

Submission to Data Availability and Transparency Bill Exposure Draft

This submission is written from the perspective of considerable experience using and managing data in government over nearly 40 years:

- Agency Head (Australian Statistician) of the primary Australian Government data agency of the Australian Bureau of Statistics (ABS) from December 2014 – 2019;
- CEO and Director of the specialist data and research agency of the Australian Institute of Health and Welfare (AIHW) from December 2010 – 2014; and
- Prior to that, over 30 years' experience using data for research, policy advice and service delivery, largely within a range of Australian Government agencies but also at the OECD in Paris.

Data is a major resource of and for government that is an essential part of our national infrastructure.

Contemporary, quality government data assists us to understand our economy, population, society and environment; helps shape sound government policies and a range of essential services; provides the basis of forecasts of likely future scenarios; and can help assess the effectiveness or otherwise of government policies and services.

Much government data is already publicly available, although the quality and timeliness of this data from a range of government agencies can be improved. Government data is also heavily utilised by the ABS and AIHW among others to produce quality, trusted national statistics and considerable information is made available for research and other public purposes.

Data access and use across the Australian Government has improved over the past five or so years, including researcher access to data. Some recent examples of the use of government data for public benefit have been particularly noteworthy:

- Development of the Data Integration Partnership for Australia, proposed by ABS in 2016 and funded by Government in the 2017 Budget, combining administrative data from across government together with our key national statistical resources. This combined data resource can improve policy and service delivery understandings for government across a range of areas and provide a good information source for researchers, but is still in a relatively early stage of development and use;
- Use of tax data to deliver more accurate needs-based funding to schools, as part of the Gonski 2.0 funding reforms, replacing previous use of location-based proxies drawing upon ABS data;
- Recent production of payroll data, complementing other world-leading ABS labour market information, has provided some timely insights about employment through the COVID-19 experience. This drew upon the emerging maturity of the ATO Single Touch Payroll initiative and improved ABS IT systems, both funded by the Australian Government.

Over recent years, enhanced data access and expanded data use has been possible through drawing upon an improved culture of data sharing and expanded use of modern technology and expert data skills.

The principles and objectives of the proposed Bill are largely sound, but can be improved.

There are still many untapped opportunities for increased data use to better inform policy and services and contribute to more effective stewardship of taxpayer funds by government.

For completeness, I would suggest making specific mention in the draft legislation of the potential for greater use of government data for program evaluation. This is highlighted in some of the supporting materials provided by the Office of the National Data Commission, but unfortunately does not explicitly feature in the proposed legislation.

In the current and prospective economic environment when fiscal policy is necessarily playing a stronger role, and government expenditure and revenue measures are now more significant than in the past, there is increased need to objectively measure whether government policies and services are achieving their objectives and delivering value for taxpayers.

In the 2020-21 Budget papers, the Australian Government estimated that it expects to spend \$2,400 billion over the four years of the forward estimates. If there is increased use of data to evaluate Government programs, improvement in the efficiency and effectiveness of government policies and services would provide a dividend to the community in terms of improved services and/or reduced taxation. Achieving an improvement of only 1% would produce a community dividend of \$24 billion, noting the gains from an effective evaluation strategy supported by available data is likely to be much greater than a 1% improvement.

Over the 20 years, there has been insufficient attention placed on proper, independent evaluation of the efficiency and effectiveness of government policies and programs. This can be easily remedied through effective use of available data, and contemporary tools of data integration can assist. This Bill would benefit from explicit mention of the potential for improved use of government data supporting and enabling effective evaluations. Simply referring to the policy function purpose as a 'catch all' purpose does not appear to be sufficient. Increased capability to undertake data integration provides greater opportunity to assess the outcomes achieved from a wide range of government programs and services, informing Executive Government, the Parliament and the community.

While this legislation is proposed to only cover data use across the Australian Government, consideration should be given to expanding opportunities to share data across the Commonwealth and State/Territory government sectors.

Many of the key policy and service delivery challenges confronted by Australia – such as health, education, infrastructure, and social welfare – necessarily involve responsibilities and responses from both levels of government. Data across only one level of government – either the Commonwealth or the state government level - provides a partial and generally inadequate view of reality for the public and may be insufficient to effectively inform policy and service delivery strategies of either level of government.

The proposed precluded purposes including enforcement-related purposes from the coverage of the Bill is sound, and consistent with the legislative provisions that currently apply to the ABS. This encourages public trust and confidence in data use for many desirable public purposes.

Be realistic about the likely benefits of the proposed Bill

From my experience managing several government data agencies and as a senior executive using data for policy, research and service delivery purposes, legislation is usually not the real constraint to effective use of data for purposes that would benefit the public.

