

**Submission to An inquiry into the preparation, administration and management
of the 2016 Census by the Australian Bureau of Statistics
Senate Standing Committee on Economics
Parliament of Australia**

This submission addresses the terms of reference of the Inquiry in particular in relation to:

- (b) the scope, collection, retention, security and use of data obtained in the 2016 Census...
- (f) privacy concerns in respect of the 2016 Census, including the use of data linking, information security and statistical linkage keys;
- (g) Australia's Census of Population and Housing generally, including purpose, scope, regularity and cost and benefits...

Summary:

1. Technology for collecting data has expanded the capacity, scope, and purpose of the Census beyond its intended role in a way that imposes on, and adversely affects, the citizen.
2. The Census requirement for people to provide a name is *ultra vires*.
3. The application of Census data to other data sets through data linkage represents of itself an increase in the scope of the Census and a breach of the integrity of the citizen independent of the gaze of the State.
4. The true cost of the Census lies in the data linkage keys, measured in terms of significant loss of citizens' protection against the State: notably in the absence of a robust human rights framework in Australia.

1. I am a lawyer and legal academic whose research interests include the digital contexts of law. My research canvases the capacity of the law to comprehend the effect of data collection on individuals and the boundary between what is personal (private) and the exercise of State power.

2. Analogue to digital

- 2.1. In the past Census data have been collected on paper with attendant limitations on the purpose to which the data may be applied. This 'analogue' view represents the baseline understanding of most citizens as to the scope of the census process.
- 2.2. The recent exponential development in digital technologies has not simply enhanced the efficiency of collection of data: they make possible the generation of 'big data' and linkages across data sets that have previously not been possible. 'Big data' is a very large data set that when analysed, affords insights into trends, patterns and associations, especially regarding human behaviour. Big data allows the generation of finely grained information about both niche and majority populations.
- 2.3. Applied also through time, the fact of this data, together with the capacity for advanced computational analysis, creates infrastructure with the ability to afford real-time understanding of populations and even of individuals. This potential goes far beyond a 'snapshot of a nation' to become surveillance infrastructure.
- 2.4. In the shift from analogue to digital, the advent of big data has expanded the capacity, scope, and purpose of the Census beyond its intended role in a way that imposes on the citizen.

3. Retention of names and addresses

- 3.1. Pursuant to an announcement in December 2015,¹ the ABS planned to retain names disclosed in the Census with no destruction date.
- 3.2. In the face of criticism, the ABS backed down, indicating that it would retain names until the earlier of 2020 or until no longer required.
- 3.3. Section 51(xi) of the *Australian Constitution* empowers the Parliament to enact legislation with respect to ‘census and statistics’.
- 3.4. Reflecting this power, section 8(3) of the *Census and Statistics Act 1905* (Cth) (‘Act’) permits the ABS to collect ‘statistical information’.
- 3.5. The ABS website states that names are collected in the Census to:²
 - assist householders completing the form to report the relevant information for each person
 - ensure the Census covers the entire population and data is of high quality
 - enhance the value of Census data, by combining it with other national datasets to better inform government decisions in important areas such as health, education, infrastructure and the economy.
- 3.6. However, names are not ‘statistical information’. The stated purposes for collecting names are secondary to the purpose empowered under the Act and beyond the power afforded by the *Constitution*.
- 3.7. It is a logical inconsistency to have a process by which to ascertain the entire population, yet relying on names to ‘ensure that the Census covers the whole population.’ If that entire population were already known (ostensibly by name) then there would be no need for a census.
- 3.8. Names should not be collected, nor retained.

