

## Review of Proposed Changes to Sex Discrimination Act

### Introduction

This submission provides a formal response to the NSW Government Review of the Anti-Discrimination Act 1977 (NSW), focusing on the consultation document's examination of sex and gender discrimination (Sections 4.95–4.100). Adopting a sex-based perspective, this submission will focus on the risks of amending the Sex Discrimination Act (SDA) to women, girls, gay men and lesbians, as distinct and discreet groups that require sex-based protections under the SDA.

It is noted that the 'amendments' proposed to the SDA have not arisen from public pressure or demand. For example, polling generated by Redbridge prior to the election, and cited by Equality Australia, suggests minority groups are widely accepted within Australian society and that Australians do not wish to see identity issues politicized.

The inherent risks to free speech, freedom of association and same-sex services, provisions and spaces raised by these amendments, have not been widely publicized to the residents of NSW.

Discrimination laws, originally designed to promote equality and protect marginalized groups, are increasingly being manipulated, misapplied and reinterpreted to serve specific ideological agendas, often at the expense of their intended purpose. The extraordinarily important sex-discrimination legislation brought by Susan Ryan to parliament in 1984 will be virtually undone by the amendments proposed by the government. The NSW government risks taking an ideological sledgehammer to this legislation by removing sex as the defining component of sex-based discrimination.

In their study published in the *British Journal of Political Science*, Ziller and Hebling (2019) explore how anti-discrimination policies may influence political support, particularly amongst minority groups and those professing egalitarian values. However, the effectiveness of these laws can be undermined by inadequate knowledge of policymakers and/or selective enforcement.

What Ziller and Hebling point out is that when anti-discrimination laws are perceived as responsive to specific groups, but not others, such laws can exacerbate social divisions rather than mitigate them. There must be transparent and consistent application of the law to avoid perceptions of favouritism or ideological capture.

Indeed, when enforcement agencies or judicial systems prioritize cases (e.g. *Tickle v Giggle*) based on ideological alignment, the broader goal of equal protection is compromised. This selective enforcement can severely and critically erode public trust in institutions, as certain groups, like biological women and lesbians, may feel excluded from protections offered by these laws. **This submission rejects the ideological weaponisation of sex-based rights in discrimination law.**

The binary nature of sex is a biological fact, irrespective of ideological claims to the contrary. That the semantic gender-based claims of Fausto-Sterling and Augustin Fuentes, amongst others, can be so easily dismissed by the scientific evidence of only two gametes and binary developmental pathways (which may be subject to variation) in humans should put an end to the spectrum hypothesis. It has fallen to evolutionary biologists like Richard Dawkins (AFR, 2023) and Colin Wright (City Journal,

March 2023), and scholars like Marinov (2020) to prove that sex is indeed immutable and unchangeable in humans.

The sex of humans is emphatically not on a 'spectrum.' There is no third sex and there are no human hermaphrodites (<https://theparadoxinstitute.org/watch>). Sex, despite the hyperbolic claims of social constructionists, is binary, and innate variations of sex characteristics exist within the binary and are specific to one sex or the other (Elliott, 2023). Innate variations of sex characteristics are often highly complex medical matters, frequently related to reproduction. The politicization of so-called 'intersex' people (who constitute 0.3% of the population according to the ABS) is an obscene politicization of private medical conditions for ideological and political gain (InterAction).

It is wholly inappropriate for activists to use discrimination law as an ideological weapon. Discrimination law has always been conceived as a shield against disadvantage. As legal scholar Margaret Thornton notes, discrimination law is designed to provide a course of action and a remedy for an aggrieved individual, rather than a punishment of the perpetrator (in Eastal, 2010). In more recent years, ideologues within the justice system have attempted to employ discrimination law as tool of punishment and compliance, often under the pretext of progressivism or 'modernisation.'

