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THE STATISTICS DETERMINATION 1983

This document responds to the invitation by the Department of the Treasury for comments on the *Statistics Determination 1983* under the *Census & Statistics Act 1905* (Cth).

It is made by the Australian Privacy Foundation, the nation's politically independent and paramount civil society organisation concerned with privacy. Information about the Foundation is at www.privacy.org.au.

Summary

In summary, the Foundation considers that –

- the proposals in the Determination consultation paper demonstrate a misunderstanding of the scope for re-identification of 'de-identified' data about business and organisations (and by extension about individuals),
- the broadening of the regime further weakens data protection
- #censusfail means stakeholders outside government are legitimately wary of Treasury's assurance about the effectiveness of current/planned ABS protocols that would give effect to proposals in the consultation paper.

On that basis the Foundation calls for a public consultation process that –

- brings together stakeholders from outside government, in particular through a round table, to assist understanding of specific proposals and – importantly – of their implementation
- is informed by public scrutiny of the draft new Determination,
- is informed by evidence that the ABS has taken on board the substantive criticisms regarding both the Census and the MADIP program,
- is informed by published evidence of engagement by the Office of the Australian Information Commissioner with Treasury and the ABS,

- occurs over a sufficient period for engagement by civil society and other stakeholders prior to implementation of the new Determination.

That process is consistent with the Government's recurrently stated commitment to open government (which is not restricted to a top-down release of information for consideration within a short time-frame), initiatives such as the Digital Transformation Agency that seek to leverage statistical data, and the ABS acknowledgment of substantive deficiencies in project design/implementation regarding the Census.

The Australian community is being asked to trust that the ABS (and its partners) will 'get it right' in an environment where leading agencies such as the Department of Home Affairs (eg the large-scale refugee data breach) and Prime Minister & Cabinet (secret documents left in a filing cabinet on the second-hand market) have clearly not done so.

In the age of big data the accountability of government agencies is paramount; civil society concerns can be addressed through the engagement highlighted above.

Basis

The Foundation notes the restriction under the Determination of release of information of a personal or domestic nature 'in a way that *is likely to enable* the identification of a person'. [emphasis added]

We commend having such a restriction but note that the test 'is likely to enable' is too weak in this context, since it does not address the potential harm that may arise from exposure. Such harm cannot be expressed merely by listing some data-items and omitting others because the harm that may arise is dependent on both the person and the context. A more appropriate criterion would be 'may enable':

Release of data that *may enable* the identification of a person needs to be subject to restrictions that are commensurate with the harm that may be caused by re-identification. In the case of data that is of significant concern generally, or of significant concern to the particular individual, the only acceptable form of restriction is prohibition.

Such a restriction should also not be eroded through statutory or administrative measures. The Foundation, in briefing the ABS regarding MADIP for example, noted civil society's concerns regarding ongoing weakening of protection of information privacy under several statutes through data sharing initiatives such as Operation CADENA that lacked appropriate transparency and governance.

Consistent with this advice regarding MADIP, and submissions to parliamentary committees and law reform bodies at the Commonwealth and state/territory levels, the Foundation considers that ABS has had insufficient regard for the scope for re-identification of sensitive data about individuals

(directly or as owners/operators of small to medium enterprises) in the emerging environment of ‘Big Data’.

There is now an extensive body of knowledge from researchers, data scientists and administrators in Australia and overseas regarding potential future vulnerabilities in previously accepted de-identification methods, and growing effectiveness of new re-identification techniques. This confirms that expectations about the effectiveness of de-identification (for example when non-public data sets can be readily integrated with public, academic or commercial data sets) have historically been misplaced; and it also suggests that the increasing proliferation of access to both non-public and public data sets (including hacked data sets, and others inappropriately released under a careless ‘Open Data’ rubric) will increase this risk in future.

In addition to this re-identification threat from other data ‘in the wild’, the technical capacity of machine learning, neural network and other sophisticated artificial intelligence/‘Big data’ analytical techniques is also increasing rapidly, so that even with no increase in access to potential matching data, it is becoming ever more feasible to re-identify what once might have been ‘safe-enough’ anonymised data using these extremely powerful new tools.

Civil society needs to be confident that the ABS and its partners within government (and presumably outside government, given overseas trends to sell public sector data to commercial bodies rather than merely research institutions) are looking ahead, prospectively protecting privacy rather than reacting to inappropriate release/use of data on a retrospective basis, and without sanctions that are sufficient to deter misbehaviour. The data breaches that occur by way of re-identification can create risks and harms that persist for an indefinite period, and cannot be revoked by or removed by a belated apology or software update.

The consultation refers to ensuring the Determination remains fit-for-purpose; that means looking ahead on a technically and informed basis.

There appears to be no indication that a necessary level of acceptance of, or engagement with, the deteriorating environment for re-identification risk is occurring, whether by active public participation in research efforts to understand how these factors erode the safety of existing methods or by warnings to technical, data manipulation and general communities of this deterioration. The Foundation would be happy to assist improve such engagement.

