



COUNT US IN 2026

SUBMISSION TO THE AUSTRALIAN BUREAU OF STATISTICS 2026 CENSUS
TOPIC CONSULTATION

28 APRIL 2023

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

CONTENTS

Count Us In: Including LGBTI people in the Census	2
1. Introduction	2
2. The public value criteria	2
3. Further assessment criteria.....	4

Attachment: Equality Australia submission to the consultation on the *Census and Statistics Amendment (statistical Information) Regulations 2019*, dated 10 January 2020

ABOUT EQUALITY AUSTRALIA

Equality Australia is a national LGBTIQ+ organisation dedicated to achieving equality for LGBTIQ+ people.

Born out of the successful campaign for marriage equality and established with support from the Human Rights Law Centre, Equality Australia brings together legal, policy and communications expertise, along with thousands of supporters, to address discrimination, disadvantage and distress experienced by LGBTIQ+ people.

Sydney office: 414 Elizabeth Street Surry Hills NSW 2010

Melbourne office: Victorian Pride Centre, 79-81 Fitzroy Street St Kilda VIC 3182

Telephone: +61 03 9999 4527

Email: info@equalityaustralia.org.au

www.equalityaustralia.org.au

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.

COUNT US IN: INCLUDING LGBTI PEOPLE IN THE CENSUS

1. INTRODUCTION

Equality Australia welcomes the opportunity to make a submission to the consultation on the 2026 Census topic review. The Census must reflect the diversity of our nation by properly including LGBTI people in the statistical data it collects and analyses.

Reliable data means no one gets left behind when planning our healthcare and social services programs. However, there is currently a lack of adequate data on the LGBTI population in Australia. For example, while we know that LGBTI people have significant mental health and wellbeing disparities compared to other Australians, we do not know how many LGBTI people there are or where they are located. Further, the power of Census data which is already collected would be magnified if we could locate the LGBTI population within that data and do further comparisons on topics such as our health, housing, homelessness, income and work, and unpaid work and care. The best way to improve important social, economic and wellbeing outcomes is to ensure that our leaders and decision makers have the information required to consider the diversity of our community when creating policies that affect our lives.

This submission is not intended to be comprehensive, and we also rely on the submission we have previously provided to the consultation on the *Census and Statistics Amendment (Statistical Information) Regulations 2019*, which we **attach** to and forms part of this submission.¹

While we recognise that the Australian Bureau of Statistics (ABS) has sought to explore further topics for Census 2026 based on its criteria, our central proposition in our earlier submission and which we reiterate in making this submission, is that the ABS must comply with its obligations under the *Sex Discrimination Act 1984* (Cth) in how it goes about administering Commonwealth laws and programs. The onus is not on LGBTI people or our community organisations to make good the case for our inclusion in Census 2026. Rather, it is the responsibility of those who scope and approve the Census questions to ensure that the Census does not discriminate against LGBTI people, whether by omitting us from Census 2026, or asking questions or analysing data in a way which discriminates against us. Regrettably, Equality Australia's position is that this responsibility was not discharged in respect of Census 2021, and we have put this position forward in our complaint with Mx April Long to the Australian Human Rights Commission.

We make this submission without prejudice to our discrimination complaint regarding the 2021 Census, which is currently before the Australian Human Rights Commission, and without limiting any evidence or submissions we have led or may lead in that matter.

2. THE PUBLIC VALUE CRITERIA

ASSESSMENT CRITERIA 1: NATIONAL IMPORTANCE

Capturing data on sexual orientation, gender identity and sex characteristics is of significant national importance. This is because information about the LGBTI population in Australia is necessary to support public policy development and decision making at all levels of government. For example, the Commonwealth Department of

¹ Equality Australia (2020) '[Count us in 2021: Submission to the consultation on the Census and Statistics Amendment \(Statistical Information\) Regulations 2019](#)'.

