

Privacy and the 2016 Census

What is the Census?

When the Census and Statistics Act was being revised in 2006, the Attorney-General's Department advised, when asked for a definition of the Census to be placed in the revised Act, that the "Census" does not have to be defined, as in law the term can only relate to the Census of Population and Housing, due both to the wording of the Constitution and to the common meaning of the term. Under either of those tests, the composition of a Census, as defined in legislation, does not include matching the Census data with administrative data, after the Census has been taken.

Privacy

The Acting Australian Information Commissioner recently said *"Privacy is not secrecy. It is about giving individuals control over how their personal information is handled; creating customer confidence and trust. As such, good privacy practices and great innovation directly support each other."*

Unfortunately, Australian citizens will have no "control over how their personal information is handled" in the forthcoming Census of Population and Housing. The ABS is collecting name and address of each Australian, will retain that information and will match the Census records with various administrative records held by government (health, tax, New Start, social security, etc). Australians will be given no say in how their information is used as the ABS has said the provision of 'name and address' is compulsory.

This is a direct and deliberate breach of the Australia's Privacy Principles, which, to say the least, is a surprising action for the ABS to be taking.

Quality of Census data at risk

By doing this, the ABS has put the very success and value of the 2016 Census at significant risk.

From as early as 1976 (see the *Law Reform Commission Report "Privacy and the Census"*) to the mid-1990s (see the *Parliamentary Committee into the Treatment of Census Forms*) the ABS has found that the Australian public is very concerned about the collection of names and addresses. More recently, the ABS's own research shows that 19% of Australians don't trust the ABS.

The compulsory collection and retention of names and addresses is thus very likely to result in a significant public backlash against the 2016 Census with people either boycotting the Census or providing incorrect information.

This will have serious consequences. First, thousands and thousands of government, business, academic and other users rely on high quality Census data, and a reduction of the accuracy of that data would be a serious issue.

Second, an important legal issue is at stake. Following a 1975 High Court decision on the Representations Act (135 C.L.R.1) the Attorney-General and the Solicitor-General of the day opined that a 5 yearly Census was required to ensure the accuracy of State population estimates, to be used for the purposes of determining the number of seats that each State have in the House of Representatives. This opinion led to the provisions in the Census and Statistics Act, 1905, which **require** the ABS to conduct 5-yearly censuses and produce quarterly population estimates. (In doing so, it was acknowledged that even this step may not preclude a challenge against the High Court decision.)

If significant doubts arise, about the accuracy of the population counts coming from the 2016 Census, then this would be a very serious matter indeed, and it would be difficult to redress.

The public has not been consulted

In large measure, the public has not been consulted about this significant escalation of privacy intrusion. The ABS did present a Privacy Impact Statement (PIS) in 2015 but:

- It was not reported in any main stream media – just the IT News and Public Service News
- It did not mention that for the 2006 Census the same proposal was dropped after a damning Privacy Impact Report by skilled privacy expert, Mr Nigel Waters, and
- It did not mention a similar proposal for the 2011 Census, which the then Statistician didn't let go forward because of privacy concerns and the possibility of significant public backlash.

Perhaps the reason why these last two experiences weren't mentioned in the PIS was that the ABS would have very great difficulty in answering a question like "If this matching proposal was rejected in 2006 and again in 2011 for privacy and respondent reaction reasons, what has changed in 2016 that makes such a proposal acceptable?"

Not surprisingly this topic has gone viral on the Internet, and one thing is certain from these comments, informed Australians are not amused.

Privacy advocates have not been consulted.

When the same proposal was made for the 2006 Census it was also strongly opposed by the Australian Privacy Foundation. Remarkably neither the the Australian Privacy

Foundation (APF), or any other non-government privacy agency, were consulted about the 2016 PIS.

When the approach proposed for 2016 was discovered, the APF again became very concerned and took up this issue with the ABS and with some vigour. In a letter to the Australian Statistician, the APF said:

*'Concerns about census information are greater in 2016 due to reports of more explicit threats of the use of legal compulsion against citizens who may be less certain about participation as a result of the changes in the census (**an anonymous, specific-purpose, temporary and relatively safe one-off snapshot appears to have changed into a less-safe, personally identified, lifetime longitudinal dossier, with potentially fewer protections**)'*. (emphasis added)

More than a Conundrum

When you think about it, the 2016 Census proposal as it now stands, does indeed seem to be a strange concoction. It will allow people to opt-in to having their form kept by Archives for 100 years before release.

However, it provides no choice to people concerning the retention of their name and address information for at least 4 years in a population register, during which time their census data will be matched with administrative records.

As currently proposed, the Statistician would effectively be saying to all Australians *'whether you like it or not the ABS intends to keep your name and address identified information for around 4 years (or longer if we think that it worthwhile approach to take), and will match it to various administrative data sets over that time, as it sees fit'*.

This, without doubt, is the most significant invasion of privacy ever perpetrated on Australians by the ABS. What is motivating me is that as an Australian citizen I am appalled that the ABS can think it can use the threat of prosecution to make me provide data that allows the ABS to set up, what is in effect, a 'Statistical Australian Card'.

I'd expect that a large proportion of Australians, if they really understood what is proposed, wouldn't want their personal information used in this way: just like they opposed the Australia Card.

Also, these two approaches, concerning how the ABS is collecting the data, just don't hang together. For this reason, I'd be surprised if the Australian public doesn't ask 'if placing Census returns in Archives for 100 years before release can be done on an opt-in basis, why is the more sensitive matching of Census records with administrative data being done on a compulsory basis'.

For a statistical office, this approach is just not tenable. To collect accurate information the willing cooperation of the public is required; this is an old adage, but a very true one. Threatening the public with prosecution is never a successful strategy to adopt.