Discrimination law is also not a state-sanctioned mechanism to punish diversity of opinion and freedom of association. The proposed amendments risk authoritarian overreach by demanding homogeneity or 'forced teaming' amongst disparate groups (de Becker, *The Gift of Fear*). Social homogeneity has never been the objective of discrimination law; ***fairness and equality of opportunity are the stated aims.***

It may be convincingly argued that the social divisions so evident in Victoria and NSW have been supercharged by political interference in identity politics by state and federal politicians. NSW politicians should avoid such unintended consequences and refrain from engaging in contemporary grievance politics. Governments must be transparent and employ evidence-based approaches to social policy to counteract such unintended consequences.

The SDA, and discrimination law more generally, is supposed to reflect the social contract. We posit that the changes that are sought to the SDA amount to nothing less than a rewriting of the social contract through explicitly ideological social-engineering. The linguistic and semantic amendments proposed by lobby groups are wholly inappropriate and unsuited for such pragmatic legislation. The reasonable residents of NSW are not intimately acquainted with the linguistic fallacies of queer theory, and the ideological 'expansion' of human rights discourse. And it should be noted that LGBTQ+ activists simply disregard the interpretative and operational difficulties of implementing such abstract ideological concepts, often preferring repressive, coercive implementation measures, which result in social fragmentation.

The NSW government has a duty to respect the rights of all citizens and residents, and not to prioritize certain groups. Indeed, the ideological abstractions of 'inclusion' and 'equity' are not the law in any state in Australia, and for good reason.

In the world as it is, the protected characteristic of sex retains its importance in the twenty-first century, as it is a fundamental fact of human existence. The NSW SDA must reflect the 'lived-experiences' of NSW citizens and residents, including women, girls and sexual minorities. Any attempt to impose a hierarchy of 'vulnerability' based on nothing more than personal grievances should be strongly resisted. Discrimination law is not the arena in which to play out the identity claims and grievance

politics of motivated individuals. The SDA has to be fair and accessible to all, or else it defeats its purpose.

Currently, discrimination law is not accessible to all, as the costs of pursuing a case are prohibitive. It is our view that the NSW government should be dealing with accessibility, ideological capture and prejudice within the current system, rather than expanding and redefining current law.

Biological women MUST be able to fairly pursue discrimination claims, and women, girls, gays and lesbians must not be at risk of prosecution in defending our sex-based rights. As Reem Alsalem, the UN Special Rapporteur on Violence Against Women and Girls notes, ‘you cannot protect in law what you cannot clearly define.’ And, as Alsalem rightly asserts:

there has been a concerted international push to delink the definition of men and women from their biological sex and erase the legal category of “women.” Such efforts have undermined the practical achievement of equality between men and women. Women are therefore being denied their rightful recognition as a distinct category in law and society. It is a form of ‘coercive inclusion’ that relies on the expectation that women will be kind enough to sacrifice their own recognition and protection for the sake of others.

[\(https://www.deseret.com/opinion/2025/08/06/women-violence-erasure-reem-alsalem-united-nations/\)](https://www.deseret.com/opinion/2025/08/06/women-violence-erasure-reem-alsalem-united-nations/)

We call on the government of NSW to once again protect the sex-based rights of women and girls by retaining, respecting and protecting the category of ‘woman’ as a sex-based constituency. Our reasoning is set out below.

## **RESPONSE TO THE CONSULTATION PAPER BY SECTION**

### **Section 4 – Classifications and Categories (p.59)**

The proposed reforms which seek to replace sex-based framing in the ADA with the undefined concept of ‘gender,’ and other ideological terminology, is opposed in the strongest possible terms.

The ADA review considers replacing ‘sex’ discrimination with ‘gender discrimination’ (4.96), removing binary definitions of ‘man’ and ‘woman’ in ss 23–24 ADA 4.98–4.100, and, replacing ‘opposite sex’ with ‘different sex,’ changing 4.101.

