

A Comprehensive Submission to the  
NSW Anti-Discrimination Act (1967)  
Review 2023 by Fair Game Australia

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29th September 2023

New South Wales Law Reform Commission  
Level 13, St James Centre  
111 Elizabeth Street  
Sydney NSW 2000  
Australia

Dear Members of the NSW Law Reform Commission,

**Re: Comprehensive Submission to the Anti-Discrimination Act Review**

I am writing to you on behalf of Fair Game Australia, a group of concerned citizens advocating for equitable and evidence-based anti-discrimination legislation. We appreciate the opportunity to contribute to the ongoing review of the Anti-Discrimination Act 1977 (NSW) and to address issues of growing concern related to this legislation.

Firstly, we share the deep concerns regarding recent developments in anti-discrimination and equalities legislation. These developments have raised apprehensions about the pursuit of true equality and fairness within the law. We believe that certain ideologically driven pressure groups and activists have played a significant role in shaping legislative changes that may not benefit society as a whole but rather serve the interests of a select few.

One area of concern is the potential for privileging one protected class over another, which could have unintended consequences, particularly affecting females, who constitute over 51% of the population. This concern is exacerbated by an ongoing High Court constitutional challenge to federal legislation, asserting a conflict between sex and gender identity that may be irreconcilable. Favouring gender identity at the expense of sex raises concerns about infringing upon the rights of an entire protected class.

In light of these challenges and our international obligations, particularly under the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), we urge caution in making future changes and amendments to legislation. We believe that any legislation should be balanced to ensure fairness and justice for all while respecting CEDAW principles.

Furthermore, we recognise the need for clarity in anti-discrimination legislation to address these issues and to maintain the original goals of anti-discrimination laws—to rectify injustices related to immutable human characteristics. To achieve this, we propose that anti-discrimination legislation should clearly define "man" as an adult human male and "female" as an adult human female, in alignment with established scientific understanding.

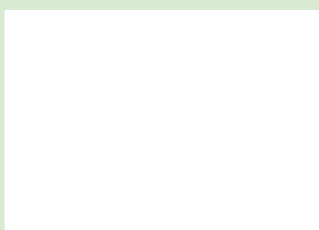
We believe that this definition, acknowledging the binary and immutable nature of sex, is essential to ensuring that our legislation remains equitable and complies with our international obligations under CEDAW. Such clarity in the law will also help avoid the conflation of belief-based issues with discrimination laws, ensuring that these laws serve their original purpose.

Within this submission, you will find appendices featuring examples of anti-discrimination laws that traditionally centred on safeguarding immutable characteristics. Additionally, you will discover comprehensive and illustrative explanations supported by examples that underscore the inherent conflict between immutable protected characteristics and beliefs. These insights compellingly demonstrate why beliefs should remain outside the scope of anti-discrimination legislation, preserving the law's primary mission of safeguarding those characteristics that cannot be changed.

In conclusion, we respectfully request that the NSW Law Reform Commission take our comprehensive submission into account. We believe that addressing the concerns will help uphold the principles of equality, fairness, and non-discrimination in our society without conflating belief-based issues with anti-discrimination legislation.

Thank you for your attention to these pressing matters. We are eager to engage in further discussions and cooperation to ensure that our legislation promotes true equality while respecting the principles of fairness and justice.

Sincerely,



Fraser Anderson

On Behalf of Fair Game Australia  
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# Executive Summary: Prioritising Immutable Characteristics in NSW Anti-Discrimination Legislation

This executive summary encapsulates the key arguments and recommendations presented in our submission on the New South Wales (NSW) Anti-Discrimination Act. Our focus is on the paramount importance of crafting legislation that unequivocally safeguards only immutable characteristics while excluding all belief-based categories to improve and enhance equality and anti-discrimination protections for all.

## Background:

The NSW Anti-Discrimination Act is undergoing critical reform, necessitating careful consideration to maintain its core principles of justice, equity, and legal clarity. This legislation has historically aimed to protect individuals from unfair treatment based on characteristics they cannot change or choose—immutable characteristics. Our submission contends that preserving this focus is vital to the Act's effectiveness and integrity.

## Core Arguments:

### **1. Original Legal Intention:**

- Anti Discrimination laws were designed to address historical injustices related to immutable characteristics like sex, race, permanent disability, age, and sexuality.
- Protecting these immutable traits aligns with the fundamental purpose of this legislation.

## **2. Clarity and Enforcement:**

- Immutable characteristics are unambiguous, measurable, and enforceable under anti discrimination laws.
- Focusing on these traits ensures clarity and effectiveness in combating discrimination.

## **3. Avoiding Conflicts with Belief Systems:**

- The inclusion of belief-based classes, such as religious, political, and cultural beliefs, can lead to conflicts between immutable classes and belief systems, resulting in legal ambiguities and disputes.

## **4. Balancing Protection and Freedoms:**

- Anti Discrimination laws must not infringe upon fundamental freedoms, including freedom of thought, speech, belief, association, expression, and organisation.
- Upholding these freedoms without fear of legal repercussions is paramount.

## **5. Separating Gender Identity:**

- Gender identity, a contentious issue at the federal level, should be addressed separately to ensure clarity and prevent potential conflicts within the legislation.

## **Recommendations:**

- The NSW Anti-Discrimination Act should explicitly focus on safeguarding immutable characteristics while excluding all belief-based categories, whether individual or collective.
- Immutable characteristics provide a solid, scientifically accurate foundation for the legislation, ensuring legal certainty and effectiveness.
- Separating gender identity protection from the Act can enhance clarity and prevent potential conflicts.