Health and the Commonwealth Department of Social Services has supported the collection of this data in the Census to inform policy making and service planning,² as have local councils.³

Based on the best estimates of our population size, LGBTI people comprise a sizable minority of the Australian population, comparable in size to several other groups that are currently counted in the Census.⁴ We have unique characteristics and needs that are reflected in a number of national priority policy areas, including in aged care, mental health and family violence.⁵

LGBTI people are a group that have experienced and continue to experience discrimination and disadvantage because of their sexual orientation, gender identity and sex characteristics.⁶ While parliamentarians and policy makers often make decisions about our lives, including introducing law reform and policy programs that affect us,⁷ we often lack reliable data or estimates on how many people these decisions will affect and where they are located.

Census data on LGBTI people will also be used for research purposes. For example, researchers could use the data to cross-check against their own sampling or compare information against national averages.

ASSESSMENT CRITERIA 2: CURRENT NEED FOR DATA

Despite significant health and wellbeing disparities for LGBTI people in Australia compared with the general population, there is currently no comprehensive or location specific population data for LGBTI people in Australia.⁸ The best available data, collected by Australian Research Centre for Sex, Health and Society at La Trobe University, is not location-based in the manner of the Census nor does it provide the scale and coverage of the Census.⁹ This presents a barrier to the ability of government and community organisations to provide targeted programs and services that meet the needs of the LGBTI community both locally and nationally.

As comparable countries such as New Zealand, the United Kingdom, Canada, and Malta move towards counting their LGBTI populations, data in Australia will become increasingly relevant and useful in international benchmarking.¹⁰

² Department of Health (2018) [Submission to Australian Bureau of Statistics Review of 2021 Census Topics; Report to the Census Senior Responsible Officer dated 21 June 2019](#), Part A: Extracts of analysis from the topic review investigations report, pp 13-14.

³ See, eg, South Gippsland Shire Council (2018) [Submission to the Australian Bureau of Statistics Review of 2021 Census Topics](#); City Whittlesea (2018) [Submission to the Australian Bureau of Statistics Review of 2021 Census Topics](#); City of Casey (2018) [Submission to the Australian Bureau of Statistics Review of 2021 Census Topics](#); Darebin City Council, [Submission to the Australian Bureau of Statistics Review of 2021 Census Topics](#); Banyule City Council (2018) [Submission to the Australian Bureau of Statistics Review of 2021 Census Topics](#).

⁴ It is estimated that 3-4% of the Australian population identify as gay, lesbian or bisexual, approximately 1% identify as transgender, and 1.7% are born with an intersex variation: Carman et al (2020) [Research Matters: How many people are LGBTIQ?](#) Rainbow Health Victoria. In comparison, 3.2% of the population identify as Aboriginal and Torres Strait Islander, 2.3% have served or are currently serving in the Australian Defence Force, and 3.2% are affiliated with Islam, 2.7% with Hinduism and 2.4% with Buddhism: Australian Bureau of Statistics (2022) [Aboriginal and Torres Strait Islander People: Census](#); Australian Bureau of Statistics (2022) [Service with the Australian Defence Force: Census](#); Australian Bureau of Statistics (2022) [Cultural diversity: Census](#).

⁵ See, eg, Department of Health (2017) [Aged Care Diversity Framework](#); National Mental Health Commission (2022) [Vision – 2030](#) p 36; Commonwealth of Australia (2022) [National Plan to End Violence Against Women and Children 2022-2032](#), pp 45-46.

⁶ See, eg, Australian Human Rights Commission (2015) [Resilient Individuals: Sexual Orientation Gender Identity & Intersex Rights](#), pp 14-22; A Hill et al, [Private Lives 3: The health and wellbeing of LGBTIQ people in Australia](#), La Trobe University, pp 37-41.

⁷ See, eg, [Equal Opportunity \(Religious Exemptions\) Amendment Act 2021](#) (Vic); Births Deaths and Marriages Registration Bill 2022 (Qld); Variations in Sex Characteristics (Restricted Medical Treatment) Bill 2023 (ACT); NSW Government (2022) [NSW LGBTIQ+ Health Strategy 2022-2027](#); Victorian Government (2022) [Pride in our future: Victoria's LGBTIQ+ strategy 2022-32](#).

