



Australian
Human Rights
Commission

Review of the Sex Standard

**AUSTRALIAN HUMAN RIGHTS COMMISSION SUBMISSION TO THE
AUSTRALIAN BUREAU OF STATISTICS' REVIEW OF THE SEX STANDARD**

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1 Introduction

1. The Australian Human Rights Commission makes this submission to the Australian Bureau of Statistics (ABS) Review of the Sex Standard/Potential New Gender Standard.
2. The Commission commends the ABS for reviewing the Sex Standard and considering options for standardising the collection of data which is not currently captured by the Sex Standard's biological sex categories of male, female and in some circumstances 'intersex or indeterminate'. Further consideration of the concepts of sex and gender identity may provide the ABS with options to promote greater collection of intersex data and to collect data which is currently missing, such as regarding trans¹ people whose gender identity² may be different to their sex at birth.
3. This brief submission outlines the need to collect further and better data on intersex and gender identity and provides options for further action on standardising this collection.

2 Recommendations

4. The Australian Human Rights Commission recommends that the Australian Bureau of Statistics:
 - Prioritise standardising the collection of intersex and gender identity data [**Recommendation 1**].
 - Convene a Working Group with representatives of trans and intersex communities, academics and policy-makers to further consider options for the Sex Standard and a potential standard for gender identity [**Recommendation 2**].
 - Develop options for change collaboratively with the Attorney-General's Department to ensure consistency with the proposed national guidelines on the collection and recognition of gender by the Australian Government [**Recommendation 3**].

3 Why collect intersex and gender identity data?

5. Collecting data is a necessary step in order to measure inequality, track progress towards the realisation of human rights and to determine how best to develop policy and provide services to particular groups. Essentially, 'if it is not counted, it tends not to be noticed'.³ The Office of the High Commissioner for Human Rights has said:

[t]here is a need for suitable information, for example, in the form of statistics, indicators or even indices, in order to undertake a situational analysis, inform public policy, monitor progress and measure performance and overall outcomes.⁴

6. There is a severe lack of 'suitable information' concerning trans and intersex people. The current available sources relating to health data are

outlined in the National LGBTI Health Alliance's discussion paper *LGBTI Data: developing an evidence-information environment for LGBTI health policy*.⁵ Not only is it important to monitor the health needs of trans and intersex people, there is a need to measure the realisation of other economic, cultural and social rights and equality in civil and political rights. As will be discussed below, the Sex Standard does not currently provide a framework for the collection of this data.

4 Why standardise intersex and gender identity?

7. As the ABS has described, the aim of the Sex Standard is to 'achieve consistency across all data sources in terminology, data collection procedures and definitions of categories associated with human sexes'.⁶ The Standard is used for the collection of data by the ABS but it also provides 'a standard for other organisations to collect data about sex in surveys and administrative collections'.⁷
8. Researchers and organisations may be reluctant to collect intersex and gender identity data through lack of guidance or understanding. Given the current collection of intersex and gender identity data is so sparse, the standardisation of how to collect this data could promote confidence in how to collect it, and result in increased rates and improved quality of collection.

5 Standardising and collecting intersex and gender identity data

5.1 Standardising the collection of intersex data

9. The current Sex Standard defines sex as the 'biological distinction between male and female'.⁸ The standard classification offers two categories of 'Male' and 'Female' with the option to include the category of 'Intersex or Indeterminate' 'where necessary'.⁹ The Sex Standard currently states that 'Intersex or Indeterminate' should not generally be used on data collection forms completed by respondents. Further the Glossary of Terms limits guidance on the examples of surveys in which this category can be used to 'perinatal collections and hospital morbidity'.¹⁰
10. The Australian Institute of Health and Welfare (AIHW) National Health Data Dictionary and National Community Services Data Dictionary both suggest that 'Intersex or Indeterminate' is normally used for babies for whom sex has not been determined for whatever reason.¹¹ This wording is based on the Sex Standard.¹²
11. An intersex person may have the biological attributes of both sexes or lack some of the biological attributes considered necessary to be defined as one or the other sex. Further an intersex person may be of any age.

