

**Australian Law Reform Commission (ALRC)**

 **Serious Invasions of Privacy in the Digital Era**

**ABS Submission - November 2013**

**1. Introduction**

The Australian Bureau of Statistics (ABS) welcomes the opportunity to have input into the ALRC's Inquiry into Serious Invasions of Privacy in the Digital Era. This submission outlines the legislation governing the ABS with respect to Privacy, and examines issues around ABS collection and use of data, including administrative and other forms of ‘big data’. The submission also responds to some of the specific questions raised in ALRC Issues Paper 31: *Serious Invasions of Privacy in the Digital Era*.

**2. The ABS and the ABS legislation**

The ABS is Australia’s official national statistical agency. It was established, as the Commonwealth Bureau of Census and Statistics, with the *Census and Statistics Act 1905* (*CSA*). The agency became the ‘Australian Bureau of Statistics’ in 1975 with the passing of the *Australian Bureau of Statistics Act 1975* (*ABS Act*). This Act also established the role of the Australian Statistician, and defined the functions of the ABS. The *ABS Act* gives the ABS a co-ordination function with respect to the statistical activities of other official bodies and the use of administrative and other forms of ‘big’ data for statistical purposes.

Under the *CSA*, the ABS is authorised to collect personal information for the specified purposes. This includes the Statistician having power to compel respondents to provide information. Onthe other hand, the legislation imposes very strict obligations on ABS officers to maintain the confidentiality of information supplied.

Issues Paper 43 examines the interaction between the *Privacy Act* and the increasing use of digital and affordable mobile technology, and that these new technologies allow unprecedented levels of surveillance and tracking of the activities of individuals, of recording and communication of personal information, and of intrusion into physical space. In particular, the Issues Paper considers the enactment of a statutory cause of action and other legal remedies and innovative ways in which the law could prevent or redress invasions of privacy.

The main comment the ABS wishes to make is that existing legislation has established the role of the Australian Statistician, defined functions of the ABS, and authorises the ABS to collect personal information for specified purposes. The ABS considers that the *CSA* provides very strong protection for personal information collected under it. Any statutory cause of action, or other legal remedies and innovative ways in which the law could prevent or redress invasions of privacy, needs to be cognisant of existing legislation such as the *CSA* and *ABS Act*, and not impede the ability of the ABS to provide an effective statistical service by co-ordinating and maximising the use of official data.

Provisions in the *CSA* have served the ABS and the public well. The *CSA* sets out clear obligations for the ABS in regard to protecting the confidentiality of data, and is the basis for the organisational culture where confidentiality is paramount. In its 108 year history, no ABS officer has been prosecuted for a breach of the ABS' legislated confidentiality requirements. There is strong community acceptance of, and support for, the ABS role, and a high level of trust in the ABS to protect the personal information provided.

For the ABS, where its ability to operate effectively rests on its culture, practices and clear community understanding and trust of its confidentiality and privacy responsibilities, legislation must remain specific to the agency, and be clearly spelt out in this context. In the case of the ABS, the use of specific statutes allows the provisions to be tailored to the situation of the agency. Having specific secrecy provisions in the *CSA* facilitates very clear communication of rights and responsibilities both in our dealings with respondents and with employees within the ABS. As well, reference to the specific protections provided within the *CSA* is more powerful in building trust for the ABS than a reference to general provisions under another Act.

**3. General Comment**

While Issues Paper 43 examines the interaction between the *Privacy Act* and the increasing use of digital and affordable mobile technology, the ABS is also actively examining the interaction between the *CSA* and *ABS Act* and the increasing use of digital and affordable mobile technology, and the data that it collects. In particular, digital and affordable mobile technology enables innovation, is having a transformative effect on various aspects of the operations of the ABS, and is enabling productivity and efficiencies.

