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SUBMISSION TO THE SENATE ECONOMICS REFERENCES COMMITTEE ON THE 2016 CENSUS

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Executive Summary

Terms of Reference

The Economics Reference Committee of the Senate Standing Committee on Economics of the Australian Parliament has been asked to investigate the 2016 Census, with particular reference to

* the preparation, administration and management on the part of the Australian Bureau of Statistics (ABS) and the Government in the lead up to the 2016 Census;
* the scope, collection, retention, security and use of data obtained in the 2016 Census;
* arrangements, including contractual arrangements, in respect of the information technology aspects of the Census;
* the shutting down of the Census website on the evening of 9 August 2016, the factors leading to that shutdown and the reasons given, and the support provided by government agencies, including the Australian Signals Directorate;
* the response rate to the Census and factors that may have affected the response rate;
* privacy concerns in respect of the 2016 Census, including the use of data linking, information security and statistical linkage keys;
* Australia’s Census of Population and Housing generally, including purpose, scope, regularity and cost and benefits;
* the adequacy of funding and resources to the ABS;
* ministerial oversight and responsibility; and
This joint submission has its origins in our research, public policy work, and community engagement at the Queensland University of Technology around the Census 2016.1 We provided expert commentary in the media during the controversy.2 The topic is of interest to both intellectual property and media law, and criminal law

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and justice. This joint submission by two legal researchers makes the following recommendations to the inquiry into Census 2016:

**Recommendations**

**Recommendation 1**

In the United States of America and the European Union, there has been a history of misuse and abuse of Census data. Such history highlights the need for appropriate protection of individual anonymity, confidentiality, privacy, security, and secrecy.

**Recommendation 2**

The preparation, administration and management on the part of the Australian Bureau of Statistics (ABS) and the Government in the lead up to the 2016 Census was inadequate. The privacy assessment was cursory and lacked independence and impartiality. There was a lack of genuine consultation with the public, civil society, privacy experts, and information security specialists about the 2016 Census Model.

**Recommendation 3**

The Australian Bureau Of Statistics has taken an overly broad approach to the collection, retention, and use of data obtained in the 2016 Census.
Recommendation 4

Names and addresses (and other data at a personally identifiable level) should not be collected in the Census, and any data of this nature collected be destroyed.

Recommendation 5

The Australian Bureau of Statistics should not create Statistical Linkage Keys (SLKs).

Recommendation 6

That previous or future Australian Bureau of Statistics data breaches are disclosed and subject to formal inquiry.

Recommendation 7

The Australian Bureau of Statistics should stripped of the power to make threats and issue fines in light of the importance of voluntary participation, informed consent, and research ethics.

Recommendation 8

There is a need to overhaul contractual arrangements in respect of the information technology aspects of the Census.
**Recommendation 9**
That oversight and accountability processes be strengthened, either through a more active role of the Office of Australian Information Commissioner (OAIC); or the completion of an independent and transparent Privacy Impact Assessment.

**Recommendation 10**
Caution must be exercised in the interpretation and use of the 2016 census data due to the issues that arose during its administration, and the subsequently lower than usual response rate.

**Recommendation 11**
The Federal Parliament should implement the recommendations of the Australian Law Reform Commission in respect of the introduction of a statutory cause of action for serious invasions of privacy.

**Recommendation 12**
It is worthwhile comparing the experience of the 2016 Census in Australia with the 2016 Census in Canada. While Canada enjoyed a high completion rate of its census, Statistics Canada did experience significant problems in respect of information technology. Moreover, there have been conflicting legal precedents in Canada about the imposition of fines for non-completion of the mandatory census.
Biographies

Dr Monique Mann is a Lecturer at the School of Justice, Faculty of Law at the Queensland University of Technology. Monique is interested in socio-legal research on police technology, biometrics, and surveillance. She graduated with a PhD from the ARC Centre of Excellence in Policing and Security (CEPS), Griffith University in 2015. While completing her PhD Monique interned with the United Nations in Vienna, was a visiting scholar at the Regulatory Institutions Network (RegNet) at the Australian National University and worked as Research Analyst at the Australian Institute of Criminology (AIC).

Dr Matthew Rimmer is a Professor in Intellectual Property and Innovation Law at the Faculty of Law, at the Queensland University of Technology (QUT). He is a leader of the QUT Intellectual Property and Innovation Law research program, and a member of the QUT Digital Media Research Centre (QUT DMRC) the QUT Australian Centre for Health Law Research (QUT ACHLR), and the QUT International Law and Global Governance Research Program. Rimmer has published widely on copyright law and information technology, patent law and biotechnology, access to medicines, plain packaging of tobacco products, intellectual property and climate change, and Indigenous Intellectual Property. He is currently working on research on intellectual property, the creative industries, and 3D printing; intellectual property and public health; and intellectual property and trade, looking at the Trans-Pacific Partnership, the Trans-Atlantic Trade and Investment Partnership, and the Trade in Services Agreement. His work is archived at SSRN Abstracts and Bepress Selected Works.
Introduction

This submission provides a critical legal analysis of the Census 2016. This work relies upon historical context; an analysis of the legal associated with anonymity, confidentiality, privacy, and information security; a consideration of research ethics; and comparative analysis, looking at jurisdictions of North America and the European Union. This submission has three main parts. First, there is a general discussion of the history of the Census, and the concerns that have arisen over the misuse of information, particularly in the United States and the European Union. Second, there is an analysis of the evolution and development of the 2016 Census in Australia. There is an in-depth analysis of legal, ethical, and public policy issues arising from the 2016 Census. Third, this submission counterpoints the Australian experience with Canada’s Census 2016.

1. The History of the Census

In his 1939 poem, ‘The Unknown Citizen’, the poet W.H. Auden reflects upon the relationship between the citizen and the state, thinking about the work of the Bureau of Statistics:

He was found by the Bureau of Statistics to be
One against whom there was no official complaint,
And all the reports on his conduct agree
That, in the modern sense of an old-fashioned word, he was a
saint,
For in everything he did he served the Greater Community…
Was he free? Was he happy? The question is absurd:

Had anything been wrong, we should certainly have heard.³

In many ways, this is a prescient and resonant piece of work by W.H. Auden about information collecting by governments and states. It is also about the limits of government knowledge, and personal identity, privacy, and confidentiality.

For Rear Vision, Annabelle Quince and Keri Phillips of ABC Radio National considered the historical debate over the Census.⁴ Historian Professor Margo Anderson from the University of Wisconsin provides a useful overview of the development of the modern census:

Censuses are formal time-defined population counts of a national state, and most countries do them now and most have for a good chunk of the 20th century. The function of the census is variable for different countries. In the US for example it's used to allocate seats in our legislatures and in particular our House of Representatives and in our electoral college. It's used as the baseline measure almost in all countries for economic statistics. So many of us are familiar with things like the labour force participation rate or the unemployment rate and so forth. And you need...for those rates you need denominators. And the census often serves as the baseline information for that. It's used for measuring growth and change and migration around the country. And often there are kind of cultural reasons that people, they mark the progress of their societies, if you will, by periodic census.⁵

⁵ Ibid.
Taking a long view, Margo Anderson comments that there has been an evolution in the role and purpose of the modern census: ‘So I would argue that in the late 18th, early 19th century there was a fundamental shift in the notion of what a census was for, shifting it to the ruler looking at his ruled, to the people essentially standing up and expressing themselves.’

