Australian Government
National Indigenous Australians Agency

NIAA

Submission to the Statutory Review of the Data Availability and Transparency Act 2022

May 2025

General Comments

The National Agreement on Closing the Gap recognises that data is a cultural, strategic and economic asset for Aboriginal and Torres Strait Islander Peoples, essential for self-determination and community-led development. Of direct relevance for this statutory review, all levels of government have committed to transforming the way government works (priority reform 3) and enabling shared access to data and information at a regional level (priority reform 4) through the National Agreement on Closing the Gap. Article 17 (d) of the agreement states "Aboriginal and Torres Strait Islander-led data: Aboriginal and Torres Strait Islander people have access to, and the capability to use, locally relevant data and information to set and monitor the implementation of efforts to close the gap, their priorities and drive their own development".

It is important the Data Availability and Transparency 2022 Act (Act) recognise Aboriginal and Torres Strait Islander communities' desire for greater access to government held data about or that may affect them. In particular, the Act should consider how the data aspirations of Aboriginal and Torres Strait Islander Peoples and organisations can be provided for and what support they may require in order to be able to meet these aspirations. The Act must also support the enactment of the Commonwealth Government commitment under the National Agreement on Closing the Gap and the Framework for the Governance of Indigenous Data to transform the way government works in order to meet Aboriginal and Torres Strait Islander communities' aspirations for greater empowerment and shared decision making.

Commonwealth Government Secretaries endorsed the Framework for the Governance of Indigenous Data in December 2023[1]. Indigenous data is defined as information or knowledge, in any format or medium, which is about and may affect Indigenous peoples both collectively and individually[2]. The Framework commits the Commonwealth Government to: partner with Aboriginal and Torres Strait Islander people at all stages of the data lifecycle; improve the capabilities of APS staff and Aboriginal and Torres Strait Islander partners relating to Indigenous data across the data lifecycle; develop straightforward methods for Aboriginal and Torres Strait Islander people to know what data are held relating to their interests, its use, and how it can be accessed; and build towards organisational and cultural change within the APS to support the inclusion of Aboriginal and Torres Strait Islander people in data governance.

The three purposes for data sharing under section 15 of the Act are currently: delivery of government services; informing government policy and programs; and research and development. The NIAA suggests these purposes

[1] Secretaries Board communique: 6 December 2023 | PM&C
[2] Definitions — Maiam Nayri Wingara

should be expanded to include consideration of empowerment and shared decision making for Aboriginal and Torres Strait Islander communities.

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?

Accredited users

> *Accreditation under the DATA Scheme is currently limited to Commonwealth entities, state and territory entities, and some Australian universities. Other entities that could potentially benefit from access to public sector data are excluded from participating directly. Many private sector entities already access public sector data through other avenues to advance projects that are in the public interest. The Review seeks feedback on whether there may be benefits to expanding the scope of the DATA Scheme to allow additional participants.*

NIAA supports expanding the scope of the DATA Scheme to allow additional participants, including Aboriginal and Torres Strait Islander organisations, but notes that current accreditation criteria may unintentionally exclude many Aboriginal and Torres Strait Islander organisations from eligibility to participate under the DATA Scheme due to resourcing constraints. The expansion could be explicit to Aboriginal and Torres Strait Islander communities or incorporated in expansion of access to a broader set of mainstream users.

While out of scope for the Act itself, and related to the DATA Scheme, how to support and build the data capability of Aboriginal and Torres Strait Islander organisations needs to be considered. Resources to guide Aboriginal and Torres Strait Islander organisations through access pathways such as partnering with existing accredited users should also be provided.

Section 16 Data sharing principles – public interest

> *Project principle*
>
> *(1) The project principle is that the project is an appropriate project or program of work.*
>
> *(2) The project principle includes (but is not limited to) the following elements:*
>
> *(a) the project can reasonably be expected to serve the public interest;*
>
> *(b) the parties observe processes relating to ethics, as appropriate in the circumstances.*

The NIAA notes projects that are of high priority and significance to Aboriginal and Torres Strait Islander communities may not be considered as 'serving the public interest'. The NIAA suggests the DAT Act consider empowerment and shared decision making for Aboriginal and Torres Strait Islander communities as an example of 'public interest' in line with the National Agreement on Closing the Gap.

In reaching a conclusion on whether the project serves the public interest, adverse impacts should also be considered for the privacy of specific communities in addition to the privacy of individuals. For example, projects looking at remote locations within Australia have the potential to impact First Nation Australians, particularly in locations with significantly higher proportions of First Nation people. See Attachment A - Response on the Exposure Draft of the Data Availability and Transparency Code 2022, response to questions 16-18, for more detail on this point.

In making this submission, the NIAA notes that issues outlined in the NIAA's Response to The Exposure Draft of the Data Availability and Transparency Code 2022 of August 2022 (Attachment A) remain relevant.

Attachment A

National Indigenous Australians Agency

Response on

The Exposure Draft of the Data Availability and Transparency Code 2022

August 2022

General Comments

The National Agreement on Closing the Gap recognises data is a cultural, strategic, and economic asset for Australia's First Nation Peoples[3]. All levels of government have committed to transforming (priority reform 3) and enabling shared access to data and information at a regional level (priority reform 4) through the National Agreement[4]. Article 17 (d) of the agreement states "Aboriginal and Torres Strait Islander-led data: Aboriginal and Torres Strait Islander people have access to, and the capability to use, locally-relevant data and information to set and monitor the implementation of efforts to close the gap, their priorities and drive their own development".

It is important the Data Availability and Transparency 2022 Act (Act) and related Data Availability and Transparency Code 2022 (Code) recognise First Nations communities desire for greater access to government held data. In particular, the Code should consider how the data aspirations of First Nations people and organisations can be provided for and what support they may require in order to be able to meet these aspirations.

