# Responses from legislation proponents — Report 6 of 2020[1]

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# THE HON MICHAEL SUKKAR MP

**Minister for Housing and Assistant Treasurer**


Ref: MS20-000718

Senator the Hon Sarah Henderson
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Dear Senator Sarah

I am writing in response to the request from the Parliamentary Joint Committee on Human Rights (the Committee) requesting information in relation to issues raised in the Committee's *Human Rights report 4 of 2020* regarding the *Census and Statistics Amendment (Statistical Information) Regulations 2020* (the Regulations).

The Committee has sought advice in relation to the following matters:

- how collecting information as to people's diagnosed medical conditions can assist with government planning for the provision of services (noting that the nature of the medical condition is unknown and could capture a range of conditions, including those that require no provision of services);
- whether the measure is sufficiently circumscribed; in particular why it is appropriate that a person who does not disclose a diagnosed health condition would be subject to a criminal penalty; and
- what other safeguards would protect the privacy of personal information which respondents would be compelled to provide, including whether the information is securely held and how long identifiable information is retained.

In preparing the following responses to the Committee's request, input from the Australian Bureau of Statistics (ABS) has been sought. The Australian Statistician has also advised that senior officers at the ABS are available to meet with the Committee to discuss any further issues or questions that the Committee might have.

**How collecting information as to people's diagnosed medical conditions can assist with government planning for the provision of services?**

As the Committee notes in its report, the Regulations prescribe a new Census topic for 'health conditions diagnosed by a doctor or nurse'. This authorises the ABS to set questions in the Census that are within scope of the topic. The Australian Bureau of Statistics has advised that they intend to use this topic to present a list of common health conditions on the Census form. The respondent will then be required to select the condition(s) that they have been diagnosed with. As noted in the Statement of Compatibility for the Regulations, respondents will not be required to provide specific details about their medical condition(s) or any treatment(s) that they are receiving.

The conditions proposed to be included in the list are: arthritis, asthma, cancer, dementia, diabetes, heart disease, kidney disease, lung condition, mental health condition and stroke. These conditions are sufficiently prevalent and broadly described to protect the respondent's privacy when answering, while still being useful to identify small geographic areas and/or population groups where there may be a higher rate of a particular health condition. The differential rate in prevalence – especially when considered with other factors such as income, education, employment status and cultural background – can assist policy makers and service providers to more effectively target their programs.

The health conditions proposed to be listed in the Census question have been determined in consultation with key stakeholders based on prevalence in the community and to ensure consistency with other health surveys. Key stakeholders supporting the addition of a health conditions topic were the Department of Health, the Department of the Prime Minister and Cabinet (Indigenous Affairs Group), the Australian Institute of Health and Welfare and the National Institute for Dementia Research. Other interested stakeholders included academics, community and industry group organisations, and State, Territory and local government. These data users expressed a high demand for health conditions data at the local level for health service planning and to monitor change under the *National Health Reform Agreement*, and various other reporting frameworks and initiatives at the local level.

**Whether the measure is sufficiently circumscribed?**

The ABS has advised that questions about diagnosed health condition in the 2021 Census will be appropriately circumscribed to ensure that it captures only the high-level information that is most relevant to government planning. As noted above, the ABS proposes to frame its questions using broad descriptions of health conditions (arthritis, asthma, cancer, dementia, diabetes, heart disease, lung condition, mental health condition and stroke). No information will be sought about the individual's particular diagnosis, treatment plan or long-time prospects.

The ABS has also advised that their research shows the vast majority of respondents willingly participate in the Census and have done so for more than 100 years. Participation in the Census is compulsory and, while penalties may apply if a person refuses to complete the Census, the ABS's priority is to get informed and willing cooperation to ensure the continued provision of high quality data. Census data is used by people and organisations from all over Australia to decide how to deliver amenities, assistance, benefits, infrastructure, services and opportunities in the future.

The *Census and Statistics Act 1905* enables the Australian Statistician, or an authorised officer, to request a person to fill up and supply a form (section 10) or answer questions (section 11). The Statistician, or an authorised officer may, by written notice, direct a person to fill up and supply a form or answer questions within a set period being not less than 14 days. If a person fails to comply with the written Notice of Direction, a person has committed an offence and may be prosecuted under section 14 of the Act.

The ABS goes to great lengths to ensure that people are counted as part of the Census, with prosecutions that may result in fines and criminal penalties being the last option. The ABS has a range of internal processes and clearances all officers must follow before issuing a Notice of Direction to ensure fair and equable treatment of respondents. In 2016, the vast majority of Census forms were received voluntarily. Only a relatively small number of households (2,951 out of a total of 9.9 million households) were issued with a Notice of Direction to complete the Census. Of those cases 42 matters were referred to the Commonwealth Director of Public Prosecutions for consideration due to persons failing to comply with the Notice of Direction. Failure to comply with a Notice of Direction is in breach of the law and could lead to prosecution. The decision to prosecute rests with the Director of Public Prosecutions.