Secrecy

As far as I can ascertain, there is no reference made in any of the ABS documentation, or public statements about the 2016 Census, or about the proposed matching of that data with administrative records, of the existence of the secrecy provision of the Census and Statistics Act. In this provision “secrecy” actually means secrecy! I must conclude that this omission has been intentional on the part of the ABS. Is this an indication that the ABS is just going to ignore this legal requirement? Or perhaps this is just a precursor to the ABS getting the secrecy provision of the Census and Statistics Act altered?

One of the main arguments used in the past to achieve a high level of cooperation was to guarantee the secrecy of the information the respondents supply. If secrecy goes, then so too will the high level of respondent cooperation, and, most probably accurate reporting, by respondents. This would indeed be a dismal result, somewhat akin to *committing statistical suicide!*

The ABS can't collect 'name' in the 2016 Census on a compulsory basis.

The ABS is using the word compulsory as if its meaning is obvious. Well, it is not, and for starters, that term isn't mentioned in the Census and Statistics Act either. The reality is that most data collected by the ABS, even in the Population Census, is done on a voluntary basis.

The term compulsory is simply used to mean that the ABS has the power to prosecute any respondent who fails to provide the statistical information being collected, and there is some possibility that prosecution action might be undertaken by the ABS for this non-compliance.

However, before prosecution can be commenced several legal conditions have to be met. The first of these is *the enabling provision*, Section 8 (3) which, amongst other things, provides authority for the Statistician to collect statistical information in the Census. Section 8 (3) says '*For the purposes of taking the Census, the Statistician shall collect statistical information in relation to the matters prescribed for the purpose of this section.*'

This is followed by Section 10(1) which allows the Statistician to prepare forms for the collection of Census information, and by Section 10(4) which gives the Statistician the power to direct respondents to fill-up and supply the Census form to someone in authority in the ABS. The last provision is Section 14 which gives the Statistician the power to start prosecution procedures.

After that it is a matter for the courts.

First, let's consider the enabling provision, Section 8(3). By regulation, the ABS has prescribed 'name' as a topic on which statistical information may be collected and from which statistics may be produced. However, as far as I can determine, no statistics are planned to be produced from the Census about 'name'. Therefore that statistical information, that is 'name', can't be considered as being collected 'for the purposes of taking the Census'.

I say this because the Statistician is required to 'compile and analyse the statistical information collected under this Act and ... publish and disseminate the results of any such compilation and analysis' (See section 12 *Publication etc of statistics*.) With respect to 'name' it is obviously impossible to meet this requirement!

Hence the collection of 'name', per se, **is not authorised** by section 8(3) of the CSA.

'Name' can still be collected on a voluntary basis, but the ABS has no power to commence prosecution action for Australians not providing 'name'.

I should point out that I explained my conclusions on this matter to the Australian Statistician and he said he disagreed with my analysis. However, he gave no indication why he disagreed with me.

He did say he had some advice from the the Australian Government Solicitor (AGS) which concluded otherwise. (The fact the advice came from the AGS, means very little these days, as all advice has to stand on its own efficacy.)

I asked what questions he asked the AGS to address and if he would show me the AGS advice. He declined to do so. This surprised me as I would have thought that if the ABS had sound advice that is helpful to the ABS view, then there are some obvious advantages in using it.

In light of the position the Australian Statistician had taken, I did some research on this matter. I will explain what I did by telling a story.

I was, personally, heavily involved in the process of rewriting of the Census and Statistics Act. At the time, I kept good personal records of all the discussions the ABS had with the Government, the Parliamentary Draftsmen and the Attorney Generals Department on all important legal matters, including this specific issue.

My notes indicated that in the middle of June 1981, during the long process of drafting the bill to make the required, and substantial, amendments to the Census and Statistics Act, Dr Roy Cameron, the then Australian Statistician, wrote to the First Parliamentary Counsel on quite a few issues concerning the wording in the draft bill, as it then stood.

One question he asked was if the draft bill could provide for the ABS to 'collect

information and then to compile and tabulate statistics'. He also suggested that a broader term, like information, was necessary for the collection function as it could be argued that names, addresses, industry, etc, are not statistics.

An example of an issue Dr Cameron wished to address here, using the context of 2016 Census, follows. One matter prescribed for a person is *"the name and address of the undertaking in which the person was employed during that week"*. When that statistical information is collected it is matched with the ABS business register and the businesses industry code for that undertaking is added to the person's Census record so that accurate industry statistics can be produced.

Sometime in July, 1981, the Second Parliamentary Counsel replied that he agreed with the distinction Dr Cameron wished to make between the collection of information and the compilation of statistics. However, he suggested that the word "information" would be too broad and proposed the use of the term "statistical information". He thought this expression was broad enough to authorise the acquisition of names and addresses etc of respondents, **so long as it is done for statistical purposes**. *This proviso is making the same point I have prosecuted above; that is, during the taking of the Census statistics have to be produced from the collection of 'name' before the collection of name can be considered to be covered by the Section 8(3) of the Census and Statistics Act.*

The above approach, as recommended by the Second Parliamentary Counsel, was agreed to and that interpretation was embedded in the enabling statements in the Census and Statistics Act: Sections 8 (3) for the Census and 9 (1) for Statistics, were the result.

Given the view of the Second Parliamentary Counsel, and its subsequent precise implementation into the Census and Statistics legislation, I suggest the discussion on this issue ends here.

The ABS doesn't have the authority to collect 'name' in the 2016 Census on a compulsory basis.

Bill McLennan
Canberra, ACT

0427 512 987

bill.mclennan@mac.com