These changes are presented as ‘inclusive,’ specifically for those with innate variations of sex development. In practice, ‘gender’ and ‘different sex’ have no meaning whatsoever without reference to the binary nature of sex. Further, ‘gender’ and ‘different sex’ simply collapse the clear and necessary distinction between the material reality of sex and the ideological self-perception of gender identity. And as recent rulings from overseas demonstrate, the heightened scrutiny of discrimination categories or classifications may not just be redundant, but unnecessary.

In a recent transgender rights case from the United States, *L.W. ex rel. Williams v. Skrmetti*, the United States Court of Appeals for the Sixth Circuit departed from the conventional assumption that all sex-based classifications are inherently suspect and therefore subject to heightened judicial scrutiny. The Court held that, in contrast to racial classifications—which uniformly trigger strict scrutiny—sex-based classifications do not automatically warrant heightened review. Instead, the Court articulated that such classifications will only be subject to heightened scrutiny if they implicate a more profound constitutional or anti-discrimination principle.

Furthermore, the Sixth Circuit emphasized that where sex classifications are predicated on biological differences between males and females, and where those classifications treat similarly situated individuals in an ‘evenhanded and neutral manner,’ they do not raise constitutional concerns under the Equal Protection Clause. In such cases, the Court suggested that judicial intervention is unwarranted.

In the U.S., *Skrametti* signals judicial **deference** to sex-based distinctions when framed around biological differences or purposes—leading to rational basis review. If upheld by the U.S. Supreme Court, this could reinforce a broader trend of rejecting ‘heightened scrutiny’ claims unless the classification is clearly animus-driven or arbitrary.

By contrast, NSW’s reforms **include self-definition and “lived identity”** as central to legal recognition of sex and sexuality—well beyond what the Sixth Circuit might interpret as a ‘neutral, biologically grounded’ classification. NSW is moving firmly in an **affirmative action** direction, whereas other jurisdictions are moving to downgrade subjective identity claims.

The proposals outlined at **paras 4.96–4.101** of the Consultation Paper represent a fundamental shift away from the ADA’s original purpose — the protection of women and men from discrimination on the basis of biological sex. Redefining ‘sex’ in line with the abstract and ideological concept of ‘legal’ or ‘certificated sex’ would further erode women’s sex-based rights in law and practice. The reforms also expose the law to a set of **ontological and epistemic challenges** that arise when identity is **detached from material referents** and grounded solely in internal, subjective claims.

As Brendan O’Neill rightly notes, the reliance on internal self-perception as a basis for legal classification displaces the law’s traditional need for publicly knowable and consistent categories (*The Law and the Limits of Self-Identification*, 2024). It is wholly irresponsible for the NSW government to introduce unstable and indeterminate categories into discrimination law. The law, unlike culture, requires **categorical stability** to function: ambiguity undermines predictability, a core value of legal systems (Fuller, 1964).

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‘Gender’ is an expressly ideological and philosophical concept, born of (now outdated) post-modern social constructivism. Gender is, according to Judith Butler, ‘an artifice’ (*Gender Trouble*, p.1). Gender is, therefore, not a legal category grounded in material reality, but an artificial public performance. Sex, on the other hand, is an objective, biological characteristic that is universally recognised. And, unlike gender, sex is immutable, coded in every cell, and unchangeable throughout the life cycle. The artificial manipulation of secondary sex characteristics using cross-sex hormones is exactly that- an artificial, cosmetic alteration of one’s appearance. Sex is not a category that can be ‘expanded’ to incorporate the demands of social justice lobbyists. Sex is the basis of all human relationships, and the foundation stone of discrimination law.

Gender, as defined in the Australian Government’s own 2015 Guidelines, is ‘part of a person’s personal and social identity’ — it is a subjective self-description and a form of expression. Most recently, counsel for Roxanne Tickle in the *Tickle V Giggle Pty* matter (2024, Appealed 2025) sought to define ‘gender identity’ in the Federal Court in terms of haircuts, clothing and lip gloss. These references to the stereotyped accoutrements of ‘femininity’ demonstrate that ‘gender identity’ is

regressive, conformist and reductive, and merely reduces the concept of womanhood to feelings and appearances.

