
NEW SOUTH WALES COUNCIL FOR CIVIL LIBERTIES

RESPONSE TO REPORT DATED 17 JUNE 2005, PREPARED BY PACIFIC PRIVACY CONSULTING FOR THE AUSTRALIAN BUREAU OF STATISTICS ENTITLED *CENSUS ENHANCEMENT PROPOSAL: PRIVACY IMPACT ASSESSMENT REPORT*

Author: Pauline Wright
Position: Vice President
Organisation: NSW Council for Civil Liberties
Postal Address: PO Box 201
Glebe NSW 2037

The NSW Council for Civil Liberties (NSW CCL) thanks the Australian Bureau of Statistics (ABS) for the opportunity to respond to the Privacy Impact Assessment Report prepared by Pacific Privacy Consulting dated 17 June 2005 (PIA Report).

Given the conclusions drawn by the author of the PIA Report, we urge the ABS to abandon the present proposal for enhancement of the Census.

We note that the many of the conclusions drawn by the author of the PIA Report are consistent with the concerns we raised in our Submission to the ABS in relation to the proposal to develop a Statistical Longitudinal Census Dataset (SLCD), dated 10 June 2005. We respond to those conclusions as follows (adopting the paragraph numbering used in the PIA Report):

PIA Report Conclusions – Privacy Risk

- 11.3 The PIA report concludes at page 38 that “the creation of the SLCD inevitably means a more intrusive database than has been held before, and will also increase its attractiveness to a range of potential users beyond those who would only be interested in statistics”. The database will be “more intrusive in the sense that it will develop over time into a record of changes in the characteristics and circumstances of the individuals represented by the unit records” and “more attractive...in that time series information about individuals is inherently of greater interest to both government and commercial users than simple ‘snapshots’.” Indeed, we note that the head of the ABS Census Program is quoted as having described “the intention as being to turn the ‘snapshot’ of census data ‘into a movie’.” Clearly, the more intrusive the database becomes, the greater its risk to privacy.

- 11.5 The PIA Report concludes that the SLCD will “undoubtedly be very attractive” to a wide range of potential non-statistical users. It acknowledges the ABS’ argument that despite the richness of present data, and the potential for matching it with other data which already exists, this has never happened nor been proposed. While this is true, the fact that the proposal will mean a vast enhancement and enrichment of the dataset (see conclusions in 11.3) will mean that the temptation for non-statistical use will be that much stronger. The risk of such use will therefore increase dramatically.
- 11.6 The PIA Report concludes that the privacy risk derives from two sources, firstly, the ABS’ own ability to identify individuals from the SLCD and the other data it holds and, secondly, from the potential ability of third parties to identify individuals from the SLCD and other data held and collected for other purposes.
- 11.7 The second category of risk is divided into *unauthorised* third party access and *authorised* third party access (ie third parties allowed by law to use the data in a way that could lead to identification of individuals).
- 11.11 In relation to unauthorised third party access, the PIA Report acknowledges that “no security measures can...guarantee 100% effectiveness, and despite the ABS’ best endeavours, there will always remain a residual risk or unauthorised third party access”. It goes on to say, however, that because the SLCD would have “no immediate utility to any third party, particularly given the absence of names and addresses”, the risk of unauthorised third party use would not be significant (see also paragraph 11.12).

It is our view, however, that while identifying data is potentially available to unauthorised third parties (including hackers, criminals or rogue employees), the creation and retention of such a temptingly rich source of data creates too great a risk.

- 11.13 The PIA Report concludes, and we agree, that “by far the greatest privacy concern in relation to the Proposal...is the attraction of the dataset to other official bodies in pursuit of other public interests”.
- 11.14 The Report recites an example of the Tax Commissioner before World War II seeking ABS data for the purpose of court proceedings against a taxpayer and rightly commends the then Statistician for resisting the Tax Commissioner’s use for that purpose (par 11.15). It points out however, that this incident “demonstrated the willingness of a past government to put short term administrative needs ahead of principle” (par 11.16). It is the potential for such willingness by government or officials in the future that most concerns NSW CCL.