## Conclusion:

Prioritising immutable characteristics in the NSW Anti-Discrimination Act is essential for upholding justice, fairness, and clarity in the legal framework of New South Wales. This approach safeguards individuals from discrimination based on inherent characteristics they cannot change, while preserving fundamental freedoms and scientific accuracy. It fortifies the Act's position as a beacon of justice and equity in the evolving legal landscape.



## Introduction:

Our submission is guided by the principles of fairness, respect for established criteria for protected characteristics, and the importance of basing community standards on reputable scientific research. We wish to emphasise the highly contentious nature of gender identity protection within federal legislation and the associated risks of including it in NSW state legislation.

As we address the proposed changes to anti-discrimination legislation in New South Wales, we are deeply concerned about recent developments in this domain. It has come to our attention that certain ideologically driven pressure groups and activists have influenced the discourse, leading to concerns about the potential erosion of established criteria for protected characteristics, particularly sex-based rights. We believe that legislation should be shaped with careful consideration of its broader implications and a commitment to fairness and equality for all individuals.

Furthermore, the ongoing High Court constitutional challenge to federal legislation, asserting that sex and gender identity are in direct conflict and that this conflict is irreconcilable, underscores the complexity of this issue. It is our firm belief that any future changes and amendments to legislation must be approached cautiously to avoid potential conflicts with established legal principles, human rights obligations, and community standards.

## Recommendations for Clarity and Scientific Accuracy:

In light of these concerns and in accordance with our commitment to upholding the principles of fairness, equality, and non-discrimination, we propose the following recommendations:

**1: Clarity of Purpose:** Anti Discrimination legislation must serve as a beacon of clarity and scientific accuracy. To uphold the principles of justice and equity, it is essential that such legislation focus solely on protecting characteristics that are immutable, inherent, and beyond an individual's control. This entails the exclusion of individual and collective belief systems, be they religious, political, or cultural, as these aspects of personal identity are subject to change and interpretation. Embracing this recommendation ensures that the NSW Act remains true to its core purpose, safeguarding individuals from discrimination based on traits they cannot alter while avoiding legal ambiguities and preserving

the freedom for belief systems to evolve. Clarity and scientific accuracy are not just aspirations but imperatives for any robust and effective anti discrimination legislation.

**2. Preeminence of Science and Biology:** To align with the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and to ensure a clear and scientifically accurate legal framework, it is imperative that the law accord preeminence to scientific and biological realities. Ambiguous and vague terms that lack a scientific foundation, such as 'assigned at birth,' should be replaced with scientifically accepted terminology, such as 'fixed at conception.' Similarly, 'intersex' can be more accurately described as 'a Disorder of Sexual Development,' and 'a different sex' can be replaced with 'the opposite sex.' All other terms that do not have a solid basis in scientific reality must also be deleted, changed, and corrected.

**3. Clearly Defined Categories:** Each protected category within the legislation should have clearly defined criteria for establishing how membership in this class is determined. These criteria should be based on widely accepted scientific principles and should be replicable, ensuring consistency in their application to all individuals.

**4. Unambiguous Language:** It is essential that each protected class is defined within the Act using unambiguous language that is widely known, accepted, and in common use. This clarity is vital to ensuring that individuals, organisations, and legal authorities can interpret and apply the law consistently and effectively.

In presenting these recommendations, we aim to contribute to a legislative framework that respects the principles of fairness, equality, and non-discrimination while aligning with our international obligations, including CEDAW. We look forward to engaging in further discussion and cooperation to achieve these objectives and uphold the highest standards of scientific accuracy and legal clarity.

# Addressing the Terms of Reference:

## 1. Modernisation of the Act:

We urge the Commission to modernise the Act while ensuring that it remains grounded in reputable scientific research and meets established criteria for protected characteristics. Modernisation should reflect community standards that are supported by replicable studies, particularly when addressing issues related to biological sex and gender identity. Our recommendation for modernization is based on the recognition that equalities legislation, while well-intentioned, has in certain instances inadvertently led to conflicts between protected classes.

As evidenced by examples from around the world, the implementation and interpretation of equalities legislation have been challenged at times due to conflicts between the rights and protections afforded to different groups. These conflicts frequently arise from favouring one protected class over another or from using language that is specific to only one protected class while not addressing others equally.

One way to reduce these conflicts and promote a more harmonious and equitable legal framework is to eliminate single-class specific references and definitions from future legislation. We can reduce the possibility of favouritism and the unintended consequences that can occur when one group's rights appear to be prioritised over others by doing so.

For example, in cases of free speech versus hate speech laws, unbalanced equalities legislation can inadvertently suppress legitimate expressions of opinion. Modernisation should seek to address these concerns by crafting legislation that protects against discrimination while respecting the fundamental right to freedom of speech.

Similarly, when it comes to issues such as religious freedom versus LGB rights, modernised legislation can strike a better balance by providing clear and unambiguous language that respects both sets of rights. This approach ensures that no one group is unfairly favoured over another.

Affirmative action programmes can also benefit from modernization that considers the rights of all individuals. A more nuanced approach can be adopted to correct historical injustices without creating a perception of reverse discrimination.

Moreover, modernization can provide clearer guidelines for issues related to transgender athletes and prisoner rights, acknowledging the complexities involved and ensuring fairness and respect for all parties.

## Specific Recommendations for Gender Neutral Facilities, Prisons, and Sports:

In addition to the removal of single-class specific references, modernization should also address specific concerns regarding gender-neutral facilities, prisons, and sports. To achieve a more balanced approach:

**1. Gender-Neutral Facilities:** Gender-neutral bathrooms must be established as a third option, not as a replacement for existing female facilities. Where feasible, gender-neutral options should be made available. In cases where it is not possible, male toilets may be designated as gender-neutral facilities. Single-sex female spaces must be protected to comply with CEDAW requirements.