⁸ C Irlam (2013) [LGBTI Data: developing an evidence-informed environment for LGBTI health policy](#), National LGBTI Health Alliance, p 6; See also, The National LGBTI Health Alliance (2018) [Submission to the Australian Bureau of Statistics Review of 2021 Census Topics](#); A Hill et al, [Private Lives 3: The health and wellbeing of LGBTIQ people in Australia](#), La Trobe University, pp 14, 26, 34; Equality Australia (2020) [Inequality Magnified: Submission to the Australian Senate Inquiry into Australia's Response to COVID-19](#), pp 17-18.

⁹ See A Hill et al, [Private Lives 3: The health and wellbeing of LGBTIQ people in Australia](#), La Trobe University.

¹⁰ See OECD (2019) Society at a Glance: OECD Social Indicators, '[The LGBT challenge: How to better include sexual and gender minorities](#)'; Statistics New Zealand (2022) [LGBT+ population of Aotearoa: Year ended June 2021](#); Office for National Statistics (2022) [Sexual orientation, England and Wales: Census 2021](#); A Rossitto (2021) [Census to ask about sexual orientation, race and home schooling for the first time](#), TVM News.

LGBTI people in Australia are a minority population group and we are less reliably counted by surveying sample populations, particularly at the intersections of our communities.¹¹ Inclusion in the Census would provide a fuller and more accurate picture of our communities.

Data on LGBTI populations is particularly useful when combined with other characteristics collected in the Census to provide a better understanding of the diverse needs of our community. Information including the age, cultural diversity, income and employment status of LGBTI populations allows for more inclusive and targeted service delivery in areas such as aged care and health.¹²

ASSESSMENT CRITERIA 3: CONTINUING NEED FOR DATA

There have always been, and will always be, LGBTI people in Australia, and research suggests that the number of people identifying as lesbian, gay or bisexual is higher for those younger than 25.¹³ Demographic information about our communities will have enduring value and time series data is needed to understand and respond to our changing needs and characteristics.

As discussed above, LGBTI people in Australia continue to face significant health and wellbeing disparities related to ongoing discrimination and disadvantage. Data on LGBTI populations will be relevant into the future to develop and evaluate government policies and programs intended to improve health and wellbeing outcomes as well as social and economic disadvantage related to sexual orientation, gender identity and sex characteristics.¹⁴

3. FURTHER ASSESSMENT CRITERIA

ASSESSMENT CRITERIA 4: LACK OF SUITABLE ALTERNATIVES

Policy makers, legislators and service providers would benefit from access to accurate, location based and nationwide information that can be cross referenced with other demographic data. Existing alternative sources of demographic information for the LGBTI community are not substitutes for Census data. This is because existing data is not location specific and only captures community members who are connected to LGBTI researchers, and so is unable to adequately identify all of us and/or is not always representative.¹⁵ Population-wide comparisons with other Census topics such as housing, income or employment against the variables of sexual orientation, gender identity or sex characteristics are made possible through LGBTI inclusion in the Census.¹⁶

¹¹ It is estimated that 3-4% of the Australian population identify as gay, lesbian or bisexual, approximately 1% identify as transgender, and 1.7% are born with an intersex variation: Carman et al (2020) [Research Matters: How many people are LGBTIQ?](#) Rainbow Health Victoria.

¹² For example, the Department of Health recognises the aged care must be respectful and inclusive of all people, catering to the diversity of characteristics and life experiences of the population: Department of Health (2017) [Aged Care Diversity Framework](#), p 1. The NSW LGBTIQ+ Health Strategy 2022-2027 also recognises the need to consider the diversity of cultural, linguistic and socio-economic groups within the LGBTIQ+ community when providing healthcare: NSW Government (2022) [NSW LGBTIQ+ Health Strategy 2022-2027](#), p 20. See also ACON (2021) [Multicultural Engagement Plan 2021-2024](#).

¹³ Carman et al (2020) [Research Matters: How many people are LGBTIQ?](#) Rainbow Health Victoria.

¹⁴ For example, states including Victoria and New South Wales have developed long-term LGBTI health strategies, which can only be accurately evaluated against time series and location specific data on LGBTI people in Australia: see NSW Government (2022) [NSW LGBTIQ+ Health Strategy 2022-2027](#); Victorian Government (2022) [Pride in our future: Victoria's LGBTIQ+ strategy 2022-32](#). The ABS has acknowledged the value of sexual orientation and gender identity data for this purpose in an internal briefing paper on topics for the 2021 Census. See e.g. The Australian Bureau of Statistics (2019), Briefing Paper '2021 Census Topic Review – Investigations for changes for topics' (released under FOI request 29 July 2022, Disclosure log number: 2022/06).