Specific Responses

1.	*Is the approach to weighing 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 weighing arguments appears appropriate, however broader consideration is required to include First Nations data and its ethical collection and use. We suggest inclusion of a cultural safety lens and appropriate authority to inform the use of First Nations data. Where projects explore First Nation data, they should also reflect First Nations priorities, values and aspirations. Further refinement of the Code should occur via targeted consultation with First Nation organisations and community members.

In reaching a conclusion on whether the project serves the public interest, adverse impacts should also be considered for the privacy of specific communities – in addition to the privacy of individuals. For example, projects looking at remote locations within Australia have the potential to impact First Nation Australians, particularly in locations with significantly higher proportions of First Nation people.

[3] Maiam nayri Wingara, https://www.maiamnayriwingara.org/about-us.
[4] National Agreement on Closing the Gap, https://www.closingthegap.gov.au/national-agreement

The terms being used within the Code may also lead to ambiguity and potentially impact on projects being selected (or not). Projects that are of high priority, and significance, to First Nation communities may not be considered as 'serving the public interest'. We suggest an example be provided in the note for Section 6 (5) (d) regarding what would be considered 'merely of interest to the public', compared to 'serving the public interest'.

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

9. *Are the attributes, qualifications and affiliations listed in this section 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?*

In the past, research has too often been done on, rather than for, or by, First Nation Australians. This section could be strengthened by providing explicit examples for First Nations people in the context of using historical 'blaming, aggregated, decontextualized, deficit-based and restricted-access' (BADDR)[5] data. Considerations of the narrative that results from data projects built on BADDR data needs to be included in the process as part of the Project Principles Section 6 (4)(a) (v) & (vi). Also, a clear understanding of how data is going to be used and what comparisons will be made.

While partly captured in Section 7 under ethical considerations, with respect to projects involving First Nations community data there should also be recognition of cultural authority and cultural competency as required qualifications (Section 10 (3) of the Code). Where First Nations data is being collected, analysed and shared, considerations need to occur in regards to appropriateness and contextualisation of the output. Cultural competency would also be required to address Project Principles Section 6 (4)(a) (v) & (vi) of the Code regarding the impact of the project on culture. First Nations data should not be shared where the outcome (intended or risk of) will have a detrimental impact on the individual or the First Nations community by creating a deficit narrative or impacting on cultural identity.

Proposed additional principles to address this and support the Code more widely are the C.A.R.E Principles[6]:

- Collective Benefit (Inclusive; improved governance and citizen engagement; equitable outcomes)
- Authority to control (Recognition of rights; Self Determination; Active stewardship)
- Responsibility (Positive development; Commitment to enhanced data literacy; Grounded in cultural values)
- Ethics (Minimise Harm; Addresses power imbalance; for future use).

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

From a data curating and security perspective the section provides adequate information. However, Section 11 (3) of the code: "entities that are not Commonwealth bodies must comply with Commonwealth security standards, or parts of them", should be closely monitored to ensure it is enacted equitably.

There is a potential for this section to disadvantage First Nation organisations and First Nation identified projects due to varied levels of digital and data maturity and internal and cultural obligations of First Nation organisations and practical challenges that First Nation organisations face. As with the response to question 1, to address these concerns it is suggested that further refinement of the Code should occur via targeted consultation with First Nation organisations and community members.

[5] Walter, M, Lovett, R, Maher, B, Williamson, B, Prehn, J, Bodkin-Andrews, G & Lee, V 2021, 'Indigenous Data Sovereignty in the Era of Big Data and Open Data', Australian Journal of Social Issues, vol. 56, no. 2, pp. 143-156.
[6] Global Indigenous Data Alliance, https://www.gida-global.org/care

While out of scope for the code itself, how to support and build capacity of First Nations organisations also needs to be considered.

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 'reasonable person' is appropriately broad for this circumstance, however their data literacy also needs to be considered. A reasonable person may understand that de-identified data may be shared, they may not however understand that by enhancing data the data may cease to be de-identified. We do recognise in this instance, 16A (3) does prohibit actions of the accredited user to re-identify individuals.

If the data refers to specific communities comprised of individuals, and if those communities have collective decision making procedures related to data, there should also be the requirement for data to be shared if and only if a 'reasonable and properly informed community' would agree. This requires going beyond considerations of individual consent, to addressing issues of collective consent.

We recommend including something stating that 'consistent with Closing the Gap priority reforms one and four First Nations communities and organisations must have access to information and data about themselves and their communities, regardless of where it is currently held'. First Nations communities and organisations have the right to manage and make decisions about their collective information.

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?*

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?*

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?*

The requirement to acquire collective free and informed consent is expressed by Articles 1 and 19 of the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP)[7]. Section 16 of the code is framed from the perspective of the individual and does not adequately consider First Nations' communities and the consent of the community. Where First Nations' data is being considered, the collective consent of the community should also be considered. Where reasonable, informed consent should also be sought from the community, not just individuals.

Where data is to be shared, all care should be taken to ensure data is not only de-identified but should be de-identifiable (where by data integration and probabilistic match of combined datasets would not allow identification of Individual). Also, consideration should be given to whether it is necessary to share Demographically Identifying Information (DII) as well as Personally Identifying Information (PII), in order to protect groups of individuals who are de-identified in large datasets.

18(2) should include consideration of adverse impacts on groups of people, in addition to individuals.

Section 18 of the code could potentially be strengthened to provide consideration of First Nations people. Section 18(3)(d) refers to benefit of groups of people and section 18(3)(e) refers to cultural benefits and costs, however it does not include how the community interests and permission is ascertained, or how the cost benefit assessment can be made.

[7] United Nations 2007, United Nations Declaration on the Rights of Indigenous Peoples, UN.