Inadequate recognition of privacy

In making that comment the Foundation considers that it is imperative that the ABS –

- 1) take on board concerns expressed by the Foundation and other experts and

2) provide detail about how the high-level description in the consultation document regarding the new Determination is to be implemented.

Put simply, more information from Treasury/ABS is needed for a meaningful independent appraisal and endorsement of the proposals.

The consultation paper refers to benefit for the ‘public and business by, for example, facilitating better targeted government programs, services and policies’. Those benefits have not been articulated by the ABS in the consultation document or accompanying statements.

‘Five Safes’ model

The Foundation notes reference to the Government’s Public Data Policy Statement regarding use, release and collaboration. It is imperative that the reference be contextualised through acknowledgement of privacy as –

- an entitlement of all Australians
- not at odds with efficient and effective public sector administration
- a basis of, rather than antithetical to, good business practice and enhanced national productivity.

The ‘five safes’ model used by the ABS should accordingly expressly feature a respect for privacy, going beyond any reference in the fine print to the *Privacy Act 1988* (Cth) and other statute law, such as the *Census & Statistics Act 1905* (Cth), that recognises the importance of privacy as a foundation of Australia as a liberal democratic state.

Over-reliance on reputation

The consultation document refers to decision-making about the release of data on the basis of the “integrity and reputation of the user”. It should be recognised that a number of leading organisations – including Commonwealth agencies such as the ABS, Department of Prime Minister & Cabinet and Department of Home Affairs – have regrettably acquired a poor reputation regarding the handling of sensitive data.

That poor reputation is in some instances reflected in public perceptions that the organisations lack integrity because of unaccountability or a punitive response to individuals who have been exposed to harm through negligent release of sensitive personal information. (The salient example is litigation involving the now Department of Home Affairs over the refugee data breach).

Enforcement must be meaningful

The document also refers to decision-making by ABS on the basis that the user has ‘signed a legally enforceable undertaking’. The Foundation considers that data release must be addressed through effective statute law rather than

merely contractual provisions that are likely to provide an ineffective remedy on a retrospective basis where data misuse has occurred.

That law must be backed by timely, positive, transparent and otherwise effective enforcement. The Foundation reiterates long-standing concerns, consistent with independent research, regarding the incapacity of the Office of the Australian Information Commissioner, including the substantial delays in investigation by that agency and the insufficiency of its reporting regarding that investigation.

Detail is required for appraisal

The consultation document states that –

The new Determination will be drafted in accordance with contemporary drafting principles. These principles will ensure definitions and concepts are consistent with other relevant legislation and any outdated prescription is removed.

Civil society is not in a position to endorse the proposal in the absence of more detailed information. It is particularly disappointing, given the Government's recurrent commitment to 'open government' as a matter of accountability and enhanced efficiency, that detail has not been provided. Best practice means more than indicating 'our drafting will be ok'.

Unilateral release?

The Foundation notes that new Determination

could also provide the ABS with the authority to release, on a limited basis, information about businesses and organisations where they could be identified but the users of the information are restricted in how they may access and use that information.

The explanation of that release is confusing. The consultation document gives some sense that 'consent' will be involved – see Clause 5 (1)(b). That is a misnomer if the ABS has unilaterally released the data/information, there is uncertainty about what has been released and businesses, organisations and individuals have no substantive means of redress regarding the ABS's action.

On that basis more information is needed about the proposal.

Notification Process is a step backward

The Foundation has referred to the Government's recurrent commitment to open government, consistent with statute law (for example the Objects provisions in the Freedom of Information Act) and High Court judgments about the accountability of the Executive. Obfuscation of accountability through erosion of transparency is highly undesirable.

On that basis the Foundation expresses concern regarding the proposed 'simplification' of the current notification process (Clause 6). The ABS should

be required to table before both Houses of Parliament a description of each list, with sufficient *detail* for timely analysis by journalists, civil society, business organisations and members of parliament.

The ABS should additionally be required to publish a detailed description of each list on the ABS website, with notification that publication has taken place.

Release of de-identified data

The Foundation draws attention to preceding comments regarding the effectiveness of ‘de-identification’, the likelihood of re-identification in the environment of big data, and concerns about the impact of such identification. The consultation document foreshadows access to an increased range of ostensibly de-identified unit-record-level business information – Clause 7 (1) (b) – on the basis that ‘a CURF is often so confidentialised that the value of analysis based on the CURF is severely limited’.

More information about the proposed arrangements for weakening of current restrictions is desirable. Civil society has concerns regarding reference to access ‘through an ABS controlled environment only’. That access requires transparency (through inclusion in the ABS annual report or a discrete statement on its website) about –

- What organisations are being granted access
- What remuneration was received

That transparency is in itself a useful statistical report.

Yours sincerely

(per)

David Vaile
Chair
Australian Privacy Foundation

15 February 2018