Legislation may be claimed to be a constraint to effective data sharing, and legislation is often used as the excuse why data cannot be used and shared. However, from the experience of the past decade, the major constraints to effective use of government data have been a risk averse culture across government to use of data, some concern about what expanded data use might show, and to some extent low prioritisation of data related activities by respective governments.

The other challenge that will need to be addressed if this legislation is to achieve its goal is increased attention to improve the quality of government administrative data. We cannot just assume that all government data, often derived as a secondary outcome from administrative processes, is of sufficient quality that it can be used for a range of expert purposes. While some agencies, such as the ATO, devote significant resources to improving the quality of their data this is not universal and should receive greater attention over coming years.

The substantially increased resourcing to the Australian Bureau of Statistics in the 2020-21 Budget should help deal with the resource constraints previously applied to the nation's key data agency over the past decade, and this should also contribute to building data capability and specialist data skills across government.

I expect that this legislation will support more effective data use across government, but its direct impact is likely to be at the margin. The opt-in nature of the legislation for agencies, while in principle a desirable feature as existing legislation enables most effective data uses and agency heads should be accountable for decisions including how their data is used, may also limit the extent to data might be used and exposed if agencies are concerned about what any expanded data use might show when it is publicly released.

Consideration should be given to including in the legislation an over-ride capability for the National Data Commissioner to enable government data use to be shared and used for specific clear public purposes (such as program evaluation, Productivity Commission Inquiries, etc) where agencies are otherwise "reluctant" to release this public data. In these cases, the National Data Commissioner would need to assure themselves that there is a strong public purpose to the proposed data use, the proposed user of the data has the necessary skills and procedures to use data effectively and safely. This would provide a direct mechanism to promote greater use of government data for public benefit.

The most important dimension of the proposed legislation may be from the signal to government agencies that improved and increased data use is now encouraged by the government. This needs to be reinforced by other decisions of government to encourage and support data use, beyond this proposed legislation.

This has been the experience of State Governments that have introduced data sharing legislation over recent years. In the case of the NSW Government, explicit Ministerial and government support for data use has been a feature of their policy approach beyond their data sharing legislation, and the new legislative mechanisms have not been the dominant aspect enabling more expansive use of data in NSW.

In particular, returning to the theme earlier in this submission, the major benefit of this legislation may come through greater data use to rigorously assess the effectiveness and efficiency of government policies and services. A stronger evaluation culture combined with improved data use would be a sustainable and cost-effective approach to improving public policies and services applicable across the range of government activities.

Over recent years, the extra resourcing provided to the Interim National Data Commissioner has contributed to an improved understanding across the public sector of the key features required to deliver expanded and safe data use. This is a positive development, drawing heavily upon the innovations and changed practices of the Australian Bureau of Statistics over recent years, such as introduction of the Five Safes Framework.

This advocacy and education role should continue to be a feature of the work of the National Data Commissioner. To be most effective, ongoing partnerships with specialist data agencies will be critical to increase the likelihood that a standalone agency of the National Data Commission can effectively capture emerging international developments for the benefit of Australia.

The specific wording of the legislation proposed for the data sharing principles could be improved

The proposed data sharing principles, based on the Five Safes Framework already in use by the Australian Bureau of Statistics and internationally for a number of years, is well tested and works well in practice.

The Office of the National Data Commissioner has usefully provided further guidance to the Australian Government agencies on the Five Safes Framework, elaborating the nature of the Framework and how agencies could operationalise the dimensions, in order to share data more extensively but still safely.

However, I do have a question about the way in which the proposed legislation describes the “Outputs Principle”.

The draft legislation appears to be weaker than the way this Outputs Principle is operationalised by the Australian Bureau of Statistics, and weaker than the previous guidance from the Interim National Data Commissioner.

The purpose of the outputs principle is to ensure that personal information will not be improperly disclosed when information is finally released. The outputs principle is arguably the most important of the Five Principles, and can require significant technical knowledge to implement properly in certain circumstances.

The legislation proposes that it is sufficient for “outputs to be as agreed and appropriate for future use”. The main problem is the proposed use of the phrase of “outputs as agreed” as this provides no clear safeguard that individual information will not be released – the data release just needs to satisfy the agreed release arrangement, which could have been flawed when this were established. I would respectfully suggest that the other phrase “appropriate for future use” provides an inadequate safeguard for the community.

I would propose that the legislation instead draws more directly from the explicit wording used to describe the outputs principle that is within the guidance issued by the Office of the National Data Commissioner on the Data Sharing Principles in March 2019.

The proposed legislation could instead use the phrase that “the output from the data sharing arrangement is appropriately safeguarded before any further sharing or release”. This clearly gives a better indication of the outcome that is required and the steps that may need to be taken to ensure safe release of personal data.

