



COUNT US IN 2021:

SUBMISSION TO THE CONSULTATION ON THE *CENSUS AND STATISTICS
AMENDMENT (STATISTICAL INFORMATION) REGULATIONS 2019*

10 January 2020

WE NEED YOUR VOICE. [EQUALITYAUSTRALIA.ORG.AU](https://equalityaustralia.org.au)

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ABOUT EQUALITY AUSTRALIA

Equality Australia is a national LGBTIQ+ legal advocacy and campaigning organisation dedicated to achieving equality for LGBTIQ+ people. We work with LGBTIQ+ people to amplify the voices of our community and achieve positive legal, policy and social change for LGBTIQ+ people and their families in Australia. Equality Australia has been built from the Equality Campaign, which ran the successful campaign for marriage equality, and was established with support from the Human Rights Law Centre.

We acknowledge that our offices are on the land of the Kulin Nation and the land of the Eora Nation and we pay our respects to their traditional owners.

EXECUTIVE SUMMARY

Equality Australia welcomes the opportunity to make a submission to the consultation on the exposure draft of the *Census and Statistics Amendment (Statistical Information) Regulations 2019* (proposed regulations).

The Census must reflect the diversity of our nation by properly including LGBTI Australians in the statistical data it collects and analyses. When the Census fails to do so, not only do LGBTI Australians lose out – but all Australians, who expect key policy decisions to be based on evidence, also lose out.

Reliable data means no Australians get left behind when planning our healthcare and social services programs. LGBTI Australians still have significant mental health and well-being disparities compared to other Australians. The best way to improve those outcomes is ensuring that our leaders consider the diversity of our community when creating policies that affect our lives.

Reliable data also means government and policy decision makers and community organisations can deliver services to the areas where there is the greatest need. Only the Census can give us the kind of rich data that allows decision makers to identify where priority populations live so that government funding and investment delivers for all Australians the greatest value and return.

It's time for sexual orientation, gender identity, and sex characteristics questions to be added to the Census. That is what 5,190 people who signed our petition calling for the 2021 Census to include LGBTI Australians have told us, the Australian Bureau of Statistics (ABS) and the Assistant Minister to the Treasurer.

This submission does not propose to traverse in detail the sound policy rationales for the inclusion of questions on sexual orientation, gender identity and intersex status in the 2021 Census. Instead, our submission will focus on the legal case for including questions on sexual orientation, gender identity and intersex status in the 2021 Census.

We argue that the continued omission of these questions is out of step with existing Commonwealth law and Government policy. This should be remedied as soon as possible.

In particular, we argue that section 26 of the *Sex Discrimination Act 1984* (Cth) (SDA) may have been breached by what appears to have formed part of the reason for failing to test questions on sexual orientation, gender identity and intersex status in preparation for the 2021 Census, as well as the continuing failure to prescribe these matters in the proposed regulations and include such questions.

Section 26 provides that when exercising functions, powers, or responsibilities under Commonwealth law or for the purposes of Commonwealth programs, the Commonwealth must do so without discrimination on certain protected grounds. Rejecting the inclusion of questions on sexual orientation, gender identity and intersex status in the 2021 Census may therefore amount to:

- direct discrimination, if part of the reason for doing so was a fear of political controversy owing to negative attitudes towards LGBTI Australians held by some members of the public (as appears to have been the case, given what has been revealed in the documents tabled before the Senate); and/or
- indirect discrimination, given the Commonwealth's continued exclusion of such questions amounts to the imposition of an unreasonable condition, requirement or practice on all Australians to complete a deficient, partial and ill-fitting Census, which has the effect of disadvantaging LGBTI Australians by failing to count them properly and make available valuable and necessary data on sexual orientation, gender identity and intersex status.

In terms of the policy arguments, Equality Australia otherwise endorses the submissions made to the Review of 2021 Census Topics by the [National LGBTI Health Alliance](#), [Intersex Human Rights Australia \(IHRA\)](#) and others, including that:

- There is a paucity of reliable data on the prevalence of LGBTI people in Australia, including where they live and the demographics of this population (such as age, marital status, ancestry, country of birth, any unpaid caring responsibilities, employment, educational attainment and care needs);
- Current practices for collecting sexuality and sex/gender diversity in the Census 2021 are discriminatory and lead to inaccurate and incomplete data sets (for example, counting same-sex couples who live together but not individual gays, lesbians and bisexuals; collecting information on sex/gender through alternative and inadequate processes);
- Accurate data is necessary for robust government policy and planning decisions, including funding in healthcare and social services, where LGBTI people are identified as a priority population given the health and wellbeing disparities they experience (such as disproportionate rates of mental health diagnoses, suicidality, certain health issues and homelessness). This differs from other priority populations who are currently properly counted in the Census;
- The financial cost and effort involved in including these questions in the 2021 Census is likely to be minimal, especially when considering the value of capturing this data.