A. The United States of America

There is a significant dark history of abuse and misuse of census information by national governments. Margo Anderson reflected upon how the census was used in the United States during World War I:

In the United States during World War I the census was used to identify draft-dodgers. The selective service system, in other words the administration that was supposed to handle the draft, went to the census bureau and said we think people are lying about their ages. In other words, they were either saying they were too young or too old to be eligible for the draft. So give us the information from the 1910 census to tell us how old they are so we can draft.

She noted: ‘The census officials were quite uncomfortable with it, and essentially they basically strengthened the protections against that kind of intrusion after the First World War.’ The historian also observed: ‘During the 1920s in the US the Justice Department and the Labour Department went and asked for the ages of children in the 1920 census because they wanted to prosecute employers who were violating child

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6 Ibid.
7 Ibid.
8 Ibid.
labour laws’. She noted that there was ‘a similar kind of question; do you give out that information to facilitate that prosecution?’

There have been a number of subsequent controversies in the United States. In the wake of the Pearl Harbour attack during World War II, Margo Anderson comments that census data was used for the purposes of the internment of members of the American-Japanese community:

There was a racialist and racist reaction to the relatively small Japanese community on the West Coast that led to the congressional delegations and the governors and the media, the press, to call for the ousting of all Japanese from the West Coast, and their physical removal out of military areas. And in February '42 Franklin Roosevelt in an executive order authorised that removal, and from late February, early March of 1942, so July '42 the Japanese-American population on the west coast of the US was rounded up and sent to concentration camps for the duration of the war. The census, what they call small area data, was used to identify again the neighbourhoods and the city blocks and the communities where the Japanese-Americans lived.

She commented that ‘Congress also debated it and Congress passed a law in February/March of 1942 eliminating the protection of statistical confidentiality on the census.’ She noted: ‘Years later the government apologised and paid reparations to
the survivors and the people who had been incarcerated during the war, but that was not the sensibility during the war itself.”

There is a rich body of jurisprudence over the United States census. In the 1982 case of *Baldrige v. Shapiro*, the Supreme Court of the United States highlights the importance of census confidentiality:

The foregoing history of the Census Act reveals a congressional intent to protect the confidentiality of census information by prohibiting disclosure of raw census data reported by or on behalf of individuals. Subsequent congressional action is consistent with this interpretation. In response to claimed undercounts in the census of 1960 and of 1970, Congress considered, but ultimately rejected, proposals to allow local officials limited access to census data in order to challenge the census count.

Accordingly, the Supreme Court of the United States emphasized: ‘We hold that, whether sought by way of requests under the FOIA or by way of discovery rules, raw data reported by or on behalf of individuals need not be disclosed.”

After the events of 9/11 there was an attempt to access census data in America. Marc Rotenberg from the Electronic Privacy Information Center recalls:

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13 Ibid.


After 9/11 when the US had been attacked and the Department of Homeland Security went to the census bureau and said to the census bureau please give us information, in fact the data of the location of Muslim Americans living in the United States. And again you could sense very similar to what happened during the Second World War, the beginning of an effort to identify Muslim Americans. I don't think there was ever internment discussed, but at least some type of special measures. And we learned of this through a Freedom of Information Act that we had pursued with the Department of Homeland Security at the time.17

Rotenberg stressed: ‘The good news is that when the program was revealed, there was a genuine effort within the census department to improve its confidentiality procedures and to make clear that the information being collected by that one agency should not be made available to other federal agencies, even in those kinds of circumstances.”18

B. The European Union

Edwin Black, the author of *IBM and the Holocaust,*19 discussed how Nazi Germany employed IBM to conduct a census:

IBM, which bills itself as the solutions company, came to Nazi Germany and said we have the solution. They came up with the racial census. So first of all IBM in and of itself, by itself, hired thousands and thousands of census takers, they went door to door, they did this for the government. All the information was all brought into one warehouse in Berlin, centralised. Day and night these paper forms were punched into special IBM coding machines. And then

17 Ibid.
18 Ibid.
in one column they would have your mother tongue, whether it was Polish or German or Ukrainian.

In a second column they would have your religion, whether it was Jewish or Lutheran or Islam or a Catholic. In another column they would have your nationality; were you from Germany, were you from Poland, were you from France? In yet another column they would have your profession; were you a banker, were you a professor, were you a doctor? And then in a final column they would have your city, whether you were in Berlin or whether you were in Munich. And then at the rate of 24,000 cards per hour [snaps fingers], like that, suddenly they knew the identification and location of all the Jews in Berlin who were doctors. That was IBM. 20

Edward Black commented that the Census played a significant role across the six phases of the Holocaust. Margo Anderson added: ‘What the Nazis did is that they took the information, the population information from the countries that they invaded, and used it to identify people to be rounded up and put in labour camps and ultimately exterminated.’ 21 She was also conscious of the exploitation of government data systems in countries occupied by Nazi Germany: ‘So in Norway, in the Netherlands, in France, once the Nazis took over the governments, they got into the data systems and used them essentially to control the population.’ 22

As a result of this history, there have been protests over the privacy implications of census-taking in the European Union. In West Germany in 1987, the German

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21 Ibid.

22 Ibid.
Germans led a boycott against the Census, arguing that it would unduly violate privacy laws.23

At a more systematic level, there has been a strong tradition of protection of anonymity, confidentiality, privacy, and human rights in the European Union.24 There has been extensive litigation over privacy in the European Union.25 There have also been significant litigation in respect of privacy in the United Kingdom.26 The controversy over phone hacking by media organisations has also raised concerns about privacy and confidentiality.27 There has also been the development of new doctrines in the European Union, such as the right to be forgotten.28

25 Von Hannover v. Germany (2005) 40 EHRR
26 Hellewell v. Chief Constable of Derbyshire [1995] 1 WLR 804
2. The Australian Debate over the Census

While there has been much controversy over the Census in 2016, it would be wrong to assume that this is an isolated incident or occurrence. There have been longstanding legal, ethical, and public policy issues with the Australian Census.
Historian Ben Wilkie points to early historical debates in Australia over the census and the privacy of personal information.29

Notably, in 1969, Senator Lionel Murphy expressed concerns about the expansion of census requirements.30 He argued that the Australian Labor Party would press strongly for a Bill of Rights to provide for better protection of civil liberties and privacy. It is striking that Senator Lionel Murphy makes a much stronger case for the protection for privacy, civil liberties, and human rights in 1969 than some of his contemporary successors in the Australian Labor Party in 2016.

In 1971, Liberal Treasurer, Billy Snedden, mandated the destruction of names and addresses in census forms in response to privacy concerns.31

In 1976 and again in 1979, Michael Kirby – eminent law reformer and jurist – flagged issues with privacy, consent, and compulsion with the Australian Census.32

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the Australian Law Reform Commission recommended that census forms be retained. Treasurer, Hon John Howard MP rejected this recommendation. He decided not to accept the recommendation that the Census raw data be kept: ‘The government believes that it would be inconsistent with [the gathering of statistical information] and ... the guarantee of confidentiality to retain information on identified persons or households for research purposes.’ He commented: ‘Consequently the present practice of destroying all records of names and addresses and of not entering into the computer record such names and addresses will be continued’. Successive governments have maintained the practice of form destruction.

Democrat Senator Natasha Stott Despoja repeatedly raised concerns about the punitive use of threats and fines by the Australian Bureau of Statistics. She recalls that her mother was a successful objector to a survey by the Australian Bureau of Statistics:

At the time my mother was summoned, the surveys contained sensitive questions about health: matters like incontinence, smoker’s cough and other things. She was even threatened with a fine for refusing to have an "opinion" about smokers. My mother won her case.

