

June 2018

Submission on the Census

1 This submission

The ABS seeks views on the information to be collected in the next Census. This submission relates to information on sex and gender. In this regard, the ABS has asked for views on the following questions:

- Should sex or gender be collected (or both)?
- What would be the drivers for collecting gender?
- What would be the implications of changing from collecting sex?

2 IHRA

Intersex Human Rights Australia is an independent education and policy development organisation, by and for people with intersex variations or traits. Formerly known as Organisation Intersex International Australia, IHRA is a not-for-profit company, with charitable status. Our work focuses on human rights, bodily autonomy and self-determination, and on evidence-based, patient-directed healthcare.

3 Intersex

IHRA defines intersex people in line with a 2016 statement by human rights experts, published by the OHCHR:

Intersex people are born with physical or biological sex characteristics (such as sexual anatomy, reproductive organs, hormonal patterns and/or chromosomal patterns) that do not fit the typical definitions for male or female bodies.¹

This definition does not specify any sex classification or gender identity; reflecting what intersex people share in common, the definition relates solely to physical sex characteristics. Intersex people are born with sex characteristics that do not meet medical and social norms for female or male bodies, and we suffer stigma and discrimination as a result. Diagnosis

¹ OHCHR, et al. End violence and harmful medical practices on intersex children and adults, UN and regional experts urge. 2016.

<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20739&LangID=E>

typically happens because of the stigmatisation of intersex traits. Intersex traits include a wide range of hormonal, genetic and gonadal differences that may be diagnosed prenatally, at birth, at puberty, when trying to conceive, or through random chance.

We acknowledge the diversity of intersex people in our identities, legal sexes assigned at birth, genders, gender identities, and the words we use to describe our bodies. At least 40 different intersex variations are known,² most genetically determined. Clinicians frequently use a stigmatising label, “Disorders of Sex Development” (“DSD”), referring to intersex variations. Intersex people have a range of sex classifications and gender identities. Often these align with our sex assigned at birth, while some intersex people have chosen other identities.

4 Intersex people and sex classifications

The *Darlington Statement* is a community consensus statement by Australian and Aotearoa/New Zealand intersex organisations and advocates, signed in March 2017.³ It provides a statement about our heterogeneity, acknowledging:

3. *The **diversity of our sex characteristics** and bodies, our identities, sexes, genders, and lived experiences. We also acknowledge **intersectionalities** with other populations, including same-sex attracted people, trans and gender diverse people, people with disabilities, women, men, and Indigenous - Aboriginal and Torres Strait Islander, Tangata Whenua - and racialised, migrant and refugee populations.*
4. *That the word ‘intersex’, and the intersex human rights movement, **belong equally to all people born with variations of sex characteristics**, irrespective of our gender identities, genders, legal sex classifications and sexual orientations.*

In relation to gender identity and sex classifications, the Darlington Statement notes that intersex people do not share a common sex classification or gender identity and makes the following demands:

7. *Regarding **sex/gender classifications**, sex and gender binaries are upheld by structural violence. Additionally, attempts to classify intersex people as a third sex/gender do not respect our diversity or right to self determination. These can inflict wide-ranging harm regardless of whether an intersex person identifies with binary legal sex assigned at birth or not.*

Undue emphasis on how to classify intersex people rather than how we are treated is also a form of structural violence. The larger goal is not to seek new classifications

² Hiort O. I-03 DSDnet: Formation of an open world-wide network on DSD at clinician conference, “4th I-DSD Symposium”. 2013. http://www.gla.ac.uk/media/media_279274_en.pdf

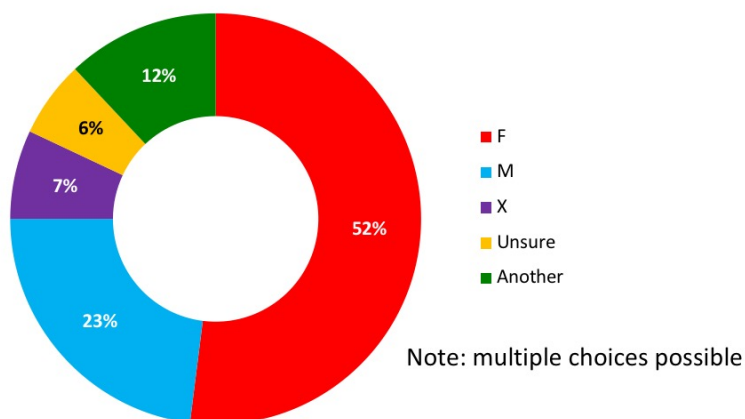
³ Androgen Insensitivity Syndrome Support Group Australia, Intersex Trust Aotearoa New Zealand, Organisation Intersex International Australia, Black E, Bond K, Briffa T, et al. Darlington Statement. Sydney, NSW; 2017 Mar. Available from: <http://darlington.org.au/statement/>

but to **end legal classification systems** and the hierarchies that lie behind them. Therefore:

- a) As with race or religion, sex/gender should not be a legal category on birth certificates or identification documents for anybody.
- b) While sex/gender classifications remain legally required, sex/gender assignments must be regarded as provisional. Given existing social conditions, we do not support the imposition of a third sex classification when births are initially registered.
- c) Recognising that any child may grow up to identify with a different sex/gender, and that the decision about the sex of rearing of an intersex child may have been incorrect, sex/gender classifications must be legally correctable through a simple administrative procedure at the request of the individual concerned.
- d) Individuals able to consent should be able to choose between female (F), male (M), non-binary, alternative gender markers, or multiple options.

Indeed, *Darlington Statement* signatories reflect our diversity. Australian sociological research based on a survey of 272 people born with atypical sex characteristics shows that 19% of respondents chose X or other non-binary sex classifications,⁴ while 75% choose binary sex classifications. Most intersex people identify with legal sex assigned at birth, while others do not. At the same time, the research found that 60% of participants use the term intersex to describe their sex characteristics.

Sex of people born with atypical sex characteristics



Jones T. Intersex and Families: Supporting Family Members with Intersex Variations. *Journal of Family Strengths*. 2017;17(2).

⁴ Jones T. Intersex and Families: Supporting Family Members with Intersex Variations. *Journal of Family Strengths*. 2017;17(2).

5 ABS Sex and Gender Standard Classifications

The current sex classifications and code structures distinguish between sex standards and gender standards, and each standard includes 3 codes.

Preferred Code	Alternate Code	Code Label	Definition
The Sex Standard Classification			
1	M	Male	Persons who have male or predominantly masculine biological characteristics, or male sex assigned at birth.
2	F	Female	Persons who have female or predominantly feminine biological characteristics, or female sex assigned at birth.
3	X	Other	Persons who have mixed or non-binary biological characteristics (if known), or a non-binary sex assigned at birth.
The Gender Standard Classification			
1	M	Male	Adults who identify themselves as men, and children who identify themselves as boys.
2	F	Female	Adults who identify themselves as women, and children who identify themselves as girls.
3	X	Other	Adults and children who identify as non-binary, gender diverse, or with descriptors other than man/boy or woman/girl.

This schema is problematic for the following reasons:

1. It assumes that intersex people are not male or female. It requires people with intersex variations to define themselves as being other than male or female. This may be intended to be inclusive, but the impact is marginalising and ‘othering’. The intersex population is diverse. Most intersex people do not consider themselves to be other than male or female.
2. In their current form, the definitions in the sex standard represent a “purification” of male and female classifications purportedly based on biology, rather than legal sex. Although requiring respondents to self-select, they have the result of failing to recognize the legal sex of respondents and push many respondents into a new category based upon a new biological ideal. Such essentialist ideas are at odds with the reality of the diversity of people’s bodies, legal statuses and identities. They also fail to take account of social processes such as discrimination and stigmatization and their impacts on the bodies of intersex people.
3. While sex is defined as a biological issue, the ABS standards coding conflates biology with identity. For example, the explanation of these classifications states that ‘While the majority of the population identifies both their sex and gender as either male or female and describe themselves as such, a small proportion of the population identify their sex and/or gender as other than male or female.’ This misrepresents the nature of intersex variations. Intersex people do not ‘identify’ their sex as other than male or female. As noted, intersex is biological in nature and is not an identity.

Imposing the language of identity on intersex creates confusion and misunderstanding.

4. Treating intersex people as neither male nor female is profoundly 'othering'. The concept of 'othering' describes power relations which place individuals and groups at societal margins. Forcing intersex individuals to 'other' themselves or deny their intersex variations is problematic. Most intersex people have been assigned male or female since birth. Assignments have been reinforced by non-consensual medical interventions from an early age. It is disrespectful of the experiences of intersex people to deny male or female administrative and legal status. It is disrespectful of intersex people to assume that they are a homogenous and undifferentiated community.
5. The imposition of third sex categories on intersex people is opposed by intersex groups and advocates. For example, the *Darlington Statement*⁵ argues that 'attempts to classify intersex people as a third sex/gender do not respect our diversity or right to self-determination. These can inflict wide-ranging harm regardless of whether an intersex person identifies with binary legal sex assigned at birth or not.'⁶
6. The classification systems ignore the meaning and import of legal sex definitions. The sex standard does not exist in isolation. It must coexist politely and respectfully with other definitions of sex. In particular, it must coexist with legal sex, including sex assigned at birth, or when birth records of sex are corrected or changed. Failure to recognize a person's sex can result in discrimination on grounds of gender identity or sex. Legal sex has a somewhat loose relationship with biological norms regarding sex. However, it should also be noted that biological norms regarding sex are also socially determined and applied.

