambiguous, and is this list proper and pragmatic? In your response, please provide reasons.**

The requirements under subsection 6(4)(a) of the draft data code are a balance between benefits, and risk or impacts. Further guidance would assist entities to apply the public interest test. The ABS proposes additional guidance on:

- how to weigh up the adverse impacts to an individual, group of individuals or Australian businesses from sharing against the broader benefit to the public from sharing.
- how to account for the benefits and costs of whether and where output will be made public as part of the public interest test.
- taking a consistent approach of either: (i) providing a list of considerations for sharing and a separate list of considerations against sharing or (ii) ensure that each subpoint outlines a balance of considerations for and against. Currently the approach is mixed; for example, subparagraph 6(4)(a)(iii) is a public benefit, and (iv) is a disbenefit. In contrast, subparagraph 6(4)(a)(v) and (vi) present a balance to be considered within each point.
- considering the benefits of the following as arguments for the project serving the public interest:
  - avoiding duplication in the collection of information by entities;
  - attaining compatibility between, and the integration of, statistics compiled by different entities; and
  - maximising the use of public sector data.

**3. Is the list of projects that do not serve the public interest able to be practically applied? What, if any, further guidance is required to support entities consider when a project does not serve the public interest?**

The draft data code proposes four cases that do not serve the public interest including where 'the project does not serve the interests of Australian citizens, permanent residents, or other people in Australia' (subsection 6(5)(a)). This is a broad statement that may be difficult to assess in specific examples, and would benefit from further guidance.

The ABS recommends further clarifying how to address projects that serve the interests of Australian businesses.



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4. Are the notes contained in this section helpful, and would this section benefit from other illustrative examples provided as notes? If yes, what examples and under which subsections?

The draft data code includes a note to subsection 6(1) with a reminder of subsection 16(11) of the Act (apply each data sharing principle and view as a whole to ensure associated risks are appropriately managed). This note would be more appropriate under section 5 as it applies across all data sharing principles.

The draft data code includes a note to subsection 6(4) for projects that may have a commercial benefit. This provides helpful guidance that when benefits are not exclusively commercial, then a project may still be in the public interest.

An additional note would illustrate how an adverse impact to one or more individuals may still be assessed as being in the public interest.

### **Project principle: applicable processes relating to ethics**

5. Under the draft data code, entities must have regard to any process of ethics applicable. Do you have any comments about this approach?

The ABS supports the inclusion of having regard to applicable ethics processes.

6. Is the note provided to assist entities identify ethics processes helpful? Why, or why not?

Yes. The note provides further guidance to entities on the considerations made by ethical processes and supports that the processes may differ depending on the circumstances of the proposed project.

### **People principle: conflicts of interest**

7. Are the requirements of this element of the people principle clear and unambiguous? What, if any, further details or guidance could assist?

See response to Question 10 for further overarching comments on application of the people principle.

8. Is the example provided under this section helpful? Why, or why not?

Yes, the example provided is helpful for illustrating where a conflict of interest might arise and how it can be managed to permit the sharing to progress.

## People principle: appropriate persons

### 9. Are the attributes, qualifications and affiliations listed in this section appropriate and easy to understand?

Yes, the attributes, qualifications and affiliations listed in this section are appropriate and easy to understand.

### 10. Would this section of the draft data code benefit from other illustrative examples provided as a note? If yes, what examples and under which subsections?

Under subsections S13(1)(e), 13A(c) and 13B(c) of the Act, the sharer, the accredited user and the ADSP, must be satisfied that the project is consistent with the data sharing principles. Subsections 16(3) and 16(4) of the Act outline the requirements for the people principle, including that data is made available only to appropriate persons and that access to data is only provided to individuals who have attributes, qualifications, affiliations, or expertise appropriate for the access. The Act does not outline how this assessment is made by the parties throughout the life of the project. The draft data code should provide further guidance on the ongoing assessment of an application throughout the lifecycle.

For example, from a data custodian/sharer perspective this requirement could be satisfied by either:

- knowing the names, qualifications, conflicts of interest of everyone proposed to access the data at the time of entering into the arrangement; or
- articulating the processes and considerations, as part of the data sharing agreement, that the accredited entity must have in place to determine who within their organisation can be an appropriate person to access the data and only listing the names of people and their relevant information who are not an Australian citizen or permanent resident in the data sharing agreement to align with section 19 of the code.

The second approach is likely to be more practicable for a longer project where individuals in organisations are likely to change. This approach would place responsibility on the accredited entity to manage provision of access in line with the requirements set out in the data sharing agreement, which would be consistent with the requirements of subsection 19(7) of the Act: 'The agreement must specify how the project will be consistent with the data sharing principles, including by describing the actions the party will take to give effect to the principles'. There is currently no requirement outlined in Part 2.6 of the Act that requires individual persons to be named in the data sharing agreement.

## Setting principle: reasonable security standards

### 11. Is this section adequate in clarifying what are reasonable standards?

No. While the draft data code notes that the security standard must be proportionate to the sensitivity of the data and the risks posed by sharing, the draft data code does not provide guidance on what would be

a reasonable security standard. The inclusion of reference to Commonwealth security standards in subsection 11 (3) of the draft data code provides no guidance to Commonwealth data custodians on the circumstances where an accredited user must comply with these, or parts of these standards.

12. Would this section benefit from an illustrative example provided as a note? If yes, what are some proposed examples?

Yes, this section could contain an example on sharing personal information (i.e., in identified form) with an accredited entity without complying with Commonwealth security standards would not meet a reasonable standard. A further example could be when de-identified data is being shared with an accredited entity then it may be reasonable to have a lower security standard.