Remote_Access_Information_Developments_-_Privacy_Protection,_Economic_Protectionism.pdf

33 Australian Law Reform Commission, Reform, 1980,

34 Ibid.

35 Ibid.

story of her prosecution (some might say persecution) was chronicled over months in her newspaper column, Saturday Serve, right up to the courtroom and the judgment in her favour.

Natasha Stott Despoja has been concerned about the use of threats and fines against other Australian citizens. She noted the case of the Van den Berg family: ‘Despite their age (they're in their 80s), non-working status and poor health, they were also being threatened with the daily fine of $110 for not agreeing to participate in the survey.’ 37 Natasha Stott Despoja emphasized: ‘I do not accept that statistical compilation in the form of monthly surveys requires threats and compulsion.’ 38 She stresses: ‘I doubt the validity of information acquired under such heavy compulsion.’ 39 Natasha Stott Despoja noted: ‘I understand the nature of statistics and I acknowledge the need for random selection but I also know you can randomly select additional willing participants without having to threaten or penalise citizens opposed to and/or upset by the survey process.’ 40 She observed that National Party senator Glen Sheil introduced a private member's Bill to make the surveys non-compulsory, but it was unsuccessful. Natasha Stott Despoja was concerned about the unchecked expansion of power by the Australian Bureau of Statistics, noting ‘the ABS has increased its power over the years.’ 41

37 Ibid.
38 Ibid.
39 Ibid.
40 Ibid.
41 Ibid.
a. the preparation, administration and management on the part of the Australian Bureau of Statistics (ABS) and the Government in the lead up to the 2016 Census;

There were significant problems with the preparation, administration and management on the part of the Australian Bureau of Statistics and the Government in the lead up to the 2016 Census. The Australian Bureau of Statistics rushed through a risible “low risk” privacy impact assessment before Christmas 2015, without adequate consultation with the public or civil society. The Australian Bureau of Statistics presented its policy change as a ‘fait accompli’.42

In February 2016, the Australian Privacy Foundation responded, writing a letter to the Australian Bureau of Statistics, expressing its deep concern about the process and the substance behind the Census 2016.43 The Australian Privacy Foundation observed: ‘Contrary to best practice, the PIA was conducted in-house, not by an independent third party’.44 The Australian Privacy Foundation noted: ‘While the ABS claims that it directly notified key stakeholders of the PIA process, to our knowledge, no NGOs, human rights or civil society organisations were notified or consulted.’ 45


44 Ibid.

45 Ibid.
Australian Privacy Foundation commented: ‘Apart from any inadequate direct notification of the PIA, it seems to have been publicised solely by means of a Statement of Intent on the ABS web-site and a media release that received minimal coverage: a mention in ‘unashamedly pro-PS’ PS News and one other niche title.’

The Australian Privacy Foundation noted: ‘The inadequacy of efforts to publicise the PIA process seem to be confirmed by the limited public feedback received, which evidently included just three responses from private citizens.’

Moreover, the Australian Privacy Foundation expressed fundamental substantive concerns about the 2016 Census: ‘APF considers that the decision to indefinitely retain personal names and addresses fundamentally changes the nature of the Australian census, with potentially serious implications for the privacy rights of Australians.’

The Australian Privacy Foundation warned: ‘We are especially concerned with both the possibility that this additional source of data may act as a ‘honey pot’ for activities such as identity theft; and with the possibility of ‘function creep’, which would result in the expanded use of this data for unintended and possibly unwelcome purposes.’

The Australian Privacy Foundation stressed: ‘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

46 Ibid.
47 Ibid.
48 Ibid.
49 Ibid.
a less-safe, personally identified, lifetime longitudinal dossier, with potentially fewer protections).\footnote{Ibid.}  

The former chief Statistician, Bill McLennan, was also shocked and dismayed over the approach of 2016 Census to privacy:

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.\footnote{Bill McLennan, ‘Privacy and the 2016 Census’, \url{https://www.privacy.org.au/Papers/ABS-Census_2016_and_Privacy_v8.pdf}}

Bill McLennan warned: ‘By doing this, the ABS has put the very success and value of the 2016 Census at significant risk.’\footnote{Ibid.} He highlighted the lack of consultation by the Australian Bureau of Statistics with the public, civil society, privacy experts, and information security specialists.
Former Privacy Commissioner Malcolm Crompton has observed that the Australian Bureau of Statistics had made a string of errors during the process. First, he commented that the approach of the institution would threaten anonymity and privacy: ‘Because it was going to be collecting and retaining the additional information, the anonymity of the completed census forms would be gone.’ Second, Crompton observed that such problems were compounded by a lack of transparent decision-making by the Australian Bureau of Statistics:

The issues there were pure privacy issues, in that there was a sense that the ABS wasn’t being sufficiently transparent about what it was doing. That ABS was doing things on the quiet. There was also not enough assurance that anything it said it was doing was what it said it was actually doing. That debate had gone on all of this year.

Third, Crompton chides the Australian Bureau of Statistics for making unrealistic claims about security. He commented: ‘The problem was that amidst that privacy debate, the ABS was giving unrealistic assurances as to the security of the information and that it wouldn’t be hacked.’ Crompton stressed that such an assurance was unwarranted: ‘All data is vulnerable, but there are steps you can take to reduce the vulnerability and respond to it.’

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54 Ibid.
55 Ibid.
56 Ibid.
57 Ibid.
Journalist Bernard Keane has expressed concerns about the 2016 Census relating to anonymity, privacy, and information security – as well worries about the administration and governance of the scheme. He commented that the Australian Bureau of Statistics went ahead with its approach, despite previous objections:

In 2005, some luckless ABS official thought it would be smart to commission an independent report on the idea of keeping names to establish unique identifiers for census information. Privacy expert Nigel Waters was duly commissioned and duly panned the idea. This briefly deterred the Bureau, but in 2011 it decided to start the process of establishing ongoing tracking of citizens via a 5% sample from the census that year — without the permission or even knowledge of the “participants”, or any independent assessment of the selection process. It then decided to extend that to the entire population — but this time the ABS made sure there was no risk of it being derailed. Rather than conduct another independent assessment, it conducted an internal review that, quelle surprise, determined the idea was a good one. On the basis of its own assessment, it waited until a week before Christmas last year to sneak out an announcement that it would be retaining names and addresses.

Keane noted that the ‘announcement failed to actually explain the purposes of keeping names and addresses, beyond the anodyne assertion that it was “to provide a richer and dynamic statistical picture of Australia through the combination of Census data with other survey and administrative data.”’ He observed the lack of community consultation about the proposal: ‘There was no discussion of how this the

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59 Ibid.
60 Ibid.
names and addresses — which everyone is hung up on — are just a tool to enable the establishment of a permanent file on each Australian, composed of our most personal details.\textsuperscript{61} He concluded: ‘ABS staff have gone too far toward seeing Australians simply as a vast data source to be manipulated — by legal compulsion, if necessary — for the purposes of bureaucrats, not as legitimate partners and customers with their own views about the line to be drawn between claims of the public good and personal rights.’\textsuperscript{62}

Libertarian philosopher of the IPA, Chris Berg, raised concerns about the impact of the Census 2016 upon freedom, liberty, and privacy.\textsuperscript{63} He reflected upon the initiative:

> It is true that modern governments are data hungry. Planners and regulators want more and more information about the populations they govern. But to the extent we have an interest in protecting ourselves against government excesses, we have an interest in denying governments carte blanche to collect information. We are not just data points in a planner’s spreadsheet. They work for us.\textsuperscript{64}

Chris Berg observed: ‘The risks to privacy are blindingly obvious.’\textsuperscript{65} He also highlighted problems in respect of anonymity, identity theft, information insecurity, hacking, and misuse of personal information. Berg noted that ‘Government

\textsuperscript{61} Ibid.
\textsuperscript{62} Ibid.
\textsuperscript{63} Chris Berg, ‘If you’re worried about privacy, you should worry about the 2016 census’, \textit{ABC The Drum}, 15 March 2016, \url{http://www.abc.net.au/news/2016-03-15/berg-census-privacy-threat/7244744}
\textsuperscript{64} Ibid.
\textsuperscript{65} Ibid.
departments have a poor record of protecting information from their own staff. The Australian Bureau of Statistics does not have an unblemished record. Indeed, the institution had embroiled in a criminal investigation of insider trading.