Current medical practices are to assign intersex people as male or female; intersex traits are controversially regarded by medicine as "disorders of sex development" and consequently people with intersex bodies are subjected to medical interventions that fail to meet human rights norms.⁷ A historical and deliberate process of

⁵ a joint consensus statement by Australian and Aotearoa/New Zealand intersex organisations and independent advocates, signed in March 2017

⁶ Ibid, Human Rights and Legal Reform, point 8

⁷ See Australian Senate, and Community Affairs References Committee. *Involuntary or Coerced Sterilisation of Intersex People in Australia*. Canberra: Community Affairs References Committee, 2013. http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Involuntary_Sterilisation/Sec_Report/index;

Comisión Interamericana de Derechos Humanos. "Violencia contra Personas Lesbianas, Gays, Bisexuales, Trans e Intersex en América." Comisión Interamericana de Derechos Humanos, November 12, 2015.

<http://www.oas.org/es/cidh/informes/pdfs/ViolenciaPersonasLGBTI.pdf>;

Council of Europe, and Commissioner for Human Rights. "Human Rights and Intersex People, Issue Paper," April 2015.

[https://wcd.coe.int/ViewDoc.jsp?Ref=CommDH/IssuePaper\(2015\)1&Language=lanEnglish&Ver=original](https://wcd.coe.int/ViewDoc.jsp?Ref=CommDH/IssuePaper(2015)1&Language=lanEnglish&Ver=original);

United Nations High Commissioner for Human Rights. "Opening Remarks by Zeid Ra'ad Al Hussein, United Nations High Commissioner for Human Rights at the Expert Meeting on Ending Human Rights Violations against Intersex Persons," September 16, 2015. <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16431&LangID=E>;

United Nations, UNDP, OHCHR, UNAIDS, ILO, UNESCO, UNFPA, et al. "Ending Violence and Discrimination against Lesbian, Gay, Bisexual, Transgender and Intersex People," September 2015; Confidential case study presented to Australian Human Rights Commission; Carpenter, Morgan, and Organisation Intersex International Australia. "Submission to the Australian Human Rights Commission: Sexual Orientation, Gender Identity and Intersex Rights Snapshot Report." Sydney:

silencing⁸ has ensured that many people with intersex traits or variations are unaware of their original sex characteristics.⁹

Many intersex people do not discover their intersex trait until puberty, trying to conceive, or through random chance; such discoveries may frequently take place via blood tests. Their “sex” designation within the proposed ABS classification prior and post diagnosis is a matter of medical and social construction, not biology. Nevertheless, the mental health consequences of failing to respect someone’s legal sex are profound.¹⁰

IHRA and other intersex human rights organisations in Australia and Aotearoa/New Zealand have agreed a common platform in the Darlington Statement.

It is not appropriate to strip or ignore intersex peoples’ existing legal sex classifications. A failure to recognize an intersex person’s legal sex is both a form of “misgendering” and may constitute discrimination.

7. The creation of third sex categories not only dismisses the heterogeneity of intersex people; it also creates a false impression that this token of recognition has a direct impact in reducing harmful non-consensual medical interventions imposed on intersex children.¹¹ For example one commentator has claimed:

... countries, like Germany, Malta, Australia and New Zealand, added the third box corresponded to gender on the birth certificates. It gives parents of intersex infants the right to choose the third option: marking the sex category “X” or “other”. By doing so, parents and doctors are not forced to put intersex babies through surgeries that would turn them into male or female. Thus, as intersex children grow up, they have the right to realise their identity by themselves.¹²

Organisation Intersex International Australia, February 6, 2015. <https://oii.org.au/28347/human-rights-commission-submission-on-intersex-legal-reform-and-services/>

⁸ Holmes, Morgan. “Is Growing up in Silence Better Than Growing up Different?” Intersex Society of North America. Accessed December 30, 2013. <http://www.isna.org/node/743>; Intersex Society of North America. “What’s Wrong with the Way Intersex Has Traditionally Been Treated?” Accessed March 11, 2015. <http://www.isna.org/faq/concealment#fn2>; MacKenzie, Drew, Annette Huntington, and Jean A Gilmour. “The Experiences of People with an Intersex Condition: A Journey from Silence to Voice.” *Journal of Clinical Nursing* 18, no. 12 (June 2009): 1775–83. doi:10.1111/j.1365-2702.2008.02710.x.