Unlike sex, gender identity is a temporary, artificial abstraction that changes over time and circumstance. There is nothing stable and/or definitive about gender identity and it is not an intrinsic, universal characteristic relevant to the majority of citizens and residents of NSW. Few NSW residents or citizens would claim a gender identity, and none would be able to accurately define the concept without reference to biological sex.

Consequently, substituting ‘gender’ for sex imports an ideological framework into the law, replacing an evidence-based category with an unverifiable subjective claim about the self. With these proposals the NSW government risks making new laws that simply will not stand the test of time.

In *For Women Scotland Ltd v The Scottish Ministers* [2024] UKSC 29, the UK Supreme Court held that the term ‘sex’ in the Equality Act 2010 meant **biological sex** and could not be redefined by ministerial regulation to include ‘gender identity.’ This was a necessary reaffirmation of women’s sex-based rights in the face of legislative overreach by the Scottish Government.

In a recent transgender rights case from the United States, *L.W. ex rel. Williams v. Skrmetti*, the Sixth Circuit held that unlike racial classifications, not all sex classifications trigger heightened scrutiny. Rather, as Jessica Clarke explains, ‘the Court reasoned that sex classifications do not trigger any special scrutiny unless they offend some deeper antidiscrimination principle.’ The Court also asserted that sex classifications should not concern courts when they ‘treat similarly situated individuals evenhandedly’ based on ‘biological differences’ (*The University of Chicago Law Review*, Vol. 92, No. 1 (January 2025), p.3).

NSW is already far behind the UK and the US in defending biological sex as a legally protected characteristic. Adopting ‘gender’ in place of sex would widen that gap, entrench legal confusion and guarantee further rights conflicts. If the NSW government chooses to ignore and reject the UK Supreme Court’s ruling on the sex-based rights of women, the NSW government will find itself to be regressive and out of step.

At a federal level, women no longer enjoy sex-based rights in Australia. Under the SDA (as amended in 2013 and 2016) and the guidance issued by AG Dreyfus (2013), ‘gender identity’ has been elevated above sex, creating direct conflicts with women’s rights to single-sex spaces, services, and provisions. And it is not simply that the sex-based rights of women and gender identity claims conflict. It is the case that current law is being weaponised and actively used against women. In *Tickle v Giggle Pty Ltd* (2023), for example, gender identity claims were used against a female-only platform intended for females, demonstrating how sex-based protections can be undermined by verbal identity claims, and/or “sex-plus” claims.

McAllister persuasively argues that comparator evidence remains relevant in proving a sex-plus claims, and that ‘the strongest sex-plus claims are those where the two types of comparator evidence are used in tandem’ (McAllister, ‘Proving Sex-Plus Discrimination through Comparator Evidence,’ *Seton Hall Law Review* 50 (2020): 762).

From a jurisprudential standpoint, the proposed amendments of the NSW government **abandon procedural neutrality**. Discrimination law, as it is currently interpreted in Australia, is moving from adjudicating observable conduct (e.g., discrimination, harassment) to validating **personal narratives**. However, subjective claims may actually undermine jurisprudence in this area, as what is considered ‘harmful’ is constantly redefined by claimants and the Court, resulting in legal incoherence.

Legal philosopher Ronald Dworkin cautioned against laws that privilege **subjective authenticity** over shared moral principles, warning they may degrade the coherence of rights discourse. And, without objective thresholds, such laws may be vulnerable to **strategic misuse**, especially in areas like sport, criminal justice, and education, where classification carries material consequences.