M.I.T. Emeritus Professor Gary Marx's ‘Ethics of Surveillance’ can be usefully applied to an analysis of the Australian 2016 Census. He identifies nine key questions for the ethics of surveillance. First, there is a need to evaluate policies, procedures, and capacities. Second, there should be an evaluation of the means of surveillance. Third, there is a focus upon clarity of goals. Fourth, there is a need to consider the goodness of the fit between means and goals. Fifth, there should be an evaluation of data collection and analysis. Considerations such as criteria for subject selection, minimization of intrusiveness, border crossings, and violation of assumptions are important in this regard. Sixth, Marx highlights the need to consider the harmful consequences and disadvantages for subjects. Seventh, the rights and resources of subjects are important. Of particular note are the right of inspection; the right to challenge and express a grievance; redress and sanctions; equal access to surveillance and neutralization tools. Eighth, Marx discusses consequences for agents and third parties. The ninth factor concerns data protection, periodic review, and data fate.

66 Ibid.


Applying this multi-factorial test to the 2016 Census, there are a range of problems under an ‘Ethics of Surveillance’. Surveillance ethics applies the test of ‘role reversal’. It has been notable that, while the Australian Bureau of Statistics has demanded that citizens participate in the census, the organisation has not been forthcoming about answering questions about its decision-making process for the Census 2016. The organisation has been operated in an opaque fashion, while simultaneously requiring the collection of personally and identifiable and sensitive information about individuals.

Josh Taylor from Crikey News was met with stonewalling and mass redactions in respect of his freedom of information requests, as evident in the image copied below:
The journalist for *The Australian*, Sean Parnell, has revealed the rather cursory use of focus groups to justify sweeping changes to the approach to the Census 2016, with the [superficial] findings shown in the images below.\footnote{Sean Parnell, ‘Focus groups ahead of #Census told @ABSStats “data linkage is not an issue many people are aware of or engaged with’’, 25 August 2016, \url{https://twitter.com/seanparnell/status/768636675660578816}}
1.3. Key Findings - General

The ABS is widely seen as trustworthy organisation producing important data for decision making. Most people’s practical experience of the type of data the ABS collects is limited to their experiences of completing the Australian census, with the vast majority having confidence that the personal data they provide to the ABS is kept safe and secure.

Knowledge of what the ABS does now with data provided is reasonably low. There was a common view across the groups that given Census data is provided in a personally identified manner, the ABS must already use this information for analysis and reporting, either on its own or in combination with other government data (such as ATO, Centrelink or Medicare data).

At the broadest level, the concept of linking data is supported and seen to yield practical value in terms of more informed decision making. At a practical level, the intricacies of how this is done at a technical level were difficult to grasp for most participants.

Some have concerns when the details of current and potential linking activities are shared, but most have not actively considered this before. For the majority, there is a presumption that this type of data linkage activity is happening already.

Specific concerns regarding data linkage centres around personal identifiers being permanently stored alongside survey data. Separation of access principles (where no ABS staff members have the power to view identified data from an individual person) are not well known but certainly serve to allay some of these concerns when communicated.

The protections the ABS has in place to secure personal information and protect the privacy of individuals were generally received well and for the majority served to assure them that the ABS would take appropriate precautions to ensure the security of people’s data. Notwithstanding this, there is a view that even the best systems and protocols cannot protect against the “rogue agent” scenario or the increasing sophistication of those intent of hacking into such information.

A recurring key concern across the groups was identified data being shared or sold to those who would use this for either illegal or marketing purposes. While ABS is seen as trustworthy, it’s obvious to many that their personal data has regularly been shared with others without their express knowledge or permission. This concern would need to be addressed in any planned change.

13 Key Findings - Personal Identifiers
1.4. Key Findings – Personal Identifiers

There was strong support for the ABS to move beyond the ‘Bronze standard’ linkage level commonly used to link unique individuals across data sets using just personal characteristics. Most felt that an accuracy rate of around just 60%-70% was not good enough and that in order to produce quality research outcomes (and thus inform policy development and service delivery), an approach producing greater accuracy was warranted.

Views varied however about how the appropriateness of using either personal names (or a coded version of names), addresses, or a combination of these to provide a more accurate foundation for linking cases across data sets. Younger participants were typically much more comfortable with more personally identifiable information to be used than either middle aged or older participants.

Once explained (through the provision of several examples), most participants across the groups readily appreciated the value that a more accurate linking process can deliver in terms of being able to monitor trends more accurately over time. Participants were receptive to how data linkage was enabling advances in social domains such as health, education and migration.

The “gains” potentially provided by data linkage were tempered with the risks most people also readily identified that arise through more extensive use of personal identifiers. While the ABS was almost universally viewed as a trustworthy organisation, it was argued that breaches of privacy and security are increasingly commonplace in today’s increasingly connected world, and that the use of more personal information in the data linkage process did carry additional risks that needed to be actively considered and managed. It was almost universally agreed that there was no way the ABS could provide 100% safeguards against such risks.

The security, confidentiality and privacy protocols the ABS applies to its data linkage processes were generally felt appropriate, if not surprising (that is, the majority of participants had assumed such safeguards would govern such practices, if not being interested in or familiar with the details of these). At an overall level, the review of these protocols did serve to allay the concerns of those more worried about the use of personal information for data linkage purposes.

A key concern related to a belief that personal identifier information would remain appended to survey or other government data, such that once an individual gained access to an ABS database they would have all the details required to potentially impact on the identified individuals in a negative manner. Those from a culturally and linguistically diverse (CALD) background were typically more likely to express concern with personal information being used and retained over time, typically as a result of having experienced less trustworthy government regimes in the past.

Having appraised both the benefits and potential risks of data linkage, the majority seemed comfortable with a move to [at least] a minimum silver level linkage approach. While full names or both name and address for data linkage was endorsed for use by the ABS in data linkage.

⇒ colmar brunton.
1.6. Conclusions & recommendations

Based on the above findings, Colmar Brunton provides the ABS with the following recommendations for its consideration:

- The issue of data linkage is not an issue many people are aware of or engaged with on any meaningful level. More broadly, the ABS is seen as a trustworthy and capable organisation, meaning that there is generally a degree of goodwill that can be leveraged in terms of bringing the community along in terms of any planned changes to data linkage practices.

- While there are increased privacy, security and confidentiality risks associated with greater use of personal identifiers in data linkage practices, the majority of Australians are open to a move beyond the current ‘bronze’ level linkage practices that yield an accuracy level of only around 60%-70% based on personal characteristics alone. Indeed, many assume current ABS practice to lie somewhere at or very close to the “gold” linkage standard.