⁹ Cabral, Mauro, and Morgan Carpenter, eds. *Intersex Issues in the International Classification of Diseases: A Revision*, 2014. <https://globaltransaction.files.wordpress.com/2015/10/intersex-issues-in-the-icd.pdf>; Carpenter, Morgan. “Intersex Rights and Freedoms.” *Court Of Conscience*, no. 9 (2015): 27–33. <http://morgancarpenter.com/intersex-rights-freedoms/>

¹⁰ See for example Martínez-Patiño, María José. “Personal Account A Woman Tried and Tested.” *The Lancet*, December 2005, 366–538; Carpenter, Morgan, and Organisation Intersex International Australia. “Submission to the Australian Human Rights Commission: Sexual Orientation, Gender Identity and Intersex Rights Snapshot Report.” Sydney: Organisation Intersex International Australia, February 6, 2015. <https://oii.org.au/28347/human-rights-commission-submission-on-intersex-legal-reform-and-services/>

¹¹ Carpenter, Morgan “The “Normalization” of Intersex Bodies and “Othering” of Intersex Identities in Australia’ (2018) *Journal of Bioethical Enquiry*, 1-9.

¹² Kondratenko, T. 2016. Born intersex in Russia: The right to be recognized. *Prospekt Magazine*, December 21. <http://www.prospektmag.com/2016/12/intersex/>. Accessed July 20, 2017. Cited in Carpenter, Morgan, ‘The

As Carpenter notes, an assumption that the creation of a third sex category will result in fewer medical normalisations of intersex children is completely speculative. There is no evidence of such a correlation, and no reason to assume that third sex categories have any impact on the medical approach to intersex variations.¹³

8. This classification is not effective in identifying intersex people as a cohort. The 'X' category for sex describes and may capture a range of non-intersex people such as people who have had a hysterectomy or orchiectomy, and transgender people who are medically transitioning or who have medically transitioned. All such people have "mixed" nor "non-binary" biological characteristics.

The 'X' category has been promoted, including by Victorian Commissioner for Gender and Sexuality¹⁴ as the opportunity for people with non-binary gender identities to be counted.

As framed, the sex classification schema count some intersex people and not others, and some transgender or gender nonconforming individuals and not others, and some other people with acquired variations of sex characteristics and not others.

9. Framed as distinct alternatives, rather than as multiple-choice options, the sex classifications will present real difficulties for intersex people to answer honestly and accurately.
10. The ABS has indicated that these classifications are self-selected. People identify for themselves how to complete the form. Therefore, this schema will de facto be collecting gender data under the guise of sex data.
11. As and when the ABS seeks to obtain data on intersex people, this should be achieved by way of a separate question. As noted on the IHRA website advice on including intersex people in forms, studies and surveys:

We recommend removing intersex from questions about sex or gender, and asking a separate question about intersex status. This will help to prevent false negatives, failures to accurately tick a survey box. By helping to demonstrate an understanding of intersex variations, it will also help ensure commencement or completion of a survey. Separating intersex from a question on sex and/or gender will avoid misgendering people with intersex variations (describing our gender identities inaccurately), and avoid inadvertently including people who mistake intersex for a non-binary gender

"Normalization" of Intersex Bodies and "Othering" of Intersex Identities in Australia' (2018) Journal of Bioethical Enquiry, 1-9.

¹³ Carpenter, Morgan, 'The "Normalization" of Intersex Bodies and "Othering" of Intersex Identities in Australia' (2018) Journal of Bioethical Enquiry, 1-9.

¹⁴ Phillips, Aileen 'Australian Census to offer 'other' option for gender question' 24 July 2016 SBS news online <https://www.sbs.com.au/news/australian-census-to-offer-other-option-for-gender-question> accessed 29 June 2018.

identity. This approach also correctly regards a person's intersex status as sensitive data, while this is not yet the case for sex or gender.¹⁵

As yet, public comprehension of intersex and intersex people remains limited, and this has an impact on data collection. At present, IHRA recommends the following ways to ask survey respondents whether or not they have an intersex variation:

Intersex is a term for people born with atypical physical sex characteristics. There are many different intersex traits or variations. Do you have an intersex variation? Yes/No

or:

Were you born with a variation of sex characteristics (this is sometimes called intersex)?

We also note the following points in relation to these questions:

Note that if the language on being "born with" is removed, then the wording asks a different question because it thus includes people who have acquired variations in sex characteristics, for example, through medical gender transition, female genital mutilation or other trauma, or other health issues.

There may also be circumstances where it may be appropriate to ask for any available diagnoses, or to use descriptive terms such as "being born with a variation of physical sex characteristics" in place of the word intersex.

It may also be appropriate to include the responses "Don't know" or "Prefer not to say".

6 Recommendations

We recommend that the ABS recognise that it already collects data on gender (on personal identification) rather than sex. The ABS should implement the gender standard in place of the sex standard.

Ideally, a gender standard would provide the specified range of choices in a non-hierarchical (and perhaps random, if online) manner, and permit respondents to add additional information on their identity.

We recommend that the ABS ask respondents a separate question on whether or not they were born with an intersex variation.

¹⁵ Intersex Human Rights Australia, 'Including intersex people in forms, studies and surveys,' 25 May 2012, <https://ihra.org/forms>