The ABS has advised that it gives consideration to the following factors before it refers a case to the Director of Public Prosecutions:

- the expected impact of prosecution in protecting the quality and integrity of official statistics and the reputation of the ABS now and in the future through general or personal deterrence (noting that reputational damage to the ABS is not a barrier to referring persons for prosecution);

- the seriousness of the offence (e.g. in terms of statistical impact, or actual or threatened harm to an ABS officer);
- any mitigating or aggravating circumstances;
- the age, physical and mental health, and any special vulnerability of the alleged offender, where the alleged offence relates to an individual; and
- the availability and efficacy of any alternatives to prosecution.

In 2016, consistent with previous Australian Censuses, no individual was issued a Notice of Direction for not responding to a particular question on the Census; all cases were for individuals not returning a Census form. The ABS has advised that they understand that not all respondents will necessarily answer all questions, although the vast majority do substantially complete the Census. Reflecting this, the ABS releases the non-response rates for each question in the Census. This is referred to as 'item non-response' and in the 2016 Census the rates ranged from less than 1 per cent to 4 per cent. The reasons relevant questions are not answered may be due to a range of factors, including respondent fatigue, uncertainty, oversight, misunderstanding, or a perception that the particular question is not relevant to that person.

**What other safeguards would protect the privacy of personal information?**

Maintaining the privacy of the personal information collected from the Australian community in the Census is of paramount importance, and is a duty that the ABS takes very seriously.

The *Census and Statistics Act 1905* prohibits the ABS from releasing any data that might lead to the identification of an individual. ABS staff who contravene this prohibition are subject to penalties and sanctions, including imprisonment and hefty fines.

The ABS has advised that they have strong security in place for the IT environment, including processes for detecting misuse of information by ABS staff. There are many layers of security including firewalls against external intrusion. The security of the ABS environment is formally assessed annually to ensure compliance with all Australian Government IT security standards.[1]

To ensure compliance with the prohibitions in the *Census and Statistics Act 1905*, all Census data is de-identified before it is used in publications and data products made available to researchers. The ABS has a customised, layered approach to removing or obscuring data depending on the chosen output, complemented by other privacy and security protection measures such as vetting and monitoring.

Access to analytical data is controlled according to the Five Safes Framework.[2] This Framework takes a multi-dimensional approach to managing disclosure risk. Each 'safe' refers to an independent but related aspect of disclosure risk. The framework poses specific questions to help assess and describe each risk aspect (or safe) in a qualitative way. This allows the ABS to place appropriate controls, not just on the data itself, but on the manner in which the data is accessed. The five elements of the framework are:

- Safe People;
- Safe Projects;

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[1] Further information about how the ABS keeps respondent information confidential can be accessed through the ABS website:
https://www.abs.gov.au/websitedbs/d3310114.nsf/89a5f3d8684682b6ca256de4002c809b/1be71b5a0eb4e902ca25711a007b923a!OpenDocument

[2] Further information about the Five Safes Framework can be accessed through the ABS website:
https://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/1160.0Main%20Features4Aug%202017?opendocument&tabname=Summary&prodno=1160.0&issue=Aug%202017&num=&view=

- Safe Settings;
- Safe Data; and
- Safe Outputs

The ABS has also advised that they have commissioned an independent Privacy Impact Assessment (PIA) on the 2021 Census. This PIA has involved extensive stakeholder consultations, is currently in the final drafting stages and I am advised it will be published before August 2020.

I trust this information will be of assistance to the Committee.

Yours sincerely

The Hon Michael Sukkar MP
Minister for Housing and Assistant Treasurer

Australian Government

Department of Defence

**Defence Amendment (2020 Measures No. 1) Regulations 2020 (the Amending Regulations)**

In the Committee's Report 4 of 2020, the Committee sought additional information about the Amending Regulations in order to assess whether section 24 of the Regulation impermissibly limits the right to work. In particular:

- whether terminating the employment of an ADF member for failure to meet a condition of their employment or enlistment (new paragraph 24(3)(b)(i)), or being absent without leave (new paragraph 24(3)(b)(iii)), without notifying them of the decision, is compatible with the right to work; and

- in the absence of notification, what opportunities ADF members would have to respond to allegations related to a failure to meet a condition of their employment or service, or to an absence without leave, prior to their employment being terminated.

***Defence Response:***

Section 24 of the Regulation, as amended by the Amending Regulations, provides for termination of service in the Australian Defence Force (ADF). Subsection (1) provides three grounds on which a member's service can be terminated: medical unfitness, redundancy and retention not in the interests of the Defence Force. Subsection (2) provides that 14 days written notice must be provided to the member before making a decision to terminate their service. Subsection (3) provides that, in certain circumstances, the notice requirement in subsection (2) does not apply. This includes in the two circumstances of concern to the Committee: where the member has failed to meet a condition of the appointment or enlistment (paragraph 24(3)(b)(i)) and where the member has been absent without leave for a period of three months or more (paragraph 24(3)(b)(iii)).

While subsection (3) exempts certain decisions from the statutory requirement in subsection (2) to provide 14 days written notice, it does not exclude the requirements of procedural fairness more generally. The obligation to provide procedural fairness is a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of a particular case (Mason J in *Kioa v West* (1985) 159 CLR 550, 585). The requirements of procedural fairness are not fixed, and will vary depending on the statutory context in which a decision is to be made, and the specific circumstances in which the decision will be made.