- Across the groups, the level identified as one that strikes the best balance between allowing the ABS to make better use of existing data was a “silver” linkage level employing an encrypted or coded version of people’s names. If concerns regarding the security of such personal information can be appropriately addressed, we believe there is scope for address to also be used. If such proposed change can be explained in an accessible (e.g. in a non-technical) and transparent manner – including coverage of both benefits and how increased privacy risks would be managed – we believe such a change would be acceptable to the broader community (notwithstanding some sectors of society – such as those from a CALD background – may need greater levels of reassurance than others).

- For the CDE Project, the majority were supportive of a move to a move from a set, predetermined programme of analysis projects to a more flexible principle-based programme – especially when being able to access and digest the principles governing such activity. However, there is a perception among a minority of people that they may be ceding control of their data to the ABS for purposes they are not aware of and may subsequently not consent to. If the ABS commits to full disclosure or planned projects (prior to these being undertaken), and ideally allows the opportunity for ongoing community consultation.
b. the scope, collection, retention, security and use of data obtained in the 2016 Census

Compelling individuals to provide identifiable personal information or be subject to fines or prosecution is a major concern as it removes capacity to provide consent (in direct conflict with the Australian Privacy Principles, *Privacy Act* 1988 (Cth)). This concern has been the main focus of public attention. The ABS has attempted to offer reassurance that personal and sensitive information will be de-identified and replaced with a statistical linkage key (SLK) to be indefinitely maintained by the ABS. However, use of a SLK does not protect the identity of individuals as data matching enables re-identification. That is, the use of a SLK is readily reidentifiable and does not offer any privacy protection.\(^{70}\) This is especially noteworthy given the potential for data matching across existing and future administrative data and information assets, including longitudinal tracking via the SLK. While the collection and retention of personally identifiable information is a concern, re-identification, matching and longitudinal tracking can occur without the provision of names and addresses. This is especially noteworthy as longitudinal matching of data via the SLK or other identifiers heightens the activities of the ABS beyond the collection and dissemination of statistical information to lifelong surveillance.

c. arrangements, including contractual arrangements, in respect of the information technology aspects of the Census;

There has been much discussion about the allocation of responsibility for the Census Fail in Australia.\textsuperscript{71}

There has been a lively public debate about the extent to which the various parties of Australian Bureau of Statistics, IBM, and the Federal Government should be held responsible and accountable for the failure of the Census.\textsuperscript{72}

The Australian Prime Minister Malcolm Turnbull has contemplated legal action against IBM, in the wake of the Census debacle.\textsuperscript{73}

Lawyers spoken to by \textit{The Australian Financial Review} said legal action against IBM was a possibility.\textsuperscript{74} Roland Müller of Parke Lawyers commented: ‘The census site


\textsuperscript{72} Justin Warren, ‘Cloud Hangs over IBM After Australian Census Catastrophe’, \textit{Forbes}, 10 August 2016, \url{http://www.forbes.com/sites/justinwarren/2016/08/10/cloud-hangs-over-ibm-after-australian-census-catastrophe/#693f0e0024fe}


failing does not necessarily mean IBM's service was valueless and that money has to be repaid, but depending on the agreements with IBM and other contractors, there may well be liability if they failed to meet their obligations around system security and stability.’75

Queenslanders were reminded of the conflict between the Queensland Government and IBM over the payroll for Queensland Health. 76 The Premier at the time, Campbell Newman said his Government was committed to recovering some of the cost: ‘Queenslanders were wronged, we believe, in the pay affair, and we intend to do what we can to recover money - for them, the taxpayers, the men and women and Queensland.’77

The Supreme Court of Queensland case of IBM Australia Ltd. v State of Queensland makes for sobering reading.78 Martin J observed:

The history of attempts to improve the efficiency of government services in Australia is not one of consistent outcomes. There have been many successes, some indifferent results and a few spectacular fiascos. The attempt that gives rise to this case belongs firmly in the last

75 Ibid.
77 Ibid.
category. It has emerged from an effort which has been described as taking “a place in the front rank of failures in public administration in this country. It may be the worst.”

In the end, the new Queensland Government decided not to appeal in the matter. Deputy Premier Jackie Trad said: ‘We think it's time to close the chapter and move on.’

The former Premier of Queensland, Campbell Newman, lamented that the calamity of Census Fail may well have been avoided if the past experience of Queensland had been heeded. He reflected:

People should lose their jobs over this. As premier, I had to prepare the state of Queensland to host the G20 and I took a huge personal interest in cyber security to the point that myself, the deputy premier and treasurer conducted our own interviews where we summoned all the departments and agencies in for meetings with us to question them intensively about what their preparations were for G20 in terms of hacking. We were told we were going to be a target for denial of service or hacking attacks during G20. I don’t accept the excuse for the census that I’ve seen on TV. I don’t understand, and I don’t accept, why this happened.

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81 Ibid.


83 Ibid.
Campbell Newman observed that a Google search would have revealed IBM’s poor performance at Queensland Health. He commented: ‘I’ve got to say that very public fight was right there in front of the federal officials when they were deciding who to contract for the ABS project.’

It is notable that IBM has reportedly sacked staff, as a result of the conduct of the 2016 in Australia.

Subsequently, there has been a similar controversy over an IBM payroll in Canada, which echoes census and Queensland Health failures.

The Census 2016 failure does seem to raise larger questions about information technology arrangements, contracting, outsourcing, and the Government’s innovation agenda. This is aligned with the fiscal environment – especially following the recent Commission of Audit in 2013/2014.

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84 Ibid.
d. the shutting down of the Census website on the evening of 9 August 2016, the factors leading to that shutdown and the reasons given, and the support provided by government agencies, including the Australian Signals Directorate;

The collection and storage of digital information presents numerous concerns for current and future information security. Any previous or future data breaches to the ABS website or ABS information holdings should be publicly disclosed and subject to formal inquiry.

Public attention in relation to the concern of information security has tended to focus on external threats and the potential for ‘hacking,’ particularly following the events of the evening of the 9th of August. The potential for internal unauthorised access of identifiable, sensitive and personal information should also be considered. This has occurred in Australian police and other government agencies.

e. the response rate to the Census and factors that may have affected the response rate

The ABS failed to engage in public consultation about the rationale for the collection of personally identifiable information, the extended retention of that information, and information security. As a result of privacy and security concerns, there were strong calls from civil society organisations and current Senators to boycott the census, refuse to provide names or provide false information. It is reasonable to expect that the requirement for individuals to provide identifiable information could have
impacted both the validity and reliability of information collected. The closure of the census website on the 9th of August (as a result of suspected / reported Distributed Denial of Service DDoS attacks) contributed to public apprehension in relation to the security of personal information provided to the ABS. This has the potential to erode public confidence and trust in both the ABS and the Census. These issues also extend to the reporting and use of the information collected from the 2016 Census. Serious consideration about the integrity of the 2016 Census dataset is required, during interpretation and any future use in informing policy decisions.