The material consequences of abandoning procedural neutrality and of strategically misapplying the law is evident in the *Lesbian Action Group v Australian Human Rights Commission* matter, in which lesbians were refused permission to hold a female-only event, and were informed that males could identify themselves as lesbians (transbians). Abandoning any pretence of neutrality, the Lesbian Action Group were informed by the AHRC and the Tribunal that male people could not be excluded from a female-only event, thereby undermining Article 22 of the ICCPR. The ruling against lesbians seeking special measures *for their protection*, not only reflects a direct inversion of the original purpose of sex discrimination law, but illustrates Australian law's departure from neutrality, international treaty obligations, reality and common sense.

#### Binary definitions of sex must be retained for the comparator test and for safeguarding.

In discrimination law, a comparator class is essential to establish differential treatment. The ADA's current framework (4.99) requires comparison with a person of the opposite sex, ensuring sex-based claims are grounded in biological differences. The proposed shift to 'gender' based terminology (4.96) risks undermining this process, as seen in *Tickle v Giggle Pty*, where Justice Bromwich directly compared Tickle to biological women, ignoring the claimant's correct classification as a biological male.

Non-binary language eliminates a clear comparator. The comparator test in ss 24 (1) and related provisions, requires a clear, binary point of comparison, as does CEDAW (Article 2). Decoupling 'man' and 'woman' from the male and female sex will completely undermine the comparator test and will make it impossible to apply the law consistently and fairly. The High Court's comments in *Norrie* [2014] HCA 11 recognised that some people may be of 'indeterminate sex' for the purposes of registration. But this decision did not erase the binary definition of sex from discrimination law. Replacing 'opposite sex' with 'different sex' undermines the coherence of the sex binary and actually removes the point of difference between the sexes.

If the comparator test is removed/altered, how will one prove that one's sex is 'different' from another? What will be the legal test of difference? A legal comparator test cannot be based on appearance, expression or perception, as none of these components are universal or have equal value. The current comparator test **MUST** be retained to ensure interpretive coherence and fairness.

#### This change would privilege subjective feelings over objective evidence

Furthermore, a linguistic shift from sex to gender invites claims based purely on perception, belief, or hurt feelings, without any need to prove material disadvantage linked to biological sex. This reconfiguration, from tangible disadvantage to subjective claims of hurt feelings, constitutes a weakening of discrimination law. A consequence of lowering the standard of objective proof of harm and/or disadvantage will be to open the floodgates to vexatious and malicious claims that will be impossible to disprove on the basis of fact. And creating further legal fictions and linguistic fallacies will dramatically increase the risk of politicized and/or ideological litigation that will thwart legitimate public debate and discussion.

## **Recommendations**

1. Retain sex as the protected attribute in the ADA and reject any proposal to substitute ‘gender’ in its place.
2. Maintain binary definitions of ‘man’ and ‘woman’ as members of the male and female sex.
3. Reject amendments that would replace ‘opposite sex’ with ‘different sex.’
4. Insert a statutory clarification — mirroring the language set out in the *For Women Scotland* judgement by the UK Supreme Court— that ‘sex’ for the purposes of the ADA means biological sex, and only biological sex.

In summary, replacing sex with gender or diluting binary definitions, would be a regressive, not a progressive step that dismantles hard-won legal protections for women and undermines the coherence of anti-discrimination law. NSW should instead follow the UK Supreme Court’s lead in *For Women Scotland* by affirming biological sex as the legal basis for protection.

## **Chapter 4 - Opposition to Expanding the definition of Homosexuality and Sexual Orientation**

The proposal to replace the clear and specific attribute of homosexuality in the Anti-Discrimination Act 1977 (NSW) with a broad and undefined concept such as ‘sexuality’ represents a significant, unnecessary and dangerous shift in the law.

While presented as a simple update, this change would *fundamentally alter* the scope and purpose of the existing provision, moving it away from its original intent to protect gay men and lesbian women from demonstrable, sex-based discrimination, and into a vague, subjective realm that risks legal overreach, activist reinterpretation, and the erosion of rights for the very group the law was designed to safeguard.