For termination decisions that meet the requirements in paragraph 24(3)(b)(i) or (iii), the statutory context means that the requirements of procedural fairness would not include a requirement to provide 14 days written notice. It does not follow, however, that termination decisions of this sort would never require that the member be given notice and an opportunity to respond. This would depend on all of the particular circumstances. Relevant matters in determining fair procedures when

making these decisions could include, for example, the nature of the condition on their appointment or enlistment, previous discussions with the member in relation to meeting the condition, or previous correspondence with the member while they were absent without leave. Regardless of the procedures adopted in relation to a particular termination decision, the rule against bias and the obligation to act reasonably remain.

The decision-maker must adopt fair procedures that are appropriate and adapted to the circumstances of the particular case. This means that, except in extraordinary circumstances, a decision-maker would generally only be able to make a termination decision after providing an ADF member with some sort of opportunity to address the matters of concern. That is, even though section 24(3) excludes the requirement to provide notice in a particular way (14 days written notice), it is compatible with the right to work because the decision-maker must still adopt fair procedures that are appropriate and adapted to the circumstances.

It would be unusual to contemplate termination of an ADF member's service where they have failed to meet a condition of appointment or enlistment, without the member having been made aware of the problem previously and given an opportunity to address it. A common example of a condition on appointment or enlistment is to complete certain training within a specified period. ADF members are made aware of this condition at the time of appointment or enlistment, and, generally, if an ADF member is at risk of not completing required training, they will be made aware of this (including the possible consequences of failing the complete the required training), and given opportunities to improve. If the ADF member fails to complete the required training in time, and termination is contemplated, the procedures adopted in relation to that decision must be reasonable, taking account of previous opportunities the ADF member has had to address the issue.

Similarly, it would be unusual to contemplate termination of an ADF member's service where they have been absent without leave for 3 months or more without having made attempts to locate and talk to the ADF member about the reason for their absence, and the possible consequences of their continued absence.

Applying the 14 day written notice requirement in s 24(2) to these sorts of decisions would result in duplication of process, without making any substantive difference to the fairness of the process followed or decisions made under section 24. The flexible obligation to adopt fair procedures that are appropriate and adapted to the particular circumstances of the case means that ADF members' right to work are protected, notwithstanding the exclusion of the 14 day written notice requirement in subsection 24(3).

The effect of the Amending Regulations is not, therefore, to impermissibly limit the right to work with respect to ADF members.

I trust that this response will assist you in your consideration of the Amending Regulations.

THE HON BEN MORTON MP
ASSISTANT MINISTER TO THE PRIME MINISTER AND CABINET

Reference: MC20-000082

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Dear Senator Henderson

Thank you for your email dated 30 April 2020, regarding the Parliamentary Joint Committee on Human Rights' view on the *Public Service (Terms and Conditions of Employment) (General wage increase deferrals during the COVID-19 pandemic) Determination 2020.*

As requested, please find following information on the human rights implications of the Determination.

The Committee has presented its view in its report, 'Human rights scrutiny report of COVID-19 legislation'. Paragraph 1.124 of the Report states:

"The committee notes that this instrument provides a six month delay to Australian Public Service wage increases occurring during a twelve month period. The committee notes the legal advice that this may engage and limit the right to just and favourable conditions of work. This right may be subject to permissible limitations if it is shown to be reasonable, necessary and proportionate."

The Determination engages but does not limit the right to just and favourable conditions of work. This is because the Determination gives effect to the Government's expectations in respect of public service wage increases in light of the exceptional circumstances and serious economic challenges being faced by many Australians during the COVID-19 pandemic.

The Determination also reflects the Government's view that, while many Australians are facing significant economic hardship and challenges, it is not appropriate for those serving the public to receive wage increases.
The Determination does not limit the fair wages and remuneration of non-Senior Executive Service APS employees for the following reasons:

1. non-SES APS employees will continue to receive their current wage;

2. the Determination only defers scheduled general wage increases for a temporary period of six months for non-SES APS employees and it does not indefinitely freeze wages;

3. the Determination only defers by six months general wage increases scheduled to occur over a time limited period, namely those due in the next 12 months;

4. the Determination does not affect any other terms and conditions of non-SES APS employees; and

5. the Determination does not affect increases in salary or allowances that result from performing higher duties, annual performance reviews, the completion of training or the obtaining of a qualification.

Paragraph 1.125 of the Report states:

"As no statement of compatibility has been provided, the committee seeks the Prime Minister's advice as to the compatibility of this measure with human rights, particularly the right to just and favourable conditions of work."

Under section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011,* a statement of compatibility is required to accompany a disallowable instrument. The Determination, as made under section 24(3) of the *Public Service Act 1999*, is not a disallowable instrument.

Thank you for your request for further information. I trust I have clarified the human rights implications of the Determination to the Committee's satisfaction.

Yours sincerely

**BEN MORTON**

12 / 5 / 2020