Furthermore, there needs to be much greater transparency regarding the events of the Census night, in which the Australian Census collapsed. There have been many competing explanations in respect of the events on Census night from the Australian Bureau of Statistics, the Federal Government, IBM, and other key other players.

f. privacy concerns in respect of the 2016 Census, including the use of data linking, information security and statistical linkage keys

The Australian Bureau of Statistics has lost public trust and confidence over the Census 2016. The Census 2016 fails to respect the right to anonymity, even though that is one of the basic Privacy Principles in Australia. There are substantive privacy risks and information security problems associated with the Australian Census. The Australian Bureau of Statistics has withdrawn its claim that its website is in the cyber-secure zone.88

The New South Wales Privacy Commissioner Elizabeth Coombs expressed concerns about the multitude of risks over radical plans to store Australians’ names and addresses in a government database after the Census.\textsuperscript{89} She said: ‘From a risk-management perspective, it’s hard not to be concerned about the proposed changes.’\textsuperscript{90} Coombs observed: ‘There are a range of risks and it’s not just the risk of misuse. The Census is a valuable information and data source.’\textsuperscript{91}

The former Deputy New South Wales Privacy Commissioner - Anna Johnston of Salinger Privacy - has also been highly critical of the conduct of the 2016 Census. To begin with, she expressed concerns about the impact of the 2016 Census on anonymity.\textsuperscript{92} Johnston commented:

This proposal represents the most significant and intrusive collection of identifiable data about you, me, and every other Australian, that has ever been attempted. It will allow the ABS to build up, over time, a rich and deep picture of every Australian’s life, in an identifiable form. Up until now, the name and address portion of census forms was not retained by the ABS; just as soon as the rest of your census answers were transcribed, the paper forms were


\textsuperscript{90} Ibid.

\textsuperscript{91} Ibid.

destroyed. But the new proposal is to keep name and address, as well as your answers to all the Census questions included this year, such as sex, age, marital status, indigenous status, religious affiliation, income, education level, ancestry, language spoken at home, occupation, work address, previous home address, vehicles garaged at your address, and the relationships between people living in the same home.

Statements from the ABS which trivialise the risks posed by stripping away census anonymity have missed the point. Seeking to justify the proposal by saying that the ABS will never release identifiable information ignores the point that they shouldn’t have it in the first place. And, as my mother taught me – you shouldn’t make promises you cannot keep.93

Johnston noted: ‘The ABS is not magically immune to the risk of data breaches.’94 She observed: ‘It was only last year that one of their staff was convicted of leaking data to a friend at the NAB as part of a multi-million dollar insider trading scam.’95 As a result of her concerns, Johnston reluctantly decided to boycott the 2016 Census.96

Privacy advocates have been concerned by the precedent of the 2016 Census (and previous censuses).97 Amy Gray from Digital Rights Watch complained: ‘The Turnbull Government’s handling of the Census to date demonstrates both a total

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93 Ibid.
94 Ibid.
95 Ibid.
disrespect for personal privacy rights and lack of digital literacy.’98 She observed: ‘The frustration felt by the public extends far beyond the inconvenience of the website crashing on Census night.’ 99 Amy Gray noted: ‘Valid privacy concerns were dismissed, confusion and obfuscation about the ‘attacks’ on the ABS servers pervaded throughout the media, and very little information was provided to the public about what had actually occurred.’100 She commented: ‘What is urgently needed is an independent investigation of the whole process, including a forensic report of the cause of the website crash, the handling of privacy concerns and the outsourcing of key services to private companies.’101

The 2016 Australian Census was administered in a way that was in conflict with the Australian Privacy Principles, principally the removal of the option of transacting anonymously or using a pseudonym. As discussed above, the creation of a SLK enabling longitudinal tracking raises a series of privacy concerns given the potential for future scope or function creep (where information collected for one purpose is used for a range of secondary, tertiary or unknown or unanticipated future purposes). This includes the ability to match and connect information, or consolidate information, across existing or future administrative data and information assets. This provides the potential for the ABS (and/or other agencies) to develop and maintain a comprehensive picture of individuals’ lives. This is further compounded by

98 Ibid.
99 Ibid.
100 Ibid.
101 Ibid.
An openness about how information will be used, by whom, and for what specific purposes.

A number of politicians have expressed privacy concerns about the 2016 Census. Senator Nick Xenophon wants the law to be changed so it is not compulsory to provide an individual's name. He said: ‘I will not be providing my name for this year's census.’ Xenophon observed: ‘I do so in full knowledge that I may face prosecution under the Census Statistics Act of 1905, and that currently involves a fine of $180 per day that is cumulative for every day of non-compliance.’ Xenophon promised: ‘I will contest any such notice, and by doing so I will in effect turn it into a test case.’ Xenophon commented:

The government should be requesting our consent, rather than requiring our names through coercion. Australians expect the rule of law, not ruled by law. This is a battle worth fighting. It’s not just because privacy is an inherent human right to maintain the human condition with dignity and respect but also because it seems the ABS, with the support of the Australian Government is about to trash that human right. And the way they’ve done so has been completely undignified and disrespectful to all of us.

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103 Ibid.
104 Ibid.
105 Ibid.
He highlighted the work of Professor Daniel Solove about ‘Why Privacy Matters’.\textsuperscript{107}

Likewise, a number of members of Australian Greens have expressed privacy concerns about the 2016 Census. Senator Scott Ludlam has been deeply concerned about the 2016 Census.\textsuperscript{108} He observed: ‘While parliament was in recess, a process that most Australians would normally find largely uncontroversial blew up spectacularly in the government's face, severely damaging confidence in the Commonwealth's lead statistical agency, potentially placing at risk the privacy of millions of people and likely compromising one of the most important datasets used daily by policymakers and researchers around the country.'\textsuperscript{109} Senator Scott Ludlam particularly objected to the creation of a Statistical Linkage Key:

\begin{footnotesize}
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  \item[108] Senator Scott Ludlam, ‘Census’, Hansard, Australian Senate, 30 August 2016, 29, \url{http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansards%2Fcd63b390-a3f0-48f9-b492-5960a591d967%2F0079%22}
  \item[109] Ibid.
\end{itemize}
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The creation of such a unified identifier for every single Australian—not opt in, not opt out, but mandatory—should have been subject to a substantial public debate and a measured weighing of the costs and benefits. Such a debate will inevitably take place in the context of high-profile data breaches here and around the world, indiscriminate surveillance and data storage by signals intelligence agencies, and the potential misuse of such data either by authorised agencies or by unauthorised actors. This is a conversation that needs to be had. I am not sure that this is necessarily a Left or a Right thing either. This is something the Greens have advocated strongly from, but I would have thought the libertarian wing of the Liberal Party—or actual libertarians like Senator Leyonhjelm—would have some views on something like this. I do not think there is a clean Left or Right political divide here; this is a debate that absolutely needs to be had by the light of day.110

Ludlam lamented: ‘In contempuously dismissing those concerns, the government guaranteed that the census data would, at bare minimum, be compromised, and, as we found out on census night, it was actually a lot worse than that.’111 Senator Scott Ludlam commented: ‘Census fail was clearly avoidable, but the best thing that can come out of this debacle is a measured and thoughtful debate on data sovereignty, the role of the census in setting policy, the place of big data in our society and what happens when governments try to cut corners on census night.’112

Greens Senator Sarah Hanson-Young also said: ‘I will complete the census, because the data is important for helping us as a nation to understand who we are, but I won’t

110 Ibid.
111 Ibid.
112 Ibid.
include my name.’ 113 Greens Senator Janet Rice has also expressed her privacy concerns about the 2016 Census.