**2. Prisons:** In correctional facilities, transgender accommodations should be provided as a third option where possible. In cases where a third option is not viable, male prisons and male facilities should accommodate transgender requirements. This approach respects the rights and safety of all inmates.

**3. Sports:** Similarly, in the realm of sports, transgender categories and competitions must be offered as a third option. Where it is simply not possible to create separate transgender categories, male sports should accommodate transgender individuals, ensuring fairness in competition.

To summarise, the modernization of anti-discrimination legislation provides a valuable opportunity to address past conflicts and promote a more balanced and equitable legal framework. We can establish a legal framework that respects the rights and dignity of all individuals while upholding CEDAW requirements by eliminating single-class specific references and definitions and addressing concerns about gender-neutral facilities, prisons, and sports.

This approach, we believe, aligns with the principles of fairness, scientific research respect, and community standards supported by replicable studies. It ensures that the rights of all protected classes are acknowledged and upheld, promoting a society that values and protects the rights of every individual.

## 2. Range of Protected Attributes: A Call for Clarity and Scientific Accuracy

A comprehensive approach to protected attributes is essential, but the inclusion of certain classes, particularly those rooted in belief-based characteristics, raises profound concerns. To ensure the utmost clarity, scientific accuracy, and the preservation of fundamental rights, it is imperative that any new NSW anti-discrimination legislation focus exclusively on safeguarding immutable traits. The contentious nature of certain provisions, such as gender identity, at the federal level underscores the need for precision in the state's approach.

### Protected Attributes:

**1. Sex:** Sex refers unequivocally to a person's biological characteristics, typically categorised as male or female. In anti-discrimination legislation, sex-based protections aim to prevent discrimination based on a person's biological sex.

**2. Gender Identity:** Gender identity is inherently subjective and can be subject to change. To maintain clarity and scientific accuracy, it is recommended that gender identity provisions be excluded from the NSW Act. This aligns with the need for clear definitions rooted in biological reality.

**3. Marital or Domestic Status:** Protection against discrimination based on an individual's marital or domestic status is crucial. However, as these aspects are already covered in existing overarching federal legislation, their inclusion in the NSW Act can be safely removed to reduce clutter and prevent conflicts of rights.

**4. Race:** Race refers to a person's race, ethnic background, or nationality. Protections against racial discrimination aim to prevent unfair treatment based on a person's racial or ethnic characteristics.

**5. Age:** Age-based protections aim to prevent discrimination against individuals of different age groups, ensuring that individuals are not treated unfairly due to their age.

**6. Disability:** Disability protections aim to prevent discrimination against individuals with disabilities, encompassing both physical and mental conditions, and ensure equal access to opportunities and services.

**7. Homosexuality:** This class specifically protects individuals from discrimination based on their sexual orientation, rooted in immutable factors such as one's sex.

**8. Transgender Status:** Given the fluid nature of gender identity, it is recommended that transgender status provisions be excluded from the NSW Act to avoid conflicts and ensure clarity in the law.

**9. Carer's Responsibilities:** Protection for individuals with caregiving responsibilities should be retained, as it addresses real-world challenges without introducing belief-based conflicts.

## Recommendations:

**1. Clear Definition of Sex:** It is recommended that the Act explicitly define sex as binary and immutable. This definition aligns with established scientific facts related to biological sex and ensures precision in the law.

The two sexes should be clearly and explicitly defined as:

a male who has the potential to produce small motile gametes and

a female who has the potential to produce large, immotile gametes.

These definitions align with established scientific facts relating to biological sex.

**2. Definitions of Homosexuality and Heterosexuality:** Homosexuality and heterosexuality should be clearly defined as rooted in immutable factors such as one's sex. These definitions provide scientific clarity and accuracy.

**3. Removal of Gender Identity and Transgender Provisions:** To prevent conflicts and align with international treaty obligations, it is strongly recommended that gender identity and transgender provisions be removed from the Act. These issues are more appropriately addressed at the federal level, ensuring consistency and constitutionality while upholding principles of fairness and equality.

These recommendations prioritise clarity, scientific accuracy, and adherence to international obligations while safeguarding the principles of fairness and non-discrimination.

### 3. Areas of Public Life:

Conflicts between different protected attributes in public life, notably biological sex and gender identity, must be thoughtfully addressed. The Act should provide clear guidance, but given the contentious nature of gender identity protection at the federal level, it is essential to prioritise established criteria for protected characteristics over untested and uncertain provisions.

### Argument for a Return to the Original Legal Intention of Anti Discrimination Legislation:

Anti Discrimination legislation has always been designed to address historical injustices and systemic inequalities by protecting individuals from unfair treatment based on characteristics they cannot change or choose. To ensure the effectiveness and clarity of such legislation while upholding fundamental freedoms, it is imperative to return to its original legal intention.

**1. Preserving the Core Purpose:** Anti Discrimination laws were created to rectify historical injustices related to traits such as sex, race, permanent disability, age, and sexuality. Protecting these immutable characteristics serves to uphold the core purpose of this legislation.

**2. Clarity and Enforcement:** Immutable characteristics are easier to define, measure, and enforce under anti discrimination laws. The focus on these traits ensures that the legislation remains clear and effective in combating discrimination where it occurs.

**3. Avoiding Conflicts with Belief Systems:** Inclusion of individual beliefs, including religious, political, and cultural beliefs and practices, in anti discrimination legislation can produce clear conflicts between immutable classes like sex and sexuality and belief systems. This can lead to legal ambiguities and challenges in resolving disputes.