¹⁵ For example, data collected by the Australian Research Centre for Sex, Health and Society at La Trobe University is not location based and involved an opt-in survey with 6,835 participants: See A Hill et al, [Private Lives 3: The health and wellbeing of LGBTIQ people in Australia](#), Australian Research Centre for Sex, Health and Society, La Trobe University; and the General Social Survey conducted by the ABS does not collect data for trans, intersex or non-binary people: Australian Bureau of Statistics (2020) [General Social Survey: Summary Results, Australia](#). Other research does not have sufficient scope, reach, frequency or consistency: See The National LGBTI Health Alliance (2018) [Submission to the Australian Bureau of Statistics Review of 2021 Census Topics](#). In addition, as participants for the General Social Survey are randomly selected, the survey is not designed for analysis of data of smaller populations within the community: See P Vandenbroek (2018) ['The question of sexual orientation...Something for Census 2021?'](#).

¹⁶ P Vandenbroek (2018) ['The question of sexual orientation...Something for Census 2021?'](#), Parliament of Australia Library.

Without collecting LGBTI data in the Census, decision-makers and community organisations have to rely on inadequate and incomplete data on our community.

ASSESSMENT CRITERIA 5: EFFICIENCY OF DATA COLLECTION

The ABS has formulated best practice guidelines to standardise the collection of data on sexual orientation, gender identity and sex characteristics.¹⁷ While the accurate collection of LGBTI data in the Census may involve up to three additional questions, this is fewer questions than the number necessary to capture other important topic areas such as education, employment and cultural and linguistic diversity. The additional questions would also have fewer response categories than many existing Census questions, such as ancestry and religion.¹⁸ Questions capturing LGBTI demographic information that include a 'free text' box would also require less processing or coding than existing open response questions as there will be significantly fewer self-described responses.¹⁹

Cost cannot be a reasonable basis for excluding questions on sexual orientation, gender identity or sex characteristics from the Census given its discriminatory impact, the value of the data which would be collected, and the relatively small number of questions and response options that are required to capture the data. Particularly when considering the overall cost of the Census, the addition of up to three questions and the resolution of the existing question on sex cannot reasonably be said to incur a significant cost.

ASSESSMENT CRITERIA 6: WILLINGNESS AND ABILITY TO ANSWER QUESTIONS

Past experience has shown that the community in Australia are willing and able to answer questions related to LGBTI demographic information through simple questions in a household survey as the ABS is already asking questions on sexual orientation in the General Social Survey, which has a generally high response rate.²⁰

Questions regarding sexual orientation, gender identity and variations in sex characteristics do not require lengthy or complex explanation or instruction and can be easily understood, particularly if there is an education campaign accompanying their introduction into the Census. Questions addressing sexual orientation and gender identity underwent quality testing by the ABS prior to Census 2021 where they performed well when answered by LGBTI and non-LGBTI people.²¹ No problems with sensitivity, offence or non-response were identified with gender identity questions, while the majority of people were able and willing to provide a response regarding sexual orientation.²²

¹⁷ Australian Bureau of Statistics (2021) [Standard for Sex, Gender, Variations of Sex Characteristics and Sexual Orientation Variables](#).

¹⁸ See Australian Bureau of Statistics (2021) [Census Household Form](#). Of the questions necessary to capture the LGBTI population, the question concerning sexual orientation would require the highest number of options, with four options and one 'other' or free text option. By comparison, the existing Census question on religion includes ten options as well as one 'other' or free text option while the question on ancestry includes nine options as well as two 'other' or free text options.