Jacqui Lambie has also expressed concerns about the privacy implications of the 2016 Census.114

In the House of Representatives, the Independent Member for Denison, Andrew Wilkie MP, has expressed his concerns about the 2016 Census.115 He observed: ‘Despite the collection of names in previous censuses the logic for this has not been communicated to the public, if indeed there is any logic at all.’116 Moreover, he noted: ‘Nor has any explanation been given for why the ABS holding this information for much longer than normal is warranted.’117

Rather pithily, Peter Garrett – former Australian Labor Party minister and campaigner against the Australian Card – commented: ‘We should not consent to data linkage through a single identifier #census 2016 [same problems] as the ID card, function

116 Ibid.
117 Ibid.
creep & state scrutiny." His recent autobiography *Big Blue Sky* devoted a whole chapter on the battles over the Australia Card.

The legal and political challenge to the Australian Bureau of Statistics on privacy grounds by Senators Nick Xenophon, Sarah Hanson-Young, Scott Ludlam, Janet Rice and Jacqui Lambie is to be welcomed. Such politicians have shown real leadership in defending the privacy, freedom, and civil liberties of Australian citizens.

In addition to questions about anonymity, privacy, and information security, there were also deep concerns about the research ethics of the Census Fail. Ethical research involves confidentiality, informed consent, voluntary participation, and compulsion or fines or threat thereof. Unfortunately, the approach taken by the Australian Bureau of Statistics fails to respect these established ethical standards. There is a need to respect the rights and liberties of research participants – especially those in high-risk and vulnerable communities.

Dr Leslie Cannold – an academic specialist in research ethics – lamented that the Census did not meet best policies or practices. She commented:

118 Peter Garrett, ‘We Should not Consent to Data Linkage’, August 2016
[https://twitter.com/pgarrett/status/762915481598648320](https://twitter.com/pgarrett/status/762915481598648320)

119 Peter Garrett, *Big Blue Sky*, Sydney: Allen & Unwin, 2015,

Research ethics matter and are relevant to all data collection projects, including the Census. Critical questions of informed consent and confidentiality were swept aside in Census 2016. This has had predictably disastrous consequences for public trust and the reliability of the data collected. The upside of #Censusfail is that it’s provided Australian leaders with a chance to consult with experts and the Australian people about the consent and privacy implications of Big Data. This is the research ethics, digital privacy and personal information debate we had to have.\textsuperscript{121}

Cannold called on the government ‘to adopt best practice ethical and governance standards in the collection, use, linkage and storage of Australians’ personal and sensitive data.’\textsuperscript{122}

It should be noted that there has been significant litigation in the past over research, in which there has been a lack of prior, informed consent.\textsuperscript{123}

The failure of the Census is not an isolated problem. The Hon. Michael Kirby has lamented that the Federal Parliament has failed to act on privacy protection over the last forty years.\textsuperscript{124} In an age of Big Data, Cloud Computing, and Hacking, there is an

\textsuperscript{121} Ibid.
\textsuperscript{122} Ibid.
even greater need for privacy protection in Australia.\textsuperscript{125} The work of Professor Ron Deibert and the Citizen Lab at the University of Toronto has highlighted the increasing threats posed by surveillance.\textsuperscript{126}

We need a statutory cause of action for serious invasions of privacy, as recommended by the Australian Law Reform Commission.\textsuperscript{127} We need mandatory disclosure of data breaches. We need to update our privacy laws and strengthen transparency, accountability and oversight as a matter of urgency.

\textbf{g. Australia’s Census of Population and Housing generally, including purpose, scope, regularity and costs and benefits}

The Census is recognised as playing an important part in informing public policy, service delivery and research. However, for the reasons outline above, the validity and reliability of the information collected in the 2016 Census should be subject to rigorous critique prior to use in informing any future policy decisions.


It is also noted that through techniques of random stratified sampling, it would be possible to collect information that is generalisable to the Australian population with a high degree of statistical confidence. Certainly, this is the empirical method adopted in most quantitative social science research. This option would represent a more cost effective alternative to a census, or re-administration of the 2016 census, and would not require the collection or retention of sensitive personal information from every Australian citizen or resident. The Australian Bureau of Statistics should consider adopting stratified sampling techniques to supplement / replace the collection of extensive sensitive personal information from every Australian citizen or resident.
h. the adequacy of funding and resources to the ABS;

The 2016 Census failure raises larger questions about the adequacy of funding and resources to the Australian Bureau of Statistics. There are larger issues raised in respect of the Audit Commission report and the general fiscal environment within government, efficiency dividends, requiring increased outsourcing and contracting and the issues this presents in terms of accountability.

i. ministerial oversight and accountability

Clearly, there have been problems with the governance, transparency, and accountability of the Australian Bureau of Statistics. Peter Martin, the economics editor for the *Sydney Morning Herald* and *The Age*, has been insightful about the governance problems afflicting the institution.  He observed that the Australian Bureau of Statistics had embarked upon grandiose plans, while suffering from budgetary stagnation:

The Bureau's newly installed chief, David Kalisch, was war-gaming an even grander solution. Dubbed "Project Archer" after Keith Archer, the Australian Statistician who introduced computers to the ABS in the 1960s, it would make the 2016 census go away, freeing up $200 million to $400 million to upgrade the Bureau's aging computer systems, some of which ran code that was 30 years old. His predecessor Brian Pink had left at the start of 2014, warning in his final annual report that the Bureau had barely enough cash to "keep the lights on". When

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Pink arrived in 2007 the Bureau received $302 million in a non-census year. Seven years of growing expenses and relentless "efficiency dividends" later, it received scarcely any more, $312 million.\(^{129}\)

His analysis reveals a public institution in crisis – with significant issues in respect of leadership, accountability, and transparency. There have been significant difficulties in obtaining access under freedom of information laws to key internal documents related to the policy-making of the Australian Bureau of Statistics.\(^{130}\) There has been a massive loss of public trust in the Australian Bureau of Statistics in the wake of the controversy.\(^{131}\)

Moreover, there has been inadequate Ministerial and government oversight of the Australian Bureau of Statistics. Peter Martin, the economics editor for the *Sydney Morning Herald* and *The Age*, highlighted the lack of government oversight of the Census 2016.\(^{132}\) He observed that the chaos of Census 2016 was accentuated by the shifting ministerial responsibilities in the portfolio:

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\(^{129}\) Ibid.


The new minister, Michael McCormack, in the job for mere weeks, at first couldn't get through to Kalisch. McCormack had been appointed after an embarrassing interlude in which there seemed to be no minister responsible. Hawke's position had been abolished and neither treasurer Scott Morrison nor financial services minister Kelly O'Dwyer had been given the job. A fortnight after being appointed small business minister McCormack was told it was his.

Clearly, there needs to better Ministerial and government oversight of the Australian Bureau of Statistics – instead of a laissez-faire approach to the public institution’s management of the Census.

By the same token, it was disappointing that the opposition party – the Australian Labor Party – did not engage with the deeper legal, ethical, and public policy issues underlying the Census Fail. Andrew Leigh MP, for instance, argued: ‘If the Government can’t run a Census, how can they govern a country?’133 However, beyond this party political attack, there was a lack of a deeper analysis of the issue by the Australian Labor Party. While noting complaints from constituents, the Australian Labor Party urged Australians to complete the survey. There was a failure to grapple with the larger problems in respect of anonymity, confidentiality, privacy, research ethics, and compulsion. It seems a problematic position of the Australian Labor Party to urge completion of the census, without resolving legal, ethical, and public policy

133 Andrew Leigh MP, ‘If the Government Can’t A Census, How Can They Govern a Country?’, ABC News Radio, 10 August 2016, http://www.andrewleigh.com/if_the_government_can_t_run_a_census_how_can_they_run_a_country_abc_newsradio
concerns associated with the Census 2016. Moreover, it is disappointing that the Australian Labor Party has supported the imposition of fines for the non-completion of the Census, notwithstanding the issues discussed above.