**4. Balancing Protection and Freedoms:** Anti Discrimination laws must never infringe upon fundamental freedoms. Individuals should continue to enjoy the right to freedom of thought, speech, belief, association, expression, and organisation without fear of legal repercussions.



**5. Addressing Gender Identity Separately:** Gender identity, although important, has become a contentious issue at the federal level. To avoid uncertainty and potential conflicts with established criteria for protected characteristics, it is advisable to address the protection of gender identity separately from anti discrimination legislation.

The following represents what we believe is a clear, definitive list of the proposed inclusions and exclusions for new legislation based on current protections:

## Proposed Inclusions in New Anti Discrimination Legislation (Immutable Characteristics):

**Sex**

**Race**

**Permanent disability**

**Age** (to some extent, as it can include both age discrimination and age-related attributes)

**Sexuality** (e.g., same-sex, opposite sex and both sex attracted)

**Carer's Responsibilities**

Here's a list of currently protected classes that must be excluded from new legislation due to their lack of immutability:

## Proposed Exclusions from New Anti Discrimination Legislation (Non-Immutable Characteristics):

**Beliefs:** Personal beliefs, including religious, political, and cultural beliefs and practices, which are changeable and subjective, should not be included in anti discrimination legislation to avoid infringing on freedom of thought, speech, belief, association, expression, and the right to organise.

**Gender Identity:** Given that gender identity is not immutable and the contentious nature of its protection at the federal level, it is advisable to address gender identity protection separately to ensure clarity and avoid potential conflicts within the new legislation.

By adopting this approach, we can return to the original legal intention of anti discrimination legislation, focusing on protecting immutable characteristics, preserving fundamental freedoms, and avoiding conflicts with belief systems, gender identity, and other non-immutable characteristics. This will maintain clarity and effectiveness in the law while upholding the principles of equity and justice.

## 4. Clear Discrimination Tests:

The Act must provide clear and evidence-based discrimination tests that do not favour one protected category over another. Scientific consensus and established criteria should inform definitions related to discrimination based on biological sex, which is a well-established and measurable characteristic.

### 1. Combining Tests:

- We oppose the idea of combining tests for discrimination. Combining both direct and indirect discrimination into a single test is problematic.
- These two forms of conduct, while they can occur in the same set of circumstances, are distinctly separate in nature. Therefore, a unified test could lead to confusion and hinder the precise identification of discrimination cases.

### 2. Maintaining the Comparator Test:

- In our opinion, we should not dispense with the comparator test; it should be retained.
- Eliminating the comparator test in favour of another test would shift the focus from an objective test to a subjective one.
- This change would potentially lower the threshold for proving a claim of discrimination, making it easier to establish such claims, which may not align with the intended standards and protections against discrimination.

In summary, combining discrimination tests into a single, unified test could create confusion, given the distinct nature of direct and indirect discrimination. Additionally, maintaining the comparator test, rather than dispensing with it, ensures that discrimination claims remain based on objective criteria, maintaining the intended standards for such claims.

## 5. Vilification Protections:

In crafting vilification protections within the NSW Anti-Discrimination Act, a paramount consideration should be the unwavering commitment to safeguarding both free speech rights and individuals from vilification. This protection should be firmly rooted in immutable characteristics - those traits that are inherent and unchangeable - as opposed to belief-based classes, which are inherently subjective and subject to change. By grounding the legislation in clear, scientifically recognised immutable classes, the vast majority of issues will be objectively defined, ensuring a robust and unambiguous framework. In stark contrast, the current inclusion of belief-based classes introduces an unsettling degree of subjectivity, muddying the waters of what constitutes vilification and hindering the pursuit of justice. The alignment of these protections with criminal law standards while upholding the rights of individuals to express views based on reputable scientific research is crucial for the NSW Anti-Discrimination Act to fulfil its core mission effectively.

## 6. Sexual Harassment Protections:

The Act should provide unwavering and comprehensive safeguards against sexual harassment, underpinned by a steadfast commitment to clarity and the prioritisation of immutable characteristics. While addressing harassment based on immutable attributes such as sex, race, permanent disability, age, and sexuality, it is imperative that the legislation refrain from introducing belief-based categories, which can be mutable and contentious. By staying resolutely focused on immutable traits, the Act can fortify its mission to ensure equal treatment and safeguard the rights of individuals without inadvertently fueling conflicts or undermining the original intent of anti discrimination laws. In doing so, we can uphold the principles of justice and equity while avoiding potential legal ambiguities and preserving individual freedoms.

## 7. Positive Obligations:

Positive obligations to prevent harassment, discrimination, and vilification are crucial, but they must align with the paramount principle of preserving freedom of expression and scientific inquiry. It is imperative that these obligations strike a careful balance by prioritising the protection of established, immutable characteristics in anti discrimination legislation. By focusing on traits that individuals cannot change or choose, we ensure that the legislation remains uncompromising in its commitment to justice and equity, all while safeguarding the essential liberties of expression and inquiry.

## 8. Crafting Exceptions and Exemptions for Clarity and Equitability:

The crafting of exceptions and exemptions within the new NSW anti-discrimination act must adhere to a principled approach that prioritises immutable characteristics, upholding the fundamental principles of justice and equity. Only traits that are inherently immutable should be included, while individual and collective belief-based classes, subject to change, should be excluded. This clear and resolute stance ensures that the legislation maintains its original intent and focuses on protecting individuals from discrimination based on inherent characteristics they cannot alter.