### **Data principle: appropriate protection – whether data should be altered**

13. In practice, this element of the data principle, the privacy protections, and three data services set out in the Act, all work together to provide a framework to appropriately protect data. ONDC acknowledges there is a need to strike the right balance between taking a layered approach and not making the DATA Scheme too complex. Could the draft data code be improved to better assist entities apply this element of the data principle?

The ABS supports the need to strike the right balance and does not consider that the draft data code requires improvement to assist entities apply this element of the data principle.

### **Data principle: appropriate protection - data sharing must be reasonably necessary**

14. Is the ‘reasonable person’ test adequate in this section? If not, how could this section be improved to allow the entities to test whether the data proposed to be shared, collected and used is reasonably necessary to achieve the data sharing purpose?

The test introduced in subsection 12(5) requires an entity to ‘consider whether a **reasonable person**, who is properly informed, would agree that the data to be shared, collected or used is reasonably necessary to achieve the data sharing purpose’. Where a project is technically complex it may be difficult for a ‘reasonable person’ to be able to determine if the proposed sharing/collection is reasonably necessary for the project. A solution may be to add “...with the appropriate technical skills” to this section.

It is not clear what further guidance is provided by subsection 16(3); this could be considered as a note under subsection 16(2) or removed. In some cases, the alteration of data does not decrease the detail of the data but rather decreases the disclosure risk but maintains the same level of detail.

## Output principle

15. In practice, the output principle requires entities to agree how the accredited user will use shared data. Overall, how could the draft data code be improved to best assist entities apply the output principle?

The draft data code could be improved by providing further guidance/examples on how to apply the output principle to ADSP-enhanced data assets or integrated data assets which are likely to be used as inputs to further projects.

## Privacy protections

16. One of the objects of the Act is to enable the sharing of data consistently with the Privacy Act and appropriate safeguards. Does this part of the draft data code strike the right balance between holding data custodians accountable to seek consent, and providing data custodians with an exception to collect consent in circumstances where it is genuinely unreasonable or impracticable to seek consent? How could the draft data code be improved to achieve the right balance? For example, could the National Health and Medical Research Council waiver of consent guidelines be used here?

The ABS notes that there are existing provisions in the Act which enable sharing of personal information under strict safeguards.. The ABS supports the further clarification of some aspects in the draft data code. Importantly, the drafted clarifications increase transparency with the public on the restrictions that will be imposed by the Act to ensure sharing of public sector data is consistent with the *Privacy Act 1988*.

The draft data code outlines several matters an individual must be adequately informed about prior to consent being given and that consent must not have been withdrawn at the time of the sharing (subsections 15(2) and 15(5)). Consideration should also be given to including (i) how to withdraw consent and (ii) what withdrawing consent means in practice (i.e., that data shared prior to consent being withdrawn will continue to be used).

In addition, an example of ‘reasonably inferred from conduct’ in subsection 15(7) would be useful.

Subsection 16(1) sets out considerations that the data custodian must take into account to conclude that it is ‘unreasonable or impracticable to seek consent’ to the sharing of data that includes personal information about an individual. More guidance on how a data custodian should weigh up these considerations would be beneficial.

Additional clarification should be provided on subsection 16(3) on whether ‘inconvenient, time-consuming, or incur costs’ applies to the individual or to the data custodian.

The requirements for considering matters under subsection 16(1) are drafted differently to the requirement for considering matters under subsection 6(4) and section 18. It is not clear if this difference is intentional (i.e., one includes a weighing up requirement).

17. Is this part of the draft data code adequate in providing further clarification for what considerations should be taken into account when determining whether it is necessary to share personal information to properly deliver a government service? How could this section be improved?

Yes. This part of the draft data code is adequate. The ABS has no additional suggestions for improvement.

18. Does this part of the draft data code provide an adequate list of factors for data custodians to consider when determining whether the public interest justifies the sharing of personal information without consent? Would this section benefit from an example provided in a note, and if so, can you suggest one?

Yes. This part of the draft data code is adequate. No additional examples are suggested.

## **Data sharing agreements**

19. Should the data sharing agreement include any additional details about the designated individual who is a foreign national?

It would be beneficial to outline the foreign national's qualifications and expertise that they will bring to the project.

As a more general comment, section 19 of the draft data code would benefit from clarification that this requirement applies to scheme data. That is, it ceases to apply to any outputs of a project that are publicly released and exit the scheme.

## **Miscellaneous**

20. This part of the draft data code is informed by the list prescribed in section 130 of the Act. Is this an appropriate approach, and are there any additional details that should be provided to the Commissioner outside of that list?

The ABS supports the inclusions in this section of the draft data code.

21. Is the 31 July an appropriate deadline for data custodians to provide information and assistance to the Commissioner to prepare for the annual report?

The ABS considers that the proposed deadline of 31 July for provision of annual report information is appropriate.



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## Potential additions to the data code

### 22. What additional topics could the data code include to assist the establishment or integrity of the DATA Scheme?

The ABS has no additional suggestions.

#### Conclusion

The ABS appreciates the opportunity to engage with your agency on the Exposure Draft of the data code, which is a key piece of the DATA scheme framework. The development of the draft data code and consultation process is a positive step towards building consistent, efficient processes for increasing the availability and use of Australian Government data to deliver government services, policy and important research.

I extend an offer to you to hold further discussions with the ABS to elaborate on any aspect of the submission.

Kind regards

A handwritten signature in black ink that reads 'Teresa Dickinson'.

Teresa Dickinson PSM  
Deputy Australian Statistician

14 September 2022