RECOMMENDATIONS

1. The *Census and Statistics Amendment (Statistical Information) Regulations 2019 (Cth)* should be amended by the Governor-General (on the advice of the responsible Minister) to prescribe, in respect of a person not less than 15 years of age,¹ the following matters under the table in section 9 of the *Census and Statistics Regulation 2016 (Cth)*:
 - ‘gender identity’
 - ‘sexual orientation’
 - ‘variations in sex characteristics’.²
2. The Australian Statistician and ABS should, in consultation with the LGBTI community, undertake testing to finalise and include appropriate questions on sexual orientation, gender identity and intersex status in the 2021 Census.
3. The Australian Statistician and ABS should, in consultation with the LGBTI community, develop explanatory materials to educate the LGBTI and broader community on how to complete the new, inclusive 2021 Census so that valid responses are maximised.

¹ This is consistent with what was proposed in questions 58 and 59 of the test [Census dated 15 October 2019](#) prepared by the Australian Bureau of Statistics, which was tabled in documents before the Senate.

² These matters should be prescribed in addition to the existing prescribed matter of ‘sex’, which should instead be described as ‘gender’ consistent with the [Australian Government Guidelines on the Recognition of Sex and Gender](#), November 2015, [2].

POTENTIAL QUESTIONS ON SEXUAL ORIENTATION, GENDER IDENTITY AND INTERSEX STATUS IN CENSUS 2021

Equality Australia proposes these potential questions for consultation.

1. What is the person's gender?
 - a. Male
 - b. Female
 - c. Another gender (please specify)

For persons aged over 15 years:

2. What was the person's gender assigned at birth?
 - a. Same as current gender
 - b. Male
 - c. Female
 - d. Another gender (please specify)
 - e. Prefer not to answer
3. Was the person born with a variation to their sex characteristics (also known as an intersex variation)?³
 - a. Yes
 - b. No
 - c. Don't know
 - d. Prefer not to answer
4. Does the person consider themselves to be:⁴
 - a. Straight (Heterosexual)
 - b. Gay
 - c. Lesbian
 - d. Bisexual
 - e. Different identity (please specify)
 - f. Prefer not to answer

³ Based on the [IHRA Submission](#) to the 2021 Census Topics consultation.

⁴ This is consistent with was proposed in questions 59 of the test [Census dated 15 October 2019](#) prepared by the Australian Bureau of Statistics.

THE LEGAL CASE FOR COUNTING US IN THE 2021 CENSUS

1. THE LEGAL FRAMEWORK UNDERPINNING THE CENSUS

The Census is a Commonwealth program, funded by the Commonwealth Government. It is also empowered under Commonwealth law, chiefly the *Census and Statistics Act 1905* (Cth) (**CSA**). The CSA gives the Governor-General (acting on the advice of the responsible Minister), the Minister, the Australian Statistician and ABS delegates certain functions and powers, and responsibilities for the administration of Commonwealth law and the conduct of this Commonwealth program.

Crucially, much of the content of the Census and its manner of conduct is discretionary. While the CSA requires a Census to be taken every five years on and from 1981, it leaves as a matter of discretion the day on which the Census will be taken and the ‘matters’ in respect of which the Australian Statistician (and thereby the ABS)⁵ shall collect statistical information.⁶ This means that the topics to be included in the Census are entirely an exercise of discretion, with the Governor-General (acting on the advice of the responsible Minister) ultimately empowered to make regulations prescribing those matters.⁷ Then, the CSA provides further discretion to the Australian Statistician as to how they will prepare forms relating to the collection of statistical information on the prescribed matters (including the specific questions which are asked),⁸ whether and how they will request or direct a person to answer a question,⁹ and how they will analyse and publish (non-identifying) statistics.¹⁰