In addition to ministerial oversight and accountability there should be further independent and sufficiently resourced oversight, for example, by the Australian Office of Information Commissioner. This office should have been actively involved in conducting an independent Privacy Impact Assessment (rather than the PIA being conducted internally by the ABS itself). The Office of Australian Information Commissioner should be playing a more active and independent role but too has been subject to budgetary cuts and issues of impartiality from government.

j. any related matters

The digitalisation of the Census, extended retention of information and compulsion to provide identifiable information is occurring in conjunction with a broader range of information collection initiatives by government. Examples include: mandatory metadata retention; the National Facial Biometrics Matching Capability; centralisation of police information systems and biometric information via CrimTrac (now Australian Criminal Intelligence Commission); MyGov; My Health Record, and

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the Trusted Digital Identity Framework currently being introduced by the Digital Transformation Office. Therefore, the privacy and security issues raised by the 2016 Census as outlined above should be considered within this context, especially due to the ability to integrate and match information across systems.

The expansion in the nature and volume of information collected by government, and complete disregard for the Australian Privacy Principles, means that privacy protections in Australia are at risk of becoming obsolete.
3. The Canadian Debate over Census 2016

Statistics Canada celebrates Census 2016 on social media

In contrast to Australia’s Census Fail, Statistics Canada has celebrated its recent census as the ‘Best Census since 1666.’\textsuperscript{136} Statistics Canada that 98.4 per cent of the population filled out their long-and-short form questionnaires. Navdeep Bains, a new Minister for the Trudeau Government, commented upon the success of the Census:

> Canadians can be proud of their participation in the 2016 Census. Their outstanding support has enabled Statistics Canada to carry out the most successful census in Canadian history.\textsuperscript{137}

It is worthwhile investigating the Census 2016 in Canada as a counterpoint and a contrast to Australia’s 2016 Census.


While initially the experience of Statistics Canada appears positive, upon closer inspection a number of controversies with the Canadian census become apparent. Like Australia, the website for Statistics Canada became unavailable. While Statistics Canada blamed the high traffic, the internal documents obtained by the CBC revealed that design flaws were responsible.\footnote{Dean Beeby, ‘Design Flaws Crashed StatsCan’s Census Website: Documents’, CBC News, 24 June 2016, \url{http://www.cbc.ca/news/politics/census-statistics-canada-computers-online-webpage-1.3649989}} Dean Beeby reported:

In fact, traffic on the website was only at about 50 per cent of expected capacity, according to documents obtained by CBC News under the Access to Information Act. The trouble began at 6:59 p.m. ET on May 2, when the website experienced congestion for 35 minutes, preventing some from filing their data. The documents blame the digital traffic jam on the large size of Statistics Canada's so-called "landing page," the first page users see when signing on. The page design used a lot of bandwidth, and clogged the system as it was being downloaded to thousands of home computers.\footnote{Ibid.}

While there are similarities to the situation in Australia, an important difference has been that it has been difficult to gain access to the ABS’ internal documents (or legal advice) in relation to the 2016 Census.

There have also been controversies in relation to the Canadian census over compulsion, mandatory participation and fines. For example, in 2011, Audrey Tobias, an 89-year-old woman who also refused to fill out the 2011 census, was brought to

\footnotesize\begin{itemize}
\item \footnote{Dean Beeby, ‘Design Flaws Crashed StatsCan’s Census Website: Documents’, CBC News, 24 June 2016, \url{http://www.cbc.ca/news/politics/census-statistics-canada-computers-online-webpage-1.3649989}}
\item \footnote{Ibid.}
\end{itemize}
A peace activist, she declined to participate in the Census because of concerns about the involvement of Lockheed Martin. Audrey Tobias's lawyer, Peter Rosenthal, had argued that forcing her to complete the census would violate her freedom of conscience and freedom of expression under the Canadian Charter of Rights and Freedoms. While the judge dismissed the Charter arguments, he said that there was reasonable doubt as to Audrey Tobias’ intent at the time of the refusal, given her memory and conflicting testimony. The Toronto judge Ramez Khaly found that she was not guilty, and soundly criticized the government for trying to prosecute someone who was a ‘model citizen.’ The judge said the decision to prosecute Tobias, a Second World War veteran, was a ‘PR disaster.’ The lawyer Peter Rosenthal reflected upon the ruling: ‘He described our charter arguments as Hail Mary passes and he didn't catch it ...They were novel arguments but he found a more novel argument it seems in analyzing the [intent].’

In the 2013 case of R v. Finley, the Court of Appeal for Saskatchewan considered another matter of fines in respect of the census. Sandra Finley refused to complete the census, saying Statistics Canada required information from a biographical core of personal information that she wanted to keep private. She believed the request to complete the Long Form Census violated her ‘right to privacy’ under s. 8 of the Canadian Charter of Rights and Freedoms. The trial judge dismissed the application.

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141 Ibid.

142 Ibid.

143 R v Finley 2013 SKCA 47 [http://canlii.ca/t/fxetz](http://canlii.ca/t/fxetz)
by Finley. The Court of Queen’s Bench dismissed her appeal. The Court of Appeal for Saskatchewan also rejected a further appeal:

Unless a court is satisfied that the state has intruded upon an individual’s reasonable expectation of privacy, the individual will not be able to assert successfully that there has been a search let alone an unreasonable search or seizure. The summary conviction appeal court judge might have expressed this principle more clearly, but I have no doubt what he meant is that s. 8 does not protect all privacy interests, but reasonable expectations of privacy only. With regulatory statutes, like the Statistics Act, a person’s reasonable expectations of privacy are considered to be lower than in other contexts. This does not mean a court is not required to undertake the close analysis that the trial judge did in this case, but it does mean that once the analysis is complete, the result may very well be that the person cannot claim the state action in question constituted a search for the purposes of raising a s. 8 Charter challenge. 144

This case seems to be a striking contrast to the outcome in respect of Audrey Tobias. The outcomes of the legal cases in Canada over the refusal to complete the Census seem very dependent upon individual judicial decision-making, and hard to reconcile with one another.

In 2014, a 79-year-old Toronto woman, Janet Churnin, was prosecuted over contravening the Statistics Act through refusal to complete the mandatory census. 145 She argued that the compulsion to do the Census was a violation of Churnin’s Charter rights of freedom of expression and conscience, as well as an unreasonable search and seizure. Justice Cathy Mocha dismissed the defence’s arguments. She observed: ‘Miss

144 Ibid.

Churnin deliberately refused to fill out the census."\textsuperscript{146} Mocha commented: ‘It was committed deliberately, but I agree with your counsel that you did this on moral grounds.’\textsuperscript{147} The judge took into account Conservative MP Tony Clement’s comments that refusing to fill out the census should not be met with a threat of jail time. Defence lawyer Peter Rosenthal asked for an absolute discharge, but the judge disagreed, saying: ‘It is general deterrence to stop others from doing this.’\textsuperscript{148} Janet Churnin was sentenced to 50 hours of community service.

The messy litigation in respect of the Canadian Census underlines the problematic nature of collecting government information, with mandatory participation, compulsion, threats, and fines.

It should also be noted that Australia does not enjoy the same sort of constitutional protection for human rights, civil liberties, and individual freedoms such as privacy – as Canada does with the protection afforded by the \textit{Canadian Charter of Rights and Freedoms}.

\textsuperscript{146} Ibid.
\textsuperscript{147} Ibid.
\textsuperscript{148} Ibid.