### An Example of an Acceptable Exception:

Exception: Educational Requirements

An acceptable exception may pertain to educational requirements for certain professions. For instance, certain medical specialties may require specific physical abilities or qualifications based on immutable factors such as vision, hearing, or physical dexterity. This exception ensures that professionals are qualified to perform their roles effectively while still adhering to the overarching principle of immutable characteristics.

### An Example of an Acceptable Exemption:

Exemption: Physical Fitness Standards

An acceptable exemption could apply to physical fitness standards in occupations that require specific physical capabilities. For instance, roles in law enforcement, firefighting, or the military may necessitate physical fitness criteria based on immutable factors like strength and endurance. Such exemptions should be tailored to meet specific job demands while maintaining a focus on immutable characteristics.

By adopting this approach, we prioritise the protection of immutable characteristics while providing clear examples of when exceptions and exemptions may be warranted, ensuring that the legislation remains principled and equitable in its implementation.



## 9. Complaints, Procedures, and Remedies: A Focus on Immutable Classes

In crafting any new Act or mending the current one, an unyielding commitment to protecting only immutable classes is paramount. To maintain clarity and scientific accuracy, the Act must exclude all belief-based categories, which are inherently changeable. This approach reinforces the core principle that anti-discrimination legislation should address injustices based on traits individuals cannot change or choose.

### An Example of an Effective and Fair Complaints Procedure:

An exemplary complaints procedure must adhere to the Act's focus on immutable characteristics, ensuring fairness, accessibility, transparency, and impartiality for all parties involved. In the event of a complaint arising from a conflict between immutable protected classes and beliefs, the procedure should begin with an impartial investigation.

**1. Complaint Filing:** The complainant should file a formal complaint with a designated authority, clearly outlining the alleged discrimination based on immutable characteristics.

**2. Investigation:** An impartial investigator, well-versed in the Act's provisions, would examine the complaint objectively, assessing whether discrimination related to immutable characteristics has occurred.

**3. Evidence Gathering:** The investigator would collect evidence from both parties involved, ensuring fairness and thoroughness in the process. This may include interviews, document reviews, and any relevant witness testimonies.

**4. Mediation** (if appropriate): If suitable, mediation between the parties may be offered to resolve the matter amicably, keeping in mind the Act's emphasis on immutable characteristics.

**5. Adjudication:** If mediation is unsuccessful or inappropriate, the investigator would proceed to adjudication. Here, a neutral decision-maker would evaluate the evidence and make a determination based on the Act's criteria.

## Possible Remedies Respecting All Parties' Rights:

In cases where discrimination based on immutable characteristics is found, remedies should be proportionate and respectful of all parties' rights. These remedies might include:

- **Compensatory Damages:** awarding compensation to the aggrieved party to remedy the harm suffered
- **Injunctions:** issuing orders to prevent further discrimination and ensure future compliance with the Act
- **Education and Training:** Requiring relevant education and training for the offending party to promote understanding and compliance with the Act

## Clear, Fair, and Reasonable Timescales:

To uphold transparency and fairness, the complaints procedure should include clear, fair, and reasonable timescales that are binding for each stage of the process. This ensures that both the complainant and the respondent understand the expected timeline, facilitating a more comprehensible and efficient resolution.

By maintaining a stringent focus on immutable classes and providing a transparent, accessible, and impartial complaints procedure with appropriate remedies, the NSW Act can uphold its commitment to justice, equity, and scientific accuracy while respecting the rights of all parties involved.

## 10. Anti-Discrimination Board of NSW:

In the pursuit of justice and equity, it is imperative that any new Anti-Discrimination Board of NSW be resolute in its commitment to protect only those classes that are immutable while unequivocally excluding all belief-based classifications. This unwavering stance ensures that the legislative framework remains faithful to its core purpose of shielding individuals from discrimination rooted in traits beyond their control. Recognising that belief-based classes, whether individual or collective, are subject to change and interpretation underscores the need for unyielding clarity and impartiality in the enforcement of anti discrimination laws. As guardians of justice, the Anti-Discrimination Board of NSW must navigate the legal and scientific conflicts with unwavering fairness and objectivity, setting a robust example for the promotion of an inclusive and equitable society.

### Example: Impartiality in Action

Consider a scenario where an individual files a complaint alleging workplace discrimination based on their immutable characteristic, such as race. The Anti-Discrimination Board of NSW, operating with steadfast impartiality, would rigorously investigate the complaint, ensuring that all evidence and testimonies are objectively examined. Conversely, if the complaint were based on a belief system or political affiliation, the Board would, in adherence to the law, clarify that such cases fall outside the purview of anti discrimination legislation, emphasising the need to safeguard individual freedoms of thought and expression and referring the individual to the relevant authority based on any relevant statutes.

### Clear and Fair Timescales: Ensuring Transparency and Fairness

To promote transparency, fairness, and comprehension within the process, it is crucial to establish clear and reasonable timeframes for the resolution of discrimination complaints. These timeframes would provide a structured framework within which investigations and decisions are conducted, offering both complainants and respondents clarity regarding the progression of their cases. Transparent timelines not only uphold principles of justice but also bolster the credibility of the Anti-Discrimination Board of NSW, assuring all stakeholders of the impartiality and effectiveness of the adjudication process. Such measures serve to strengthen public trust in the pursuit of equitable outcomes for all.

## 11. International and Other Laws:

In our commitment to uphold international standards of human rights and fairness, it is imperative that the new NSW Anti-Discrimination Act align seamlessly with internationally recognised principles. This alignment serves not only as a moral imperative but also as an obligation to meet international treaty obligations, including but not limited to CEDAW and the UN Charter on Human Rights. To ensure the highest standards of clarity and scientific accuracy, the Act must focus solely on protecting immutable characteristics. While recognising the contentious nature of gender identity protection at the federal level, we strongly advocate for the exclusion of belief-based classes, be they individual or collective, to preserve the fundamental principles of equity and justice within the legislation. This commitment ensures that our laws remain unwavering in their mission to shield individuals from discrimination based on traits they cannot alter, all while honouring our international commitments to human rights and fairness.