While the Governor-General (acting on the advice of the responsible Minister), the Minister, the Australian Statistician and ABS delegates are afforded a range of highly discretionary functions, powers and responsibilities under the CSA and for the purposes of administering the Census, the Australian people are not. Failing to answer a required question, or providing knowingly false or misleading statements or information, constitutes a criminal offence.¹¹ The Australian Statistician and ABS officers are also required to comply with strict secrecy obligations in respect of any information given under the CSA (including information obtained through the Census).¹²

2. PROHIBITIONS ON DISCRIMINATION IN THE ADMINISTRATION OF COMMONWEALTH LAWS AND PROGRAMS

Section 26(1) of the SDA relevantly provides:

It is unlawful for a person who performs any function or exercises any power under a Commonwealth law or for the purposes of a Commonwealth program, or has any other responsibility for the administration of a

⁵ See *Census and Statistics Act 1905* (Cth) (**CSA**), s 16-17.

⁶ CSA, s 8.

⁷ CSA, s 27.

⁸ CSA, s 10(1).

⁹ CSA, s 11.

¹⁰ CSA, s 12.

¹¹ CSA, ss 14, 15.

¹² CSA, ss 19-19A.

Commonwealth law or the conduct of a Commonwealth program, to discriminate against another person, on the ground of the other person's ... sexual orientation, gender identity, intersex status ... , in the performance of that function, the exercise of that power or the fulfilment of that responsibility.

The legal obligations in section 26 of the SDA apply to all persons performing functions, exercising powers or who have responsibility for the administration of the CSA or for the purposes of conducting the Census. This includes the Governor-General (acting on the advice of the responsible Minister), the Minister, the Australian Statistician and all ABS delegates. Section 26 of the SDA makes it unlawful for any of these people to discriminate against another person on the ground of their sexual orientation, gender identity or intersex status in the performance of these functions, the exercise of these powers or the fulfilment of these responsibilities.

Discrimination under the SDA can be direct. This means treating a person less favourably than (in circumstances that are the same or not materially different) than another person who has a different sexual orientation, gender identity or who does not have variations in their sex characteristics.¹³

Discrimination under the SDA can also be indirect. This means imposing, or proposing to impose, an unreasonable condition, requirement or practice that has, or is likely to have, the effect of disadvantaging persons of a sexual orientation, gender identity or who have an intersex status.¹⁴

The obligations contained in the SDA were the product of bipartisanship. In his Second Reading Speech on the 2013 amendments which introduced these protections into the SDA, the (then) Shadow Attorney General, The Hon Senator George Brandis said: *'The opposition supports this bill most particularly because it represents the adoption by the government of coalition policy.'*¹⁵ Coalition Senators also identified anti-discrimination protections for LGBTI Australians as consistent with the policy which the Coalition took to the 2010 election.¹⁶

The obligations contained in the SDA, and in other legislation, are also supported by the [Australian Government Guidelines on the Recognition of Sex and Gender](#), which apply to all Australian Government departments and agencies. They stipulate that the preferred approach is for Australian Government departments and agencies to collect gender information where necessary, and to give people an option to identify as male, female or "X" (for people who identify as non-binary, that is neither male nor female).¹⁷

3. THE INCLUSION OF QUESTIONS ON SEXUAL ORIENTATION, GENDER IDENTITY AND INTERSEX STATUS

The inclusion of questions on sexual orientation, gender identity and intersex status in the 2021 Census has been subject to a long period of consultation by the Australian Bureau of Statistics (ABS). ABS documents tabled in the Senate indicate that the inclusion of such questions was significantly progressed. Questions addressing sexual orientation, gender identity and intersex status were in fact included in a test Census dated 15 October 2019 which was tabled before the Senate,¹⁸ but which was ultimately abandoned.

¹³ SDA, ss 5A(1), 5B(1) and 5C(1).

¹⁴ SDA, ss 5A(2), 5B(2), 5C(2) and 7B.

¹⁵ Senate Hansard, Tuesday, 18 June 2013, p. 3272.

¹⁶ Ibid.

¹⁷ [Australian Government Guidelines on the Recognition of Sex and Gender](#), November 2015, [19]-[20].

¹⁸ [Census dated 15 October 2019](#).