- 11.19 It is the conclusion in this paragraph with which we are most concerned and which accords fully with our own assessment of the privacy impact of the proposal. The PIA Report concludes that “neither the ABS nor the current government can guarantee that the current and proposed legislative controls will remain indefinitely – in the absence of any constitutional protection of privacy, they are ultimately vulnerable to the decisions of the government of the day, subject to parliamentary approval.”
- 11.20 The PIA Report also cites by way of example of ‘function creep’ the progressive use of the Tax File Number since 1989 “despite very firm promises and assurances” by government that this would not occur, to which we referred in our submission dated 10 June 2005. It is almost inevitable that despite assurances to the contrary, such a rich source of data will be subject to ‘function creep’ in the future.
- 11.21 The PIA Report properly commends the ABS’ and the Statistician’s record of resisting government attempts to change the basis of its operations or interfere with its independence (see also pars 11.22 and 11.23). It also properly identifies an example of the government obtaining changes to the Census operations in 2001. The government sought and obtained legislative amendment to allow the retention on an opt-in basis of imaged census forms from the 2001 Census.
- 11.24 Those imaged census forms will be retained by the Australian Archives for 99 years and this “prevents the ABS from giving its previously unqualified assurances about destruction of name identified information after the processing period”. While that information exists, NSW CCL is concerned that there is an unacceptable risk of it being accessed by either authorised or unauthorised third parties.
- 11.28 The PIA Report concludes that “the residual privacy risk of authorised access depends on the level of trust in the community that future governments will not overturn the longstanding principles underlying the Census and Statistics Act.” NSW CCL points out that there is a real risk that government may legislate to overturn longstanding principles long thought to be fundamental to democracy. A recent example is the anti-terror legislation introduced following the September 11 attacks in New York which enables ASIO to detain a person on a questioning warrant for up to 7 days without charge and without so much as a suspicion of that person having committed any offence.
- 11.32 NSW CCL notes the PIA Report’s conclusion and agrees that “in the event of a radical change in legislation to allow other uses, names could be scanned from the imaged forms at any time during the processing period”. For this reason alone, we believe that the proposal should be abandoned.

11.33 NSW CCL agrees with the PIA Report's conclusion that there are "strong arguments of principle for abandoning the subsidiary proposal to add the 2001 Census data to the SLCD, on the basis of undesirable retrospectivity", for the reasons set out in our submission dated 10 June 2005.

Recommendations

In relation to the recommendations set out in part 12 of the PIA Report, we respond as follows, adopting the same numbering as used in the Report (the PIA Report recommendations are recited below in italics):

1. *Consideration should be given to abandonment of the Census Data Enhancement proposals involving name matching and of reverting to previous ABS practice of confining the use of names during Census processing periods to ABS quality studies only.*

NSW CCL considers that the proposal for census enhancement as presently proposed should be abandoned. We agree with this recommendation.

2. *If the proposal is implemented, the ABS should adopt all the administrative measures it has already planned to protect confidentiality and privacy in relation to the SLCD, including in particular the setting up of a separate administrative unit within ABS to be the creator and custodian of the SLCD, and clear communication of the nature of the intended uses to respondents to all relevant surveys.*

If the proposal is to proceed notwithstanding the strong policy reasons why it should not to which we have referred in this response and in our submission dated 10 June 2005, then the measures referred to in this recommendation and the following recommendations should be implemented at the very least.

We note that the PIA Report's recommendations for legislative change are preceded by an observation that "the legislation governing the conduct of the Census and subsequent use of the Census information – the *Census and Statistics Act 1905* – cannot be completely 'future-proofed'." We agree with that observation.

We also agree that "the privacy and confidentiality protections [in the *Census and Statistics Act 1905* – the CSA] could be strengthened" and we agree with the remainder of the recommendations set out in the PIA Report, as follows:

3. *The ABS should consider seeking an amendment to the CSA to insert a definition of 'statistical purposes' to put beyond doubt that statistical purposes cannot include administrative, client management or law enforcement purposes that relate to specific individuals. A similar definition could usefully be inserted into the Australian Bureau of Statistics Act 1975. The precise wording of any such amendments*

would need very careful consideration to achieve their objective, and the Privacy Commissioner should be consulted.