¹⁹ It can be reasonably assumed that the number of people responding with an 'other' sexual orientation or gender identity response would be far lower than the number of people providing an 'other' religion or ancestry response. This is because the variety of options for describing sexual orientation and gender identity are fairly confined in comparison and most people will respond with the commonly described options. This is born out in Equality Australia's own surveys: see, eg, Equality Australia (2022) [Rainbow Votes: 2022 LGBTIQ+ Federal Election Survey Report](#) where only 2.4% and 4.9% respectively provided a free text response to the questions on sexual orientation or gender identity. Census operational managers have also advised, in relation to the 2021 Census, that the question on non-binary sex identity and sexual orientation would be 'feasible to implement': See Australian Bureau of Statistics (2019) Briefing Paper, Population and Social Statistics Division, p 25 (released under FOI request 29 July 2022, Disclosure log number: 2022/06).

²⁰ The General Social Survey is a household survey that has been collecting collects data on sexual orientation since 2010 has had a response rate of 80-90% for each year it has been conducted prior to 2020: Australian Bureau of Statistics (2019) [General Social Survey: Summary Results, Australia methodology](#); Australian Bureau of Statistics (2014) [General Social Survey: Summary Results, Australia methodology](#); Australian Bureau of Statistics (2010) [General Social Survey: Summary Results, Australia](#); Australian Bureau of Statistics (2004) [General Social Survey: Summary Results, Australia](#). The lower response rate in 2020 is attributed to the COVID-19 pandemic preventing face-to-face follow up: Australian Bureau of Statistics (2020) [General Social Survey: Summary Results, Australia methodology](#). The Household, Income and Labour Dynamics in Australia (HILDA) Survey has also been collecting data on sexual orientation through a household survey since 2012: See Melbourne Institute of Applied Economic Social Research (2020) [HILDA Online Data Dictionary Release 21](#).

²¹ Australian Bureau of Statistics (2019) Briefing Paper, Population and Social Statistics Division, pp 22, 25 (released under FOI request 29 July 2022, Disclosure log number: 2022/06),

²² Australian Bureau of Statistics (2019) Briefing Paper, Population and Social Statistics Division, pp 22, 25 (released under FOI request 29 July 2022, Disclosure log number: 2022/06).

Members of the LGBTI community want to be properly counted in the Census and so are likely to provide accurate answers.²³ For those who are part of the LGBTI community, our sexual orientation, gender identity and variations in sex characteristics are important aspects of who we are and our community can quickly and easily answer questions on these subjects. Initial testing by the ABS has also indicated that information on these topics will be able to be collected with enough accuracy to be fit-for purpose.²⁴ Indeed, Equality Australia has successfully used questions similar to the ABS's sexual orientation, gender identity and sex characteristics questions several times in our own large surveys to great effect.²⁵

While sexual orientation, gender identity and sex characteristics information may be considered private information to some, it is also information of great pride to others. The ABS should not assume that LGBTI people do not want to be identified, particularly when they understand the reason the data is being collected, how it will be used and protected, and the wider benefits that accompany the collection of the data. Nevertheless, privacy concerns can be mitigated in the same way as other sensitive data collected in the Census, such as age, religion and income. Among the strategies available to manage privacy concerns are making the questions optional, only asking the questions of people who are aged 15 years or older, and using the opportunity of completing the Census form online to manage intra-household privacy concerns.²⁶

²³ See, eg, Equality Australia (2022) [Rainbow Votes: 2022 LGBTIQ+ Federal Election Survey Report](#) where 96.4% of total LGBTIQ+ respondents indicated that being properly counted in the Census was an issue either 'very important' or 'important' to them in the 2022 federal election.

²⁴ ABS (2019) Draft brief to Treasurer and Secretary to the Treasury, 'Recommendations for change to 2021 Census topics' (released under FOI request 29 July 2022, Disclosure log number: 2022/06).

²⁵ See, eg, Equality Australia (2022) [Rainbow Votes: 2022 LGBTIQ+ Federal Election Survey Report](#).

²⁶ See Australian Bureau of Statistics (2021) [Census Household Form](#). The Census already includes numerous questions that are only asked of people aged 15 years or more.



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)

CONTENTS

Executive summary.....	2
The legal case for counting us in the 2021 census.....	5
1. The legal framework underpinning the Census.....	5
2. Prohibitions on discrimination in the administration of Commonwealth laws and programs.....	5
3. The inclusion of questions on sexual orientation, gender identity and intersex status.....	6
4. Complying with Commonwealth law and policy.....	7
(a) Direct discrimination.....	7
(b) Indirect discrimination.....	8

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.