There has been no cogent explanation for the decision to abandon that test.¹⁹ ABS documents indicate that potential questions tested well with both target and non-target populations in preliminary tests.²⁰ Further, according to the ABS, the Commonwealth Department of Social Services and Department of Health, and a number of local governments, all identified a need for a reliable evidence base to inform better decision making on crucial legislation, policies, budgetary investments and programs directly affecting the health and wellbeing of LGBTI people.²¹

On 25 July 2019, it appears that the Australian Statistician stopped short of recommending the inclusion of questions on sexual orientation, gender identity and intersex status, and instead asked the Government to give further consideration to the inclusion of topics on gender identity and/or sexual orientation, noting that *'collection could be problematic given the nature of the issues and associated sensitivities'*.²² However, in the same recommendation, the Australian Statistician also identified that the information could be collected with enough accuracy and with no identified adverse impact on the willingness of people to respond to the Census.²³ What, in particular, was considered *'problematic given the nature of the issues and associated sensitivities'* by the Australian Statistician (who then noted other countries would be proceeding with asking such questions in their national censuses)²⁴ is not explained. This factual background is relevant for the analysis which follows.

4. COMPLYING WITH COMMONWEALTH LAW AND POLICY

The inclusion of questions on sexual orientation, gender identity and intersex status in the 2021 Census would comply with existing Commonwealth laws and Government policy. In fact, failure to do so may contravene existing and well-established anti-discrimination laws and government policies.

(a) Direct discrimination

There are a number of ways in which excluding LGBTI people from being properly counted in the Census could constitute direct discrimination under section 26 of the SDA.

Taking into account 'sensitivities'

Firstly, excluding questions regarding sexual orientation, gender identity or intersex status from the Census because of *'the nature of the issues and associated sensitivities'* means treating LGBTI Australians less favourably than heterosexual, cisgendered and non-intersex Australians. This is because populations who are *not* subject to stigma and prejudice do not (and are not assumed to) attract such *'sensitivities'*, and therefore would not be made subject to such ancillary considerations when deciding how to capture meaningfully their information in the Census. Therefore, the Australian Statistician's failure to recommend the inclusion of questions on sexual orientation and/or gender identity partly on account of such *'sensitivities'* arguably constitutes direct discrimination, because it uses the very anti-LGBTI prejudice which the SDA prohibits from influencing decision-making as a reason for continuing to exclude LGBTI Australians from being counted properly in the Census.

¹⁹ See P Karp (2019) ['Questions about sexual orientation and gender identity dumped from census'](#), *The Guardian*, 5 October; P Karp (2019) ['Liberal MP calls for sexuality questions in census after ABS dumped them on minister's guidance'](#), *The Guardian*, 24 October.

²⁰ [Report to the Census Senior Responsible Officer dated 21 June 2019](#) [extract], pp. 3, 8 and 10.

²¹ *Ibid*, pp. 13-14.

²² [Australian Statistician Recommendation to the Hon Michael Sukkar MP, Minister for Housing and Assistant Treasurer dated 25 July 2019](#), [7].

²³ *Ibid*, [8].

²⁴ *Ibid*, [25].

Ill-fitting questions regarding gender

Secondly, requiring transgender and intersex Australians (under threat of criminal penalty) to answer ill-fitting questions regarding their gender, renders the diversity of gender in Australia invisible and threatens the integrity of this data. While there is no requirement under the SDA to allow a person to identify themselves as *neither* male *nor* female,²⁵ the Australian Government Guidelines on the Recognition of Sex and Gender do impose such a requirement. Further, there is no exception which allows the Census to:

- require people born with variations to their sex characteristics to choose between a male/female sex option *or* an intersex option in order to identify that they have a variations in their sex characteristics (given many people with variations to their sex characteristics still identify as male or female);²⁶ *or*
- omit the capturing of information regarding variations to sex characteristics or transgender Australians altogether.

(b) Indirect discrimination

Excluding LGBTI people from being properly counted in the Census could also constitute indirect discrimination under section 26 of the SDA.

This is because the Commonwealth's continued exclusion of questions on sexual orientation, gender identity and intersex status in the Census arguably amounts to the unreasonable imposition of a condition, requirement or practice on all Australians to complete a deficient, partial and ill-fitting Census. This has the effect of disadvantaging LGBTI Australians by failing to properly count them and collect the data necessary for supporting future government funding and investment decisions relating to their health and social service needs.