4. *The ABS should consider seeking amendment to the CSA to put beyond doubt that the reference to 'the purpose of the Act' in the secrecy provision (s.19) is confined, as the ABS asserts, to publication in accordance with s.12; communication between officers for the purposes of compilation, analysis and dissemination, and prosecution of offences covered by the CSA.*
5. *The ABS should consider seeking amendment to the CSA to make it clear that disclosure under s.19 'in accordance with determination' is not an alternative to 'for the purposes of this Act' (as it now reads) but rather a specific subset of disclosures for those purposes.*
6. *The ABS should consider seeking amendment to the CSA to apply the express defence against access by courts and tribunals (currently in s.19A in relation to 2001 Census information) both to 2006 and subsequent Census information, including the name and address information held during the processing period in whatever form, and also expressly to the SLCD indefinitely.*
7. *If the name matching proposals are abandoned (see Recommendation 1), the ABS should consider seeking amendment to the CSA to expressly confine the use of name information from Census forms to ABS quality studies, apart from the separate Census archiving provision for those providing express approval for their Census information to be retained by Archives.*

While we agree with recommendation 7, NSW CCL is further of the view that, even on an opt-in basis, future Census information should not be archived as the 2001 Census data was. We recommend that the ABS should consider seeking repeal of the legislation which enabled that to occur in the 2001 Census.

NSW CCL Conclusion

The independent privacy impact assessment carried out by Pacific Privacy Consulting at the request of the ABS reinforces the concerns we expressed in our submission, dated 10 June 2005, opposing the proposal to enhance the Census by creating the SLCD and merging it with other data (the Proposal).

NSW CCL acknowledges that the ABS has a good record to date in relation to privacy protection and that the ABS gives assurance that if the Proposal proceeds, the ABS will uphold the same standards. Nevertheless, this fails to take into account the danger posed by unauthorised access to data by rogue employees, hackers or criminals or by possible future authorised access granted to third parties by legislative amendment.

The danger is not posed by the level of standards held by the ABS but by the very existence of a dataset so valuable that the temptation to exploit it may prove overwhelming to third parties.

Given the likelihood that many members of the public will form the view that individuals may be identified by the data, because of their consequent reluctance to give full and accurate information, over time the reliability of the Census data is at real risk of becoming unreliable.

Of particular concern to the NSW CCL are the following conclusions and observations set out in the PIA Report:

- no security measures can guarantee 100% effectiveness, and despite the ABS' best endeavours, there will always remain a residual risk of unauthorised third party access
- by far the greatest privacy concern in relation to the Proposal is the attraction of the dataset to other official bodies in pursuit of other public interests
- governments in the past have demonstrated a willingness to put short term administrative needs ahead of principle
- neither the ABS nor the current government can guarantee that the current and proposed legislative controls will remain indefinitely – in the absence of any constitutional protection of privacy, those legislative controls are ultimately vulnerable to the decisions of the government of the day
- there have been examples in the past of 'function creep' despite very firm promises and assurances by government that this would not occur
- the government made changes to the 2001 Census notwithstanding opposition from the ABS and the Statistician so that imaged census forms will be retained by the Australian Archives for 99 years and consequently, the ABS is prevented from giving its previously unqualified assurances about destruction of name identified information after the processing period
- in the event of a radical change in legislation to allow other uses, names could be scanned from the imaged forms at any time during the processing period
- there are strong arguments of principle for abandoning the subsidiary proposal to add the 2001 Census data to the SLCD, on the basis of undesirable retrospectivity

- the legislation governing the conduct of the Census and subsequent use of the Census information – the *Census and Statistics Act 1905* – cannot be completely ‘future-proofed’

The risks posed by the Proposal to privacy identified in the PIA Report are too great and, accordingly, the Proposal ought be abandoned.

Yours faithfully,

Pauline Wright
Vice President
NSW Council for Civil Liberties