In this regard, the terms of reference require the ALRC to make recommendations which recognise the necessity to balance the value of privacy with other fundamental values - including freedom of expression and open justice. The ABS notes another important value – effectiveness. In this increasingly digital era, the ABS is looking to digital and affordable mobile technology to streamline operations, reduce reliance on direct data collection and hence the reporting load of individuals as well as opportunities to better inform governments, business and the community through maximising the use of existing data.

**4. Specific questions**

**4.1 Principles guiding reform (question 1)**

The ALRC issues paper proposes seven guiding principles to inform the development of proposals for reform. These are: privacy as a value; privacy as a matter of public interest; the balancing of privacy with other values and interests (this should include public interests); international standards in privacy law; flexibility and adaptability; coherence and consistency; and access to justice. The ABS suggests that these principles should also cover the balancing of privacy with existing legislation, such as the *CSA* and *ABS Act*.

**4.2 A statutory cause of action for serious invasion of privacy (questions 2 - 27)**

***The impact of a statutory cause of action (questions 2 and 3)***

The ABS would not support a statutory cause of action that impacts on, or restricts, its existing legislation, specifically the *CSA* and *ABS Act.*

The National Statistical Service (NSS) also seeks to address question 2 with a discussion on data integration involving Commonwealth data for statistical and research purposes.

To maximise the statistical value of existing and new datasets, High Level Principles and governance and institutional arrangements for data integration involving Commonwealth data for statistical and research purposes have been developed under the banner of the NSS.

An essential pillar of establishing a safe and effective environment for data integration involving Commonwealth data is the nomination of an agency as the integrating authority responsible for the sound conduct of the data integration project. The term integrating authority is cited in both the High Level Principles and in the governance and institutional arrangements, and reflects that, to the extent that the data the integrating authority deals with involves identifiable information, the integrating authority must be in a position to comply with the requirements of the Privacy Act 1988 and secrecy provisions generally.

For data integration proposals considered by data custodians to pose a high systemic risk, nomination of an accredited Integrating Authority is required. Accreditation is based on an assessment of specialist skills and infrastructure designed to mitigate the high systemic risk posed by the project.

While Commonwealth bodies have legislation that enables criminal sanctions to be imposed on staff who have access to integrated data and use it improperly (that is, for a purpose not agreed to by data custodians, such as on-sale for profit for use in targeted marketing campaigns), the situation is much more inconsistent at the state government level, and there are no criminal sanctions for private sector bodies or local councils. For example, at the state government level, neither Western Australia nor South Australia has a state equivalent of the Commonwealth Privacy Act to enable the application of criminal sanctions in the event of a breach of privacy.

The Cross Portfolio Data Integration Oversight Board (CPDIOB) has decided at this stage that it will only consider applications for accreditation for those institutions covered by privacy legislation (either the Commonwealth Privacy Act or a state or territory equivalent). At present it considers that it would not be able to grant accreditation to private sector integrators to conduct high risk data integration projects for statistical and research purposes involving Commonwealth data.

The rationale behind the CPDIOB position is that the only sanctions that could be imposed on private sector firms for inappropriate use of Commonwealth data would be under contract law, which may be inadequate given the potential value of the data. The ABS is aware of private sector firms presently undertaking data integration projects, some of which involve Commonwealth data.

The Commonwealth arrangements for data integration involving Commonwealth data for statistical and research purposes are expected to become mandatory in the first half of 2014. Following this date, while private sector firms may still conduct low and medium risk projects involving Commonwealth data, plus projects involving only state government data or projects involving data collected from the private sector (or any combination thereof), they will be unable to conduct high risk projects involving Commonwealth data as the lack of sanctions remains an issue.

***Invasion of privacy (questions 4 and 5)***

The ABS does not have a particular view on whether a list of examples of invasions of privacy should be provided for in an Act that provides for a cause of action. However, if such a list is recommended, the ABS notes that one of the suggested inclusions is 'sensitive facts relating to an individual’s private life have been disclosed'.

