



**Australian
Privacy
Foundation**

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Division Head
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20 December 2019

Dear Sir/Madam,

Census and Statistics Amendment (Statistical Information) Regulations 2019 - submission

This submission is made by the Australian Privacy Foundation regarding the proposed *Census and Statistics Amendment (Statistical Information) Regulations 2019*.

The following paragraphs highlight substantive concerns regarding inclusion of two further items in the 2021 Census and the inadequacy of the consultation process regarding those Regulations.

Basis

The Foundation is Australia's preeminent civil society body concerned with data protection. It is apolitical. It draws on expertise from law, information technology, health, marketing and other sectors.

The Foundation welcomes the opportunity to assist the Assistant Treasurer's consideration of the proposed regulations and more broadly foster a national census regime that recognises concerns evident in the development and implementation of the most recent Census.

Overall the Foundation is deeply concerned by ongoing creep in relation to the Census, where Government appears to be disregarding substantive concerns within the Australian community. Such a disregard was apparent in the most recent Census, where the rudimentary Privacy Impact Assessment about the major change of the abandonment of a century old privacy-protection approach (de facto anonymity) appeared designed to escape notice by the public and civil society. Cautions provided by civil society were disregarded and as a result there was very widespread public criticism of planning, implementation and responsiveness by the Australian Bureau of Statistics (ABS), reflected in for example the #censusfail hashtag, critiques by researchers and negative appraisals by MPs.

The Foundation recognises the importance of both the ABS and the Census as foundations of Australia's liberal democratic state. The legitimacy of both the ABS and the Census are eroded when the ABS does not engage in substantive consultation with the community regarding data collection and data sharing. As highlighted below, the proposed extension of data collection through the *Census and Statistics Amendment (Statistical Information) Regulations 2019* (Cth) is an example of that failure.

The legitimacy of data collection is eroded through incremental creeping extension of the Census. In the aftermath of unanswered questions about the good faith of intrusive changes in the previous Census data model, it is insufficient for the ABS to assume that some unarticulated public good – one that might be contested by much of the community – is all that is required for the addition of data collection elements as per the current proposed Regulations or other ABS data collection and data sharing practices.

Disregard of Community Concerns

On that basis the Foundation expresses the following concerns and calls on the ABS to engage in a more meaningful consultation. (We note that APF and perhaps other key civil society organisations do not appear to have been approached, despite obvious community interest in resolving questions about data treatment).

If there *is* a compelling case for further data collection we are sure that the ABS can indeed communicate that case to the Australian community and will receive the support of the community.

Merely indicating that the ABS intends to engage in further data collection, as distinct from explaining and justify that erosion of privacy, raises serious questions about both the proposal and about whether the ABS has taken on board the criticisms that were embodied in the #censusfail hashtag and other evidence of the withdrawal of trust and ‘social licence’, such as the inordinate and desperate effort ABS required to achieve anything like the usual level of participation.

Item 1 – Service in the Australian Defence Force

The Foundation has not sighted an explanation by the ABS of why this data should be collected, other than that it “will allow for a better understanding of the circumstances of Australia’s veteran community”.

We call on the ABS to provide a more detailed statement on the need for the item, given that there appear to be rich existing sources of data (through for example the Veterans Affairs databases) regarding the circumstances of current and former members of the veteran community.

The Foundation notes the separate submission by privacy expert Dr Bruce Baer Arnold regarding the development of a national ‘Open Data’ scheme for inter-agency data disclosure. Those frameworks envisage sharing of data with accredited non-government research institutions and research groups with epidemiological, welfare or other expertise. In the absence of more information about how the new data will be used we question whether there is much utility in adding one or more fields to the Census.

We further question why the ABS has been reluctant to provide information about the proposed inclusion of the new item. Given the Foundation’s support of a proportionate, transparent and properly oversighted census regime we are open to endorsement of a proposal that is founded on substantive consultation. Regrettably, what we have seen so far is inadequate.

We note that widespread expressions of concern among current and former members of the armed forces and their support organisations were a major feature of the controversies that emerged, in the absence of proper consultation, prior to the 2016 Census. The ongoing challenges faced by these servicemen and women, some of whom face threats at home as potentially fatal as those on the front line, need to be recognised and definitively set to rest before the next Census.