## 12. Interaction with Commonwealth Laws:

In crafting the NSW Anti-Discrimination Act, it is paramount that we adhere to principles of clarity and scientific accuracy. Legislation rooted in scientific facts is not only easier to uphold and enforce but also mitigates the risk of division and contentious disputes that can arise from laws based on subjective belief systems.

At this juncture, it is crucial to underscore the impending High Court of Australia's deliberation on a constitutional challenge, a matter pitting biological facts against conflicting personal beliefs. The High Court itself has acknowledged that these two positions are irreconcilable, and only one can prevail. To find in favour of anything other than biological fact would place Australia in direct conflict with international law and breach various international treaties, with potentially grave consequences. Therefore, NSW must exercise great caution and prioritise legal certainty by limiting the scope of the Act to include only those classes recognised as immutable while prudently excluding belief-based categories that can change or evolve over time. This approach ensures consistency and compatibility with Commonwealth anti-discrimination laws while safeguarding the integrity and legal soundness of the NSW Act.

## 13. Other Relevant Matters:

In today's evolving legal landscape, it is imperative that the New South Wales (NSW) Anti-Discrimination Act steers resolutely towards clarity, scientific accuracy, and the foundational principles of law. Global trends unmistakably signal a resurgence in the demand for science-based certainty within our legal framework. The consequences of diverging from this path are clear: a perilous descent into anarchy and mayhem, with our courts inundated by litigants. While a small group of activists contends that 'hate crimes' and 'hate speech' are on the rise, it is the flawed inclusion of subjectivity and feeling-based beliefs within anti-discrimination laws that inadvertently emboldens activists to report individuals merely for expressing dissenting views. Rigorous, evidence-based research conclusively demonstrates that discrimination is indeed on the decline, although continued legal protections are essential. However, the foundation of such protection should rest on objective facts, and the Act should remain dedicated to safeguarding only those characteristics that are immutable. This unwavering commitment ensures legal certainty and bolsters the Act's effectiveness. In light of this, New South Wales should tread with great caution and steadfastly follow a path of legal certainty, protecting immutable characteristics, and upholding the principles of equity and justice within our society.

## Conclusion:

In the context of revising the New South Wales (NSW) Anti-Discrimination Act, the need for a measured approach centred on well-established principles is evident. The Act, a cornerstone of justice and equality, demands careful consideration to preserve its core purpose and effectiveness. This submission strongly advocates for a discerning choice: prioritising immutable characteristics while excluding all belief-based categories within the legislation.

## Preserving the Core Purpose:

The historical context and *raison d'être* of anti-discrimination legislation lie in addressing historical injustices and systemic inequalities. Its primary function is to safeguard individuals from unjust treatment rooted in characteristics beyond their control—immutable characteristics (Baker, 2003). Upholding the Act's original intent necessitates a commitment to protecting individuals from discrimination based on traits they cannot change or select. Immutable characteristics, including sex, race, permanent disability, age, and sexuality, embody the essence of the Act's protective mandate (Australian Human Rights Commission, 2017).

## Clarity and Enforcement:

Immutable characteristics offer a framework that fosters clarity, enforceability, and objectivity—critical elements for the effective administration of anti-discrimination laws (Meyers, 2010). A focus on these traits ensures that the legislation remains coherent and capable of efficient implementation. When legal definitions align with scientific facts and objective criteria, the laws are more likely to achieve their intended purposes while minimising potential ambiguities or vulnerabilities to manipulation (Dau-Schmidt, 2003).

## Balancing Protection and Freedoms:

Foundational democratic principles revolve around fundamental freedoms, notably the freedom of thought, speech, belief, association, expression, and organisation. Preserving these liberties is paramount. By focusing on immutable characteristics, we strike a balance that preserves both individuals' rights to express their beliefs and their rights to be free from discrimination based on immutable traits (Freedman, 2010).

## Separating Gender Identity:

In light of the contentious nature of gender identity protection at the federal level, our submission strongly recommends addressing the protection of gender identity separately. This approach aligns with international treaty obligations and mitigates potential uncertainties within the NSW Anti-Discrimination Act (Australian Human Rights Commission, 2014).

## A Rational Choice:

In conclusion, this submission posits a prudent choice: prioritising immutable characteristics in the NSW Anti-Discrimination Act. It advocates for a path grounded in legal certainty, one that protects only those traits that individuals cannot alter. Such an approach fortifies the Act's central mission of ensuring equal treatment, upholding principles of justice and equality, and reducing legal ambiguities (Australian Human Rights Commission, 2010). This stance advocates for an NSW Anti-Discrimination Act that remains unwavering in its commitment to safeguard individuals from discrimination based on inherent characteristics while respecting individual freedoms and scientific accuracy.

The choice at hand is one rooted in rationality and prudence. Prioritising immutable characteristics in the NSW Anti-Discrimination Act reinforces the foundations of justice and equality in New South Wales, setting an example of legal clarity and precision for the broader legal community.



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# The Undeniable Reality

In conclusion, Fair Game Australia fervently calls upon the NSW Government to take decisive action in aligning the Anti-Discrimination Act with the fundamental principles of equality, justice, and scientific rigour. The Act should unequivocally uphold the principles of fairness, respect for long-established criteria for protected characteristics, and the paramount significance of sound scientific research.