In relation to disclosure, sections 12 and 13 of the *CSA* dictate how the ABS can publish statistics and release information, taking into account the secrecy provisions in section 19 of the *CSA*. When the ABS publishes statistics, or releases information, it cannot do so in a manner that is likely to enable the identification of a particular person. In order to ensure the ABS complies with this requirement, the ABS has developed statistical methods to prevent the disclosure of identifiable information, while allowing sufficiently detailed information to be released to make the statistics useful. The ALRC may wish to consider these developments in light of the proposed inclusion.

***Privacy and the threshold of seriousness (question 6)***

The ABS has no comment.

***Privacy and public interest (questions 7 and 8)***

The ABS does not have a particular view on how competing public interests should be taken into account in a statutory cause of action, or whether guidance, if any, should be provided in an Act on the meaning of 'public interest'. However, the ABS would like to note that in our opinion, activities that are enacted in law, such as *CSA,* do meet a public interest test because they are enacted by law that has been debated and passed by democratically elected members of the Australian parliament.

***Fault and Damage (questions 9 - 11)***

The business of official statistics in Australia relies on the trust and goodwill of the Australian community. This trust can be undermined by either a blatant (deliberate) breach of privacy or one caused by negligence. Either type of breach would diminish trust, and make data collection more difficult and expensive for the ABS. The fault options should serve as a deterrent from either a negligent or blatant breach of privacy.

If financial impact was the only damage which could be recognised under the proposed new laws, then this would not adequately protect the public interest. If the community's trust in the use of information is eroded, this will significantly impact on the quality of the statistics and the ABS business.

***Defences and exemptions (question 12 - 15)***

Issues Paper 43 states that 'a defence to the statutory cause of action that the act or conduct was required or authorised by or under law was uniformly recommended by the SLRC, NSWLRC and VLRC.' (paragraph 65). The ABS would also support this statement. It is consistent with our main comment that existing legislation, specifically the *CSA* and *ABS Act*, should not be unduly restricted by a statutory cause of action for serious invasion of privacy if such a cause of action was agreed.

ABS legislation requires the ABS to provide an effective statistical service by co-ordinating and maximising the use of official data. This is done through both access to, and publication of, aggregates from other data sources, and through access to individual data, including personal data. The use of official data for statistical and related purposes, as enabled by the *CSA*, must be permissible under any changes to privacy laws.

***Monetary remedies, injunctions, other remedies, who may bring a cause of action, and limitation period (questions 16 - 21)***

The ABS has no comment.

***Location and forum (question 22 - 24)***

The ABS would support the *Privacy Act 1988 (Cth)* being the one-stop shop for all privacy matters, including serious invasion of privacy in the digital era. This would minimise the potential for inconsistency and fragmentation of privacy regulation, that then creates complexity in using administrative and other forms of ‘big data’ information for statistical purposes. Consistent privacy legislation across Australia would be easier to work with, improving the efficiency and effectiveness of many areas of government business.

***Interaction with existing complaints processes (question 25)***

The ABS is of the opinion that a person who has received a determination in relation to a complaint relating to an invasion of privacy under existing legislation should not be permitted to *also* bring a criminal claim based on the statutory cause of action. The person should be limited in the avenues in which it can explore related issues, in this case, issues related to invasions of privacy.

This is also consistent to public policies for the business sector which seek to minimise duplication and unnecessary red tape.

***Other legal remedies to prevent and redress serious invasions of privacy (questions 26 and 27)***

The ABS notes that criminal sanctions apply for breaches of the *CSA*, even after employment ceases.

In relation to what ways might current laws and regulatory frameworks be amended or strengthened to better prevent or redress serious invasions of privacy, the ABS would note that it is important that these 'ways' do not have consequential, especially perverse, implications on existing legislation such as *CSA* and *ABS Act* or on the effective operations of bodies such as the ABS. The introduction of amendments or strengthening existing laws and regulatory frameworks should not introduce barriers or costs that conflate guiding principles and values such as 'value for money'.