The imposition, or proposed imposition, of this condition, requirement or practice is the product of:

- regulations proposed to be made by the Governor-General (on the advice of the responsible Minister) which omit sexual orientation, gender identity and variations to sex characteristics as prescribed matters for the purposes of statistical information to be collected in the Census;
- a decision by the Australian Statistician not to recommend the inclusion of those matters in the regulations to the responsible Minister; and/or
- a failure by the Australian Statistician to test appropriate questions on sexual orientation, gender identity and intersex status in preparation for allowing those matters to be prescribed in the 2021 Census.

Because each of above are the product of administrative discretion, and the purported exercises of powers, functions or responsibilities under Commonwealth law or for the purposes of a Commonwealth program, they are liable to challenge under section 26 of the SDA on the grounds that they impose, or propose to impose, an unreasonable and discriminatory condition, requirement or practice, and thereby constitute unlawful indirect discrimination. The proposed regulations themselves could also be challenged under public law grounds, given section 26 makes it unlawful to exercise functions or powers in a way which would have the effect of discriminating against persons on the grounds of sexual orientation, gender identity or intersex status.²⁷ The proposed

²⁵ SDA, s 43A.

²⁶ As the proposed question 7 in the test [Census dated 15 October 2019](#) would have done.

²⁷ See for example, *Waters v Public Transport Corporation* (1991) McHugh J at 412-413.

regulations, and the conduct of the Australian Statistician, could be challenged either by way of a complaint to the Australian Human Rights Commission and/or by application to the federal courts.²⁸

The imposition, or proposed imposition, of this condition, requirement or practice (namely, a deficient, partial and ill-fitting Census which excludes questions on sexual orientation, gender identity and intersex status) is not reasonable for several reasons, including:

- LGBTI people represent a significant minority in Australia, estimated to be at least 3% of the adult population.²⁹ The LGBTI population of Australia have a range of specific needs, given health and wellbeing disparities with the rest of the population.³⁰ This is similar to a range of other population groups that are included in the Census, including CALD and ATSI Australians.
- Reliable data for this priority population is needed to support crucial legislation, policies, budgetary investments and programs directly affecting the health and wellbeing of LGBTI people. This data has been requested by other Commonwealth departments and health and service providers,³¹ noting that existing data is insufficient.
- The additional questions, cost and effort involved in capturing this data is reasonable considering its public value. It is also notable that the ABS was able to conduct a national postal survey on the question of whether same-sex couples should be allowed to marry in Australia between August and November 2017. This serves to illustrate that the Australian population are capable of being asked for statistical information relating to Australia's sexual and gender diversity, notwithstanding '*the nature of the issues and associated sensitivities*', and that they can be asked to do so in a relatively short lead time.
- The Census already includes or proposes to include a range of questions on personal matters, including religious affiliation, age, income and chronic health conditions. Privacy concerns can be adequately addressed by making the questions on sexual orientation, gender identity and intersex status include a 'prefer not to answer' option, and through the existing legal framework requiring the strict secrecy of information provided through the Census.
- The Census, and only the Census, provides an opportunity to collect rich information on a range of personal and household characteristics that can be combined with other characteristics for a range of analyses. This also allows data to be released on smaller populations within the community.³² Indeed, the omission of questions on sexual orientation, gender identity and intersex status stands in stark contrast to the vast range of personal demographic data which the Census otherwise collects, including ethnicity, religious affiliation, linguistic skill, care and health needs, occupation, educational attainment, marital, familial and parental status, income, age, and domestic living arrangements.

²⁸ Australian Human Rights Commission Act 1986 (Cth), ss 46P, 46PO; Australian Constitution, s 75(v); Judiciary Act 1903 (Cth), s 39B; Administrative Decisions (Judicial Review) Act 1977 (Cth), ss 5-6.

²⁹ P Vandenbroek (2018) '[The question of sexual orientation... Something for Census 2021?](#)', Parliament of Australia Library, 13 November.

³⁰ C Irlam (2012) '[LGBTI Data: developing an evidence-informed environment for LGBTI health policy](#)', Sydney, National LGBTI Health Alliance, p. 6.

³¹ [Report to the Census Senior Responsible Officer dated 21 June 2019](#) [extract], pp. 13-14.

³² P Vandenbroek (2018) '[The question of sexual orientation... Something for Census 2021?](#)', Parliament of Australia Library, 13 November.