12. The inclusion of intersex as a category in the Sex Standard is consistent with the definition of sex as a biological characteristic. The Sex Standard currently facilitates the collection of 'Intersex or Indeterminate' data, but within limited parameters. The Standard could be amended to clarify that 'Intersex or Indeterminate' can be an option alongside Male and Female in all circumstances, including in surveys completed by the respondent themselves. The notes in the Standard could also be amended to reflect that the collection of this data need not be restricted to babies for whom sex has not been determined.

5.2 Standardising the collection of gender identity data

13. The Sex Standard acknowledges that a person's sex may change during their lifetime and that over time 'sex could be recorded as either Male or Female'.¹³ This recognises that a trans person should be able to identify as their affirmed 'sex'. Trans is a general term for a person whose gender identity is different to their sex at birth. A trans person may take steps to live permanently in their nominated gender with or without medical treatment.
14. This option in the Standard will be appropriate in many circumstances, for example in the way a person would like to record their 'sex' in interactions with governments.¹⁴ It is also indicative of the way a trans person lives their life. However this data will only establish how the person currently identifies, it will not enable the collection of data indicating whether the person has a gender identity which may not correspond to their sex at birth. Further, it restricts gender to either male or female. Individuals may have gender identities that do not fit within this binary construction. Such data may be important for health studies or in determining levels of equality.
15. This means the information sought may actually be the gender, or gender identity, of the person rather than sex. The review correctly identifies that there is a difference between sex and gender. While there is no consensus about the definition of sex or gender, a commonly held view is that sex is a fixed concept that is biologically determined and gender is socially constructed.¹⁵ A person's gender identity may or may not be consistent with their sex at birth. Gender identity is:

understood to refer to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.¹⁶
16. Given the current Sex Standard is based on biological differences, unless the definition of sex is expanded, it may not be appropriate to include the category of trans or gender identity under the Sex Standard. There may be need for another standard which further elaborates on the diversity of gender identities which exist. In any event, there will be

occasions when gender identity is the data being sought and therefore there is a need to standardise the collection.

17. The UK Equality and Human Rights Commission offers two different models for collecting gender identity data, depending on space and purpose of collection. One model asks the respondent how they were described at birth with a follow up question which asks how the person thinks of themselves now. The other model asks all respondents whether they have undergone or propose to undergo a process to affirm a gender different to the sex they were born. The follow-up question is only for those who answered yes to the first question. The follow-up question asks for the status of this process, for example if they are thinking about going through the process or if they have already been through it.¹⁷
18. The Commission does not offer a firm view on how gender identity should be included, however it does advocate that the ABS should prioritise the standardisation of gender identity to facilitate further and better data collection.

5.3 Disclosure by respondents

19. Further consideration should be given to amending the notes in the Sex Standard (and potential standard for gender identity) to reflect that trust and anonymity are paramount in ensuring disclosure by respondents. Trans and intersex people may have experienced discrimination and harassment and may therefore be reluctant to 'out' themselves for fear of subsequent treatment.¹⁸

5.4 Appropriate terminology

20. Finally, the Commission recognises that terminology can have a profound impact on a person's identity, self-worth and inherent dignity. The use of inclusive and acceptable terminology empowers individuals and enables visibility of important issues.¹⁹ The ABS should work with members of the trans and intersex communities to develop appropriate terminology in the standards.

6 Options for further action

21. The Commission is supportive of efforts to improve the data collection for trans and intersex people. This section provides two suggestions for progressing the review.

6.1 Working group

22. The Commission does not have expertise in research statistics and therefore this submission does not offer a particular model for standardising sex and gender identity. Instead, the Commission recommends that the ABS establish a working group or advisory panel to further discuss and refine options for standards on sex and gender

identity. This group should consist of members of the trans and intersex communities, researchers and policy makers. This will provide an opportunity for expertise to be shared and different perspectives clarified. The ABS already has a number of Statistics User Groups for specialised areas.²⁰

23. The membership of this working group could be expanded and made permanent in order to consider the types of data which should be targeted for collection regarding sexual orientation, intersex and gender identity for inclusion in the Census and other national data collections. This would be consistent with the Australian Government's commitment in the National Human Rights Action Plan (NHRAP) to 'amend data collection to allow for or encourage disclosure of sexual orientation and gender identity to establish a better evidence base for service provision and policy development'.²¹ The Attorney-General's Department and the ABS have joint responsibility under this action item.