**4.3 Innovative ways to reduce serious invasions of privacy in the digital era (question 28).**

The ABS notes seven innovative proposals are being considered: reviewing the role of consent in consumer contracts in the digital era; providing individuals with an enforceable right to removal of certain information; dealing with tracking technology; broadening the regulation of use of metadata; dealing with aggregation of data; prohibiting employer requests for access to private social media accounts; and regulating aerial surveillance.

***Consent in consumer contracts***

Whilst the proposal is in relation to consumer contracts, there is a substantial body of discussion around consent in the information privacy environment and this could be used to guide the discussion of consent in consumer contracts in relation to serious invasions of privacy in a digital era.

***Tracking technology***

ABS legislation requires the ABS to provide an effective statistical service by co-ordinating and maximising the use of official data. This is done through both access to, and publication of, aggregates from other government data sources, and through access to individual data, including personal data. Tracking technologies are a potential source of data for statistical and related purposes that would reduce reporting burden on Australian citizens and collection costs. In particular, there is increasing interest within the official statistical community to explore the use of mobile phone and mobile phone tower data to improve the breadth and timeliness of local population statistics and for transport planning.

In undertaking this work, the ABS ensures it meets the Privacy Principles.

More generally, through its work on health and social statistics, the ABS is aware that the community expects its information to be used effectively both at the point of service provision for the individual, and also in research for the public good. In balancing privacy against public benefit of research, there is a need to recognise this broad, but not necessarily vocal, community support for using information to achieve better social outcomes. Current privacy legislation does not differentiate between statistical uses of personal data that have no direct impact on an individual, and administrative or regulatory use, which may impact the individual. Statistical use will often be a secondary use of collected personal information, but it is an important one with strong community acceptance, and very low risk to the individual if carried out with appropriate safeguards such as are provided in the *CSA*.

Any innovative way to reduce serious invasion of privacy in the digital era should take account of the nature of the proposed use, and the existing safeguards in place to protect confidentiality.

***Aggregation of data***

The ABS notes and agrees there is a problem of re-identification in large datasets that are initially thought to be anonymous, or de-identified. The ABS believes that some of the problem is due to terminology, such as anonymous, de-identified, and confidentiality often being used interchangeably. These terms cannot, in our view, be used interchangeably. De-identifying a dataset is not sufficient for protecting the identification of persons in that dataset. The ABS has worked with the Office of the Privacy Commissioner and released a series of guidelines on confidentiality, including a glossary of terms, to aid in improving understanding and best practice in the use of these terms. The guidelines can be found at [www.nss.gov.au](http://www.nss.gov.au).

As noted earlier, sections 12 and 13 of the *CSA* dictate how the ABS can publish statistics and release information, taking into account the secrecy provisions in section 19 of the *CSA*. When the ABS publishes statistics, or releases information, it cannot do so in a manner that is likely to enable the identification of a particular person. In order to ensure the ABS complies with this requirement, the ABS has developed statistical methods to prevent the disclosure of identifiable information, while allowing sufficiently detailed information to be released to make the statistics useful. These methods are continuously improved to keep up-to-date with methodological and technological advancements that are now making it possible to deal with re-identification in datasets (large or small) in an efficient way. The ABS would welcome discussion with the ALRC on innovative yet practical ways for dealing with the aggregation of data to prevent serious invasions of privacy in the digital era.

**5. Conclusion**

As Australia’s national statistical office, the ABS takes its obligation to protect the confidentiality of personal information extremely seriously. The *CSA* provides the ABS with clear obligations in regard to protecting the confidentiality of data and provides strong assurance to respondents that the information they provide is protected.

The ABS would not support a cause of action, or other innovative ways to reduce serious invasions of privacy in the digital era, that impede its operations under the *CSA* or *ABS Act*.

**6. ABS Contacts**

Any questions regarding this submission should be addressed to:

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