Given the highly contentious and evolving landscape surrounding gender identity protection at the federal level, alongside the inherent risks associated with hasty decision-making, it is of paramount importance that the Act unswervingly prioritises the protection of established criteria for protected characteristics. Doing so will mitigate unforeseen and adverse consequences while safeguarding the rights and dignity of individuals across the state.

Our impassioned plea to the NSW Law Reform Commission is underscored by a comprehensive elucidation of the compelling arguments articulated in this submission. We implore the Commission to embark upon a meticulous and far-reaching review, guided by our earnest recommendation to reframe the Anti-Discrimination Laws. This reframing must rekindle the legislation's original intent, which was to provide robust protection to those possessing immutable characteristics that remain unalterable under any conceivable circumstance. The undeniable reality is that individuals continue to face discrimination solely on the basis of these immutable traits, reinforcing the urgent need for action.

In taking this course of action, the NSW Government and the Law Reform Commission have an extraordinary opportunity to reaffirm the state's commitment to justice, equality, and evidence-based governance. By forging a path firmly rooted in these principles, we can collectively pave the way for a society that not only celebrates diversity but enshrines it in the very fabric of our legal system, ensuring that discrimination finds no quarter within our borders.

Thank you for considering our submission.

Sincerely,



Fraser Anderson  
On Behalf of Fair Game Australia  
[www.fairgameau.com](http://www.fairgameau.com)

# Appendix 1 - We never protected individual beliefs in anti discrimination legislation until now, why?

Historically, anti-discrimination legislation has sought to address immutable characteristics because there is no way of changing these inherent attributes to avoid discrimination. These laws have aimed to protect individuals from unjust treatment based on qualities they cannot alter, fostering a more equitable society. Below is a chronological list of such legislation:

Inclusion of individual beliefs into anti-discrimination laws only emerged in the last decade. This inclusion has raised significant concerns, as it departs from the foundational principles of these laws by introducing mutable elements. Such a shift has, in some cases, eroded the rights of those with immutable protected characteristics, who critically rely on the legal protections afforded by the law. To uphold the integrity of anti-discrimination legislation and prioritise the rights of those with immutable characteristics, it is imperative to remove all beliefs from the legislation. Furthermore, there is a compelling case for strengthening the protection of immutable characteristics against any encroachment by individual beliefs. This step is essential to ensure that anti-discrimination laws fulfil their original purpose of combating discrimination based on inherent, unchangeable attributes.

## United States:

**1. Civil Rights Act of 1866 (U.S.):** One of the earliest U.S. federal laws aimed at protecting civil rights, focusing on granting equal rights to all persons regardless of race or colour.

**2. Civil Rights Act of 1964 (U.S.):** Title II prohibits discrimination based on race, colour, religion, or national origin in places of public accommodation.

**3. Civil Rights Act of 1964 (U.S.):** Title VII prohibits employment discrimination based on race, colour, religion, or national origin.

**4. Age Discrimination in Employment Act of 1967 (U.S.):** This federal law prohibits age-based employment discrimination against individuals aged 40 and older.

**5. Americans with Disabilities Act (ADA) of 1990 (U.S.):** ADA addresses disability-based discrimination in employment, public accommodations, transportation, and telecommunications.

## United Kingdom:

**1. Race Relations Act 1965 (UK):** One of the first UK laws aimed at preventing racial discrimination in various areas of public life.

**2. Sex Discrimination Act 1975 (UK):** Addresses discrimination on the basis of sex or marital status in employment, education, and other areas.

**3. Disability Discrimination Act 1995 (UK):** Aims to protect individuals with disabilities from discrimination in various aspects of life, including employment, education, and access to goods and services.

**4. Equality Act 2010 (UK):** Brought together and expanded upon various anti-discrimination laws in the UK, covering characteristics such as race, sex, disability, and age.

## Australia:

**1. Racial Discrimination Act 1975 (Cth):** Prohibits discrimination on the basis of race, colour, or national or ethnic origin in various areas of public life.

**2. Sex Discrimination Act 1984 (Cth):** Addresses discrimination on the grounds of sex, marital status, and pregnancy in various aspects, including employment and education.

**3. Disability Discrimination Act 1992 (Cth):** Prohibits discrimination on the basis of disability in various areas, including employment, education, and access to goods and services.

**4. Age Discrimination Act 2004 (Cth):** Aims to combat age-based discrimination in employment and other areas.

**5. Sex Discrimination Amendment (Sexual Orientation) Act 2013 (Cth):** This amendment added sexual orientation as a protected attribute to the Sex Discrimination Act 1984 (Cth) in Australia.

## Appendix 2 - Belief versus Immutability

Immutable protected characteristics, such as race, disability, sex, age, and sexuality, will invariably encounter conflicts with changeable beliefs due to the fundamental difference in their nature. Immutable characteristics, by definition, cannot be altered or adjusted to fit specific circumstances, and individuals possessing these characteristics require legal protections to ensure they are not disadvantaged or discriminated against. In contrast, beliefs, opinions, and behaviours can evolve, adapt, or be modified to navigate situations or gain benefits. As demonstrated by various scenarios, while beliefs can change, immutable characteristics remain constant, underscoring the necessity for legal safeguards to address discrimination and ensure equal treatment for all, regardless of their immutable characteristics. While beliefs hold significance, they should not be accommodated within anti-discrimination law, which has a distinct purpose, and their inclusion can subvert and dilute the law's effectiveness in addressing systemic discrimination.

### Example: Promotions and Biological Sex in the Workplace

**Scenario:** Alex and Taylor both work for a company and are equally qualified for a promotion. However, the company has a policy that, for this specific role, they are seeking to promote a man.