6.2 Consistency across the Australian Government

24. Given ABS standards are used by 'other organisations to collect data about sex in survey and administrative collections' it is important that the development of the standards are consistent with progress being made elsewhere.
25. The Australian Government announced in its National Human Rights Action Plan 2012 that it is 'developing national guidelines across the Australian Government public sector agencies to ensure sex and gender information is collected consistently across government and only where there is a legitimate purpose, and to build consistency in the way gender may be changed in Commonwealth records'.²² This data could be used as part of administrative collections.
26. The ABS should ensure that in reviewing the Sex Standard, and in considering the necessity of a standard for gender identity, there is consistency with the development of the Australian Government's national guidelines on sex and gender.

¹ Trans is a general term for a person whose gender identity is different to their sex at birth. A trans person may take steps to live permanently in their nominated gender with or without medical treatment. For further information on terminology see Australian Human Rights Commission, *Addressing sexual orientation and sex and/or gender identity discrimination* (2011), p 5. At http://www.humanrights.gov.au/human_rights/lgbti/lgbticonsult/index.html (viewed 13 March 2013).

² 'Gender identity' is understood to refer to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms: *The Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* (2007), introduction, preamble.

³ J.K Galbraith cited in Office of the High Commissioner for Human Rights, *Human Rights Indicators: A Guide to Measurement and Implementation* (2012), p 1.

- ⁴ Office of the High Commissioner for Human Rights, *Human Rights Indicators: A Guide to Measurement and Implementation* (2012), p 1.
- ⁵ National LGBTI Health Alliance, *LGBTI Data: developing an evidence-informed environment for LGBTI health policy* (2012), pp 27-30. At <http://www.lgbthealth.org.au/data> (viewed 13 March 2013).
- ⁶ Australian Bureau of Statistics, *1285.0 Demographic Variables: Sex Standard* (1999), para 2.
- ⁷ Australian Bureau of Statistics, *Review of the Sex Standard*, <http://www.abs.gov.au/websitedbs/D3310114.nsf/home/Review+of+the+Sex+Standard> (viewed 20 February 2013).
- ⁸ Australian Bureau of Statistics, *1285.0 Demographic Variables: Sex Standard* (1999), para 5.
- ⁹ Australian Bureau of Statistics, *1285.0 Demographic Variables: Sex Standard* (1999), paras 11-12.
- ¹⁰ Australian Bureau of Statistics, *1285.0 Demographic Variables: Sex Standard* (1999), Glossary.
- ¹¹ Australian Institute of Health and Welfare, National Community Services Data Dictionary Version 7 (2012), p 483; Australian Institute of Health and Welfare, National health data dictionary Version 15 (2010), p 1466.
- ¹² Australian Bureau of Statistics, *1285.0 Demographic Variables: Sex Standard* (1999), para 20.
- ¹³ Australian Bureau of Statistics, *1285.0 Demographic Variables: Sex Standard* (1999), paras 8, 27.
- ¹⁴ Office for National Statistics, *Trans Data Position Paper* (May 2009), p 9.
- ¹⁵ For further discussion see Australian Human Rights Commission, *The sex and gender diversity project* (2009), p 7. At http://www.humanrights.gov.au/genderdiversity/sex_files2009.html (viewed 20 February 2013).
- ¹⁶ *The Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* (2007), introduction, preamble.
- ¹⁷ For the questionnaire see Equality and Human Rights Commission, *Collecting information on gender identity*, revised (second) edition (2012), appendix 1.
- ¹⁸ See for example Equality and Human Rights Commission, *Collecting information on gender identity*, revised (second) edition (2012); Office for National Statistics, *Trans Data Position Paper* (May 2009), p 7.
- ¹⁹ For further discussion see Australian Human Rights Commission, *Addressing sexual orientation and sex and/or gender identity discrimination* (2011), p 5. At http://www.humanrights.gov.au/human_rights/lgbti/lgbticonsult/index.html (viewed 13 March 2013).
- ²⁰ Australian Bureau of Statistics, *ABS Statistics User Groups*, <http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/702BBC3495950293CA257A4B0083B186?opendocument> (viewed 12 March 2013).
- ²¹ Australian Government, *National Human Rights Action Plan* (2012), action 205.
- ²² Australian Government, *National Human Rights Action Plan* (2012), action 209.