The proposed arrangements cannot ensure there is not inappropriate data use and data release

The supporting material in the Consultation Paper released by the Office of the National Data Commissioner in September 2020, that accompanies the Exposure Draft suggests that “The Bill **ensures** data is only shared if prescribed conditions are met” (emphasis added).

Unfortunately, no legislation, administrative structures and support can ever ensure there will not be inappropriate data use or data sharing. The regulatory structures should aim to mitigate risks, but they can never eliminate this risk.

The proposed accreditation process should help government agencies to understand the challenges of increasing their use and release of government data, and for many of these agencies data use and data release is not their main purpose or core activity. Accreditation may be able to identify data activities that should be able to be safely undertaken by an agency, and those data activities where it should seek the assistance of a specialist data provider. Accreditation should point to areas in agencies where data capability and data infrastructure need to be further improved.

This is the clear objective of the proposed legislation. However, the real challenge comes in the practical implementation of the proposed accreditation structures and arrangements to give effect to the legislated intentions and outcomes.

Accreditation processes, and the associated purposes, principles and agreements unfortunately cannot provide a guarantee that data activities across government will meet the standards set out in the legislation. Unfortunately, agencies may still make judgments to pursue data activities beyond their capability, and accreditation of skills and capabilities at a point in time is no guarantee that these skills and capabilities will be retained over time.

Ultimately, the likelihood of effective, safe data use and release will largely depend upon the skills and judgments of the government agency releasing the data and the user of the data. It is unrealistic to expect that policy or service delivery agencies, whose primary role and purpose does not revolve around expert data use, would always make sound judgments satisfying the standards of this legislation. There is a prevailing risk that at least some government agencies do not know what they do not know about safe and effective data use.

The legislation properly encourages these agencies to draw on the skills of more expert data agencies, but this also will require cultural change across the bureaucracy to move towards greater collaboration rather than every agency attempting to build their own capability. Guidance material could be designed specifically for Agency Heads and other senior executives to improve their understanding of the risks and challenges that their agency is expected to manage and when and where they can get assistance.

Implementation of the proposed legislation should seek to deliver a net positive public benefit, but this outcome is not guaranteed

The proposed regulatory structures set out in the legislation, drawing upon the Productivity Commission recommendations in the Report from the 2017 Inquiry on Data Availability and Use, are very extensive. They are extensive for the proposed regulator, potential data releasers and data users, in order to create a secondary/subsidiary pathway for data release and use beyond current arrangements.

Beyond the specifics of the legislation, there are many key implementation choices around the detailed nature of the proposed accreditation process, that will have resource implications for the National Data Commission and for those considering using these provisions to release and use data.

There is a judgment here beyond the specifics of the proposed legislation: balancing costs, safeguards and impact. A very thorough approach to accreditation of data release and use is more likely to achieve the objectives of safe use of data enshrined in the legislation, but the costs of such an implementation strategy across government may discourage some otherwise worthwhile data use for public benefit. Pursuing a light touch regulatory approach, with lower direct costs to all, may encourage greater data use, but at increased risk of enabling inappropriate data use.

Regulation does necessarily also have an opportunity cost – consuming scarce government resources and especially scarce data skills to accredit and build capability among new data providers that could otherwise be devoted to expanding and using data services across government. This opportunity cost could be significant in the early years, although there is the potential for the opportunity cost to decline over time as the system matures and data capability is expanded across government.

If the legislation encourages and enables greater use of data to evaluate government policies and programs, as suggested earlier, then it is more likely that this legislation will contribute to a public benefit that exceeds its implementation and administration costs.

Some proposed governance arrangements could be changed, to improve their effectiveness over coming years

I would suggest that the National Data Commission would be best attached to the Treasury portfolio. The Treasury portfolio already includes the ABS, where data understandings, data skills and experienced operational judgments along these lines are already well established and where these staff skills could be more easily shared with the new agency. The current location of the National Data Commission within the Department of the Prime Minister and Cabinet has worked during this phase of preparing the legislation, but this does not appear to be such a good fit to the skills and judgments required for its proposed future operational and regulatory role.

Provision of broadly based and independent advice through the National Data Advisory Council (NDAC) is a useful mechanism to receive a range of expert perspectives within a confidential deliberative environment, to improve the decision making of the Data Commissioner and their office. If this feature of the governance of NDAC supporting the National Data Commissioner is considered important enough to be legislated, then I would suggest it is important enough to have an independent chair rather than have the option of the National Data Commissioner also taking on this role. This is consistent with contemporary governance arrangements that are increasingly moving towards having an independent chair alongside greater use of independent expert advice.

The proposed reviews of the legislation at three years and then ten years are very positive dimensions, that would be strengthened if reviewer(s) were independent of government with findings and recommendations transparently published in a timely manner.