Item 2 – Health conditions diagnosed by a doctor or nurse

#Censusfail highlighted widespread and deep community concerns regarding collection and potential mismanagement of sensitive personal information. Those concerns must be recognised and (importantly) *seen* to be recognised by the ABS. A failure to do so will foster misreporting by people providing data through the Census, and potentially undermine trust in the Census as a whole.

The Foundation is well aware of the statutory framework regarding ABS activity. It notes however concerns regarding both ABS resourcing and ABS data management in recent years, including negative reports by the Australian National Audit Office and the Australian Parliament. The proposed additional 'Health' item represents a worrying extension of a major honeypot, in other words a major resource of sensitive personal information that may be inadequately safeguarded and that if compromised may have serious consequences for census participants. We further assume that the data will be widely disclosed within government. Unresolved concerns about the breach of trust in the government's My Health Record abandoning the traditional medical ethical consent model despite earlier assurances, and the security access control failures in its flawed fragmented IT system, may add to concerns about health data, collected under threat of prosecution, in the next Census.

On that basis caution is needed before adding data about health conditions, in particular about chronic conditions. The onus is on the ABS to explain why the additional data is needed, how it will be used and why the data is not adequately provided through existing data collections.

As with the Foundation's comment on the preceding item, we are open to persuasion regarding imperative inclusion of 'health conditions' in the Census. The current consultation has not addressed the concerns and is, worryingly, symptomatic of a consultation ethos in which public sector entities simply indicate 'this is what we are going to do' without providing civil society with a basis for endorsement.

Linkages and Compliance

The Foundation reiterates its past concerns that the requirement for name can mean data linkages and serious breaches of privacy. As noted above, a data breach could be very harmful, both for the individuals involved and also for the public reputation and tolerance of the Census' intrusions. Please refer to previous submissions on this topic of name retention and on the failed Privacy Impact Assessment (PIA) in 2015 used to justify it for the first time in 2016.

The Foundation also again expresses its concern that noncompliance with mandatory provision of information by people subject to the Census is ultimately subject to a (recently introduced) offence.

This criminalisation is no longer appropriate, if it ever was, because the Census is no longer effectively anonymous, which it was when the crime was introduced. Any policy claim made at the time of the introduction of these controversial offences, to the effect that it was proportionate to criminalise non-compliance, is no longer credible in the aftermath of the bad-faith removal of the anonymity protection just before the 2016 Census. (Effective anonymity was a central feature of the Census which had been in place and worked well for a century to give good reason to treat the information as relatively low risk for the person to supply; its protective benefit was stripped away without proper consultation in the PIA of late 2015, despite the properly conducted 2005 PIA identifying its importance, and the risks to privacy and public trust in removing it.)

It should also be said that the ABS' demonstrated incapacity to specify and manage the reliable provision of online collection services in the face of inevitable low-grade routine cyber attack demonstrated by the flawed 2016 Census is seen as another good reason for the criminal offence provisions not to apply to the next Census.

And to compound these privacy and online data management problems in Census 2016, there were also repeated misleading official communications and messaging which appeared to misrepresent the scope of the main non-compliance offence. This appeared to have been done -- as growing concerns and potential resistance to completing the census developed before and after the Census night -- to misleadingly give the impression to ordinary non-lawyers that mere non-completion was the offence, and thus that everyone not completing the Census commits a crime, and risks prosecution. In reality, while the other 'provision of false information' offence is widely cast with no narrow triggering notification, the non-compliance offence is only triggered after expiry of a set period after a specific compliance direction is notified to an individual who has not yet complied. Such misrepresentations, in apparent effort to scare doubters into compliance by implying the relevance of an offence that does not

actually exist, complete the list of factors discrediting the existence and use of these offences, and we repeat our call for them to be removed prior to the next Census.

Action

The Foundation calls on the ABS to provide meaningful information without delay regarding the issues noted above, and to prioritise the concrete steps needed to rebuild a basis for public trust in a safer Census.

A handwritten signature in black ink, appearing to read 'D Vaile', with a stylized, cursive script.

David Vaile
Chair
Australian Privacy Foundation