office of the privacy commissioner
new south wales

Senator the Hon Ian Macdonald
Chair
Senate Legal and Constitutional
Affairs Legislation Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

21 DEC 2016

Dear Senator

Submission on the Privacy Amendment (Re-identification Offence) Bill 2016

As NSW Privacy Commissioner I have strongly supported legislation designed to strengthen privacy protections for citizens as well legislation to increase the public benefit from the responsible use of data.

Although the *Privacy Amendment (Re-identification Offence) Bill 2016* is a Federal Bill, I and my Office have received enquiries about the Bill's intended and likely effects. Essentially, the Bill acknowledges the risks inherent in publicly releasing datasets considered to be de-identified. The concerns expressed to my Office, and the evident confusion about its perceived impacts, prompt this submission. From the outset, I support the submission of my Federal colleague, Mr Timothy Pilgrim, Australian Privacy Commissioner, but provide a State perspective arising from the matters raised with my Office.

First, not all entities that re-identify de-identified datasets are acting for nefarious purposes. On the contrary, some are performing a function akin to that of the caged canaries that warned of life threatening noxious gases in the mines of old. A major concern raised with my Office is the unintended possibility of 'killing the data canary' which is operating to warn of possible undetected (ie not public) re-identification.

This point is well made by a number of submissions particularly from the Melbourne University research team which spotted the vulnerabilities in the publicly released Medicare and PBS dataset. While there is an 'exemption' provision, the issues raised in submissions around the use of this provision available to the Federal Attorney General indicate the provision warrants better legislative treatment to secure the desired outcome.

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The second issue of concern to those contacting my Office is the confusion around the coverage of State instrumentalities. While my Federal colleague has stated that the Bill as drafted will not bind State and Territories nor apply to the majority of Universities, sufficient doubt is being expressed that definitive advice and treatment is required.

Thirdly, while the purpose of the proposed law is to act as a deterrent, it places a disproportionately high onus on external recipients to be aware which released datasets are considered to have undergone a de-identification process. The proposed provisions do not appear to create corresponding obligations on the releasing entities to certify each released dataset as deriving from personal data or the treatment used to achieve the outcome of non-identifiable data.

Provisions are needed to oblige the releasing entities to undertake their responsibility for releasing non-identifiable datasets and to have in place processes to monitor and recall data sets. Such provisions will balance the obligations that the Bill places on the community to deal with released data in privacy respecting ways, and secure better outcomes. Balanced responsibilities will better achieve the deterrent effect envisaged and additionally, assist prosecutors and regulators to more effectively respond both to release of supposedly de-identified data and any subsequent re-identification.

Fourthly, the Bill's coverage of small business and individuals is supported as the actions of either can have a profound effect upon the privacy of individuals. As Professor Butler commented:

> "While in a democratic society the state may have an interest in preserving the autonomy of its citizens from invasions of their privacy, the value of such prohibitions may depend upon the willingness of the relevant authorities to prosecute transgressions. In any event, it is the individual who has his or her dignity or autonomy affronted that has the greater interest in preventing or redressing the wrong. Any appropriate legislative response should therefore make provision for reparation for individuals who have been aggrieved by invasions of their privacy." (Des Butler *"The dawn of the age of the drones: An Australian Privacy Law perspective"* (2014) 37(2) University of NSW Law Journal 434, 469)

But it is not just the actions of these entities to re-identify de-identified datasets that need consideration in the Bill but also the public release of datasets involving or derived from personal or health information by these entities. If the outcome sought is the protection of the privacy of citizens and their confidence in the appropriate use and treatment of information about them, then the datasets released by these bodies and their responsibilities of such releases also warrants inclusion in the Bill. Australia's privacy laws

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lag behind the protections available in international jurisdictions. For this reason it is critical that a piecemeal approach is not taken to fundamental issues such as identification of individual citizens from large datasets that have supposedly been de-identified.

Conclusion

Data analytics can provide insights that inform policy development, service delivery and commercial decisions. This can produce tangible outcomes for the community in areas such as health, research and economic activity. Utilising and nurturing mechanisms that provide an extra measure of privacy protection is necessary in today's technological world. The concerns expressed to my Office are that the draft legislation is too blunt an instrument to secure the advantages of responsible release of datasets while protecting citizens and Government against mal-intended re-identification.

I am happy to provide any further detail that may assist with any questions that arise from this submission.

I agree to this submission being published. Please ensure that prior to the publication of this letter my signature is redacted from the version to the published.

Yours sincerely

Dr Elizabeth Coombs
A/NSW Privacy Commissioner
21/12/2016