**Conflict:** Alex, who is biologically a man but believes he is a woman, decides to openly acknowledge his biological sex as a man for this promotion opportunity to benefit from the company's policy. Taylor, a woman, has no option to change her biological sex and is at a disadvantage for this specific promotion.

**Resolution:** Alex acknowledges his biological sex as a man for the promotion process and is selected for the role based on the company's policy to promote a man. Taylor, a woman, while equally qualified, cannot change her biological sex, and therefore, she does not have the same opportunity to benefit from the company's policy in this specific case.

In this simplified scenario, Alex admits to being biologically a man to take advantage of the company's policy, while Taylor, a woman, cannot change her biological sex and is disadvantaged in this particular promotion opportunity, highlighting the difference between immutable characteristics and changeable beliefs.

## Example: Workplace Emergency and Physical Challenge

**Scenario:** Alex and Taylor work on the upper floors of a building, and there is a fire on their floor. To evacuate, they must descend a ladder from a high window. Alex has only one leg, making climbing down the ladder impossible. Taylor, on the other hand, has two legs but has an intense fear of heights.

**Conflict:** Both Alex and Taylor are faced with the urgent need to evacuate the building. Alex's physical disability (having only one leg) is an immutable characteristic that makes it impossible for him to descend the ladder. Taylor, while having the physical ability to climb down, has a fear of heights that hinders her.

**Resolution:** In the face of the emergency, Alex, with his physical disability, is unable to climb down the ladder. Taylor, recognising the urgency of the situation, overcomes her fear of heights and successfully climbs down the ladder, prioritising her own safety. Regrettably, due to the severity of the fire and the lack of assistance, Alex does not make it out safely.

This scenario emphasises the importance of considering disabilities seriously in emergency situations and the need for appropriate accommodations and assistance. It also highlights the contrast between an immutable characteristic and a changeable belief, illustrating the challenges some individuals face in emergencies.

## Example: Prenatal Resources Allocation

**Scenario:** In a community with limited prenatal resources, Alex and Taylor are both seeking access to these essential resources. Taylor is genuinely pregnant and in need of proper prenatal care, while Alex is falsely claiming to be pregnant, demanding resources he does not require.

**Conflict:** The limited prenatal resources cannot fully accommodate the demands of both individuals. There is a shortage of medical professionals, facilities, and supplies. Taylor, who is genuinely pregnant, faces the risk of inadequate care due to resource limitations. Alex, while pretending to be pregnant, is consuming resources that could otherwise benefit Taylor.

**Resolution:** Faced with the scarcity of resources, a critical examination of the situation reveals the truth. Alex, acknowledging that he is not pregnant and that his claim was false, chooses to admit his deception. This decision allows the limited prenatal resources to be allocated to Taylor, who genuinely needs them for her pregnancy.

In this scenario, Alex's dishonesty is revealed, highlighting the importance of equitable resource allocation for individuals with genuine needs based on immutable characteristics, such as pregnancy, rather than deceptive claims. This underscores the conflict between immutable characteristics and deceptive behaviors.

## Example: Workplace Restroom Usage

**Scenario:** In the workplace, Alex is pretending to be a woman and frequently uses the women's restroom. Taylor, a female employee, becomes increasingly concerned about this situation, as she feels uncomfortable and unsafe when sharing the restroom with Alex. Eventually, Taylor stops using the workplace restroom altogether to avoid the discomfort, which leads to a urinary tract infection (UTI).

**Conflict:** Taylor's concern and discomfort escalate due to Alex's presence in the women's restroom, making her frightened to go in there. She starts avoiding restroom use at work to prevent uncomfortable encounters, despite the health risks. Taylor's health problems worsen, ultimately leading to a severe UTI, as she was left with no choice but to avoid restroom use due to Alex's behavior.

**Resolution:** Unfortunately, Taylor's UTI worsens, requiring hospitalization and medical treatment. It becomes clear that her avoidance of restroom use at work, resulting from her fear of Alex's presence, has severely impacted her health. Workplace authorities address the situation by ensuring restroom usage aligns with individuals' biological sex, respecting the comfort and safety of all employees. Alex is advised to use facilities consistent with his biological sex. However, even with these changes, the damage to Taylor's health has already been done.

In this scenario, Taylor's fear and avoidance of restroom use are a direct result of Alex's actions, emphasising the importance of creating a safe and inclusive workplace environment that accommodates everybody's needs. It underscores the necessity for individuals to use facilities that align with their biological sex to ensure the comfort, safety, and fairness of all employees, though regrettably, the harm inflicted on Taylor's health cannot be undone.

## Analysis of the Problem, and the Solution

The inclusion of beliefs within anti-discrimination legislation presents a significant conundrum, where the victim of discrimination is often left without adequate protection against the changeable beliefs of another individual. In such scenarios, individuals wielding beliefs can readily claim anti-discrimination protection, rendering the very essence of anti-discrimination legislation antithetical to its fundamental premise. The primary objective of anti-discrimination laws has been to redress injustices arising from immutable characteristics such as sex, race, disability, age, and sexuality, attributes over which individuals have no control. The introduction of changeable beliefs into this legal framework obscures the core mission of anti-discrimination legislation, creating a situation where those with immutable characteristics find themselves inadequately shielded from the fluctuating beliefs of others. To truly uphold the principles of anti-discrimination and safeguard the rights of vulnerable individuals, it is imperative to eliminate all references to beliefs within the legislation and to fortify protections for immutable protected classes. This realignment is essential to ensure that anti-discrimination legislation remains effective and capable of fulfilling its intended objectives in fostering a just and equitable society.