4. Right to privacy – and the nature/types of privacy

- 4.1. There is no (or very limited) common law right to privacy, and Australia has no bill of rights. There is therefore little systematic, strong protection for Australians against the exercise of State power.³ It is therefore imperative that Australians do not easily give up any of the ad hoc protections they have; and that they are not required through force of law to empower State encroachment into personal freedoms. This is the most concerning aspect of the reach of the ABS through lateral and longitudinal data linkage.
- 4.2. The application of the statistical links amount to a *system* requiring personal information under compulsion of law where the system has increasingly powerful capacity to store, sort, match, and predict Australians’ lives in fine-grained detail.
- 4.3. Used in other contexts, this is the infrastructure of surveillance. ‘Providing new insights where information has previously not been available’⁴ by integrating data, as the ABS says, offers entirely new possibilities for our personal information. Concerning of itself, without a robust human rights framework, the ABS claims that ‘remember, your data is safe’ hold little weight.

¹ ‘ABS Response to Privacy Impact Assessment’ [Australian Bureau of Statistics Media Release](#), 18 December 2015.

² Australian Bureau of Statistics, *About the Census*, ‘Privacy, Confidentiality, Security’ <<http://www.abs.gov.au/websitedbs/censushome.nsf/home/privacy>>.

³ The ABS has visibly exercised its power including via its field officers. Frequently individuals have perceived this – sometimes ‘threatening’ – exercise of power as sending a message that conflicts with the ABS’s advertised position. See Kate Galloway, ‘Troubles with #CensusFail’ *Storify* (15 September 2016) <<https://storify.com/katgallow/troubles-with-censusfail>>.

⁴ *Australian Bureau of Statistics*, ‘Data Integration: FAQ’ <<http://www.abs.gov.au/websitedbs/D3310114.nsf/home/Statistical+Data+Integration+-+FAQ>>.

- 4.4. Without entering into concerns about the potential for data breaches, through this system the State has removed Australians' individual capacity to establish and maintain boundaries between the State and citizen. This 'breathing space' would otherwise allow people to be themselves, guided by their social interactions and value systems, and free to become engaged citizens away from the gaze of the State. Becoming an engaged citizen is regarded by some as the very *nature* of privacy,⁵ and by others as a *type* of privacy.⁶ As Solove points out:

The activities that affect privacy are not necessarily socially undesirable or worthy of sanction or prohibition. ... In many instances, there is no clear-cut wrongdoer, no indisputable villain whose activities lack social value.⁷

- 4.5. Government promises to protect privacy are important, but miss an essential issue with the ABS plans for data linkage. *Once we have given our information our privacy has already been breached.* The State's understanding of 'privacy' suggests that it will protect us from interlopers' misuse of our data without acknowledging that tracking us through our lives is a breach in the first place.⁸
- 4.6. This is a foundational issue that must be addressed⁹ by policy-makers and Parliament before addressing additional questions of privacy once government has access to citizens' personal information.

5. Efficiency

- 5.1. The ABS uses the language of *efficiency* and *public interest* in justifying the changes.
- 5.2. It may well be that collecting and retaining our names along with our personal information is *efficient* – but that does not address the foundation question of whether citizens retain the privacy that constitutes them as members of a liberal democratic society.

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⁵ Julie E Cohen, *Configuring the Networked Self: Law, Code and the Play of Every Day Practice* (Yale University Press, 2012).

⁶ Daniel J Solove, 'A Taxonomy of Privacy' (2006) 154 (3) *University of Pennsylvania Law Review* 477.

⁷ Ibid, 559. See also Kate Galloway, 'Yielding and Wielding Personal Information' 26 (13) *Eureka Street* (5 July 2016) <<https://www.eurekastreet.com.au/article.aspx?aid=49580#.V9yMQbXYbnJ>>.

⁸ This point is made in the data retention context in Paul Bernal, 'DRIP: A Shabby Process for a Shady Law' *Paul Bernal's Blog: Privacy, Human Rights, Law, The Internet, Politics, More* (12 July 2014) <<https://paulbernal.wordpress.com/2014/07/12/drip-a-shabby-process-for-a-shady-law/>>.

⁹ Kate Galloway, 'Census Scepticism as Privacy Comes Under Threat' 26(15) *Eureka Street* (31 July 2016) <<https://www.eurekastreet.com.au/article.aspx?aid=49683#.V9yLtbXYbnI>>.