Experience in other jurisdictions, as well as recent Australian case law, shows that such expansions invite definition creep, ideological framing, and the weaponisation of anti-discrimination laws against the protected class itself.

The ADA (NSW) currently prohibits discrimination and vilification on the basis of homosexuality, correctly defined as a ‘male or female homosexual’ (s 4(1), s 49ZF–s 49ZG). This is specific and concrete and clearly defines a same-sex sexual orientation. The term reflects the original intent of the law: to address real, documented discrimination faced by gay men and lesbian women on the basis of their innate sexual orientation.

Replacing ‘homosexuality’ with the ill-defined abstraction of ‘sexuality’ would unacceptably broaden the scope of protection and actually undermine protections for sexual minorities. Whilst activists wish to endlessly expand the umbrella of protections for lifestyle choices, there is no evidence that protecting sexual behaviour like polyamory or sadomasochism is either necessary or desirable. Not all sexual expression is positive.

The umbrella term of ‘sexuality’ does not, in fact, protect homosexuals from discrimination, but would protect the practice and expression of sexual activity, however that is defined by the individual. For example, recent findings indicate that sexual choking is increasingly common among Australians

under 35. Yet research also reveals that many lack the understanding of the serious physical and consent-related dangers involved. If the NSW government signals, via discrimination protections that sexual expression is valid, this massively increases the risk of harm of violent and exploitative sexual abuse to women and children ([https://www.theguardian.com/society/article/2024/jul/02/risk-of-serious-injury-as-strangling-during-sex-becomes-normalised-among-young-australians?utm\\_source=chatgpt.com](https://www.theguardian.com/society/article/2024/jul/02/risk-of-serious-injury-as-strangling-during-sex-becomes-normalised-among-young-australians?utm_source=chatgpt.com)).

The expansion of this category is dangerous as it invites the deliberate misuse of the law by sexual predators seeking legal protection for potential criminal and/or deviant acts. For example, there has been an aggressive push from paedophiles in recent years to recast themselves as ‘minor attracted persons.’ Under the proposed amendments it would be entirely possible for a paedophile to argue in a NSW Court that they have the ‘right’ to have their ‘sexuality’ protected under such expansive discrimination laws.

Such ill-defined terms as ‘sexuality’ naively invite exploitation by bad actors and also invite overreach by the government into the private affairs of citizens. It is not for the government and courts to regulate the ‘sexuality’ of citizens. It is the role of the legislature and the judiciary to protect citizens and residents from harm.

It is also the case that discrimination law must reflect the genuine harms experienced by citizens and not the latest social trends, labels and categories peddled by activists. Self-made and self-declared categories of attraction or non-attraction are not part of the historic struggle for homosexual rights and have no direct connection to the homophobic, sex-based discrimination that required specific legal protections.

Cases like *Toonen v Australia* and *Young v Australia* illustrate the importance of specific terminology in addressing targeted discrimination. The specificity of ‘homosexuality’ in 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994), allowed Toonen to seek a legal remedy that directly addressed the criminalization of same-sex sexual activity. A vague term like ‘sexuality’ would dilute such remedies, making it harder to address explicitly homophobic discrimination. Similarly, in *Young v Australia* (Human Rights Committee Communication No.941/2000), Edward Young argued that Australia’s veterans’ pension laws discriminated against same-sex couples by denying benefits to partners of homosexual veterans, violating Article 26 of the ICCPR. The Human Rights Committee found discrimination based specifically on sexual orientation, emphasizing the distinct disadvantage faced by homosexual couples. The case’s success hinged on the clear identification of ‘homosexuality’ as the protected characteristic.

The expansive and ‘inclusive’ approach adopted in the ACT and Tasmania—where ‘sexuality’ includes heterosexuality, homosexuality and bisexuality (para 4.75–4.76)—is so open-ended and diffuse, as to be meaningless. The word ‘includes’ invites courts and tribunals to keep expanding the meaning over time, well beyond what Parliament debated or intended.

Another example of incoherent and incompatible legislative drafting comes from Queensland where a ‘lack of attraction’ (para 4.74) risks extending the law to entirely unrelated lifestyle preferences or unfortunate circumstances. Asexuality and similar self-descriptions have NO historic or legal connection to the fight for homosexual rights, do not involve a history of systemic disadvantage comparable to gay men and lesbians, and should NOT be given identical legal weight in a statute designed to combat sex-based discrimination.

The 2023 NSW Equality Bill attempted to make a similar expansion to the umbrella proposals put forward for the SDA but was rejected in the final Equality Act 2024. The omission was deliberate, indicating insufficient parliamentary and public support. Reintroducing these expansive ill-defined terms now suggests a cavalier disregard for the democratic process and a disdain for the views of NSW residents.

Discrimination law is not supposed to reflect individual lifestyle choices, preferences or personalities. Discrimination law is designed to protect vulnerable sexual minorities against homophobic harm.

Disturbingly, the consultation paper cites definitions rooted in the Yogyakarta Principles (para 4.71, fn 61); an unratified activist document that has been repeatedly rejected by UN member states, with no binding legal authority in Australia. Despite the near-universal *rejection* of the Yogyakarta Principles, these activist-talking points have been used by activist-scholars to advance social engineering projects that go far beyond genuine discrimination claims. Indeed, some activists are trying to retrospectively rewrite international treaties, like CEDAW and the ICCPR, to include their ideological dogma. If these ideologues are so confident in the justice of their positions, they should put the case of ‘gender identity’ and ‘inclusive sexuality’ to the Australian people.

The dangers of using discrimination law as a tool of ideological social engineering projects is clear. Expanded and ambiguous definitions in discrimination law have already been used against the very groups they were meant to protect, as in the *Lesbian Action Group* and *Tickle v Giggle*. This ruling not only erases the constituency and category of ‘lesbian,’ it also fatally undermines the concept of same-sex attraction and freedom of association.

These cases show that once attributes are broadened beyond their original scope, the law can and will be used to erode the rights of the original protected class. These proposals are not minor ‘modern’ updates—they constitute a fundamental rewriting of the ADA’s intent, without any public mandate.

#### **SECTION 4.7 (2) — Sex Discrimination, Pregnancy and Breastfeeding**

**Should the ADA prohibit discrimination based on pregnancy and breastfeeding separately from sex discrimination?**

**The Anti-Discrimination Act 1977 (NSW) (ADA) should** retain “sex” as a protected attribute in its current form, with pregnancy and breastfeeding explicitly recognised as inherent biological characteristics of the female sex. Any legislative reform that seeks to **decouple** pregnancy or breastfeeding from the category of sex discrimination risks not only distorting the biological and material basis upon which these protections were originally conceived but also weakening the legal coherence of anti-discrimination frameworks.

Under **ss 24(1)–(1A)** of the ADA, discrimination on the grounds of pregnancy or breastfeeding is treated as discrimination based on a characteristic generally appertaining or imputed to women. Section **35** further confirms that affording benefits in connection with pregnancy, childbirth, or breastfeeding does not constitute unlawful sex discrimination against men. This legislative structure appropriately reflects that such capacities are exclusive to females, and that the discrimination which arises in relation to them is necessarily sex-based.

This position is supported by **High Court authority**, most notably in *Commonwealth v Human Rights & Equal Opportunity Commission; ex parte Hickie* (1998) 85 FCR 1. In that case, the Federal Court

recognised that discrimination on the ground of pregnancy is a form of sex discrimination, given that only women are capable of pregnancy and childbirth. Similarly, in *Schou v State of Victoria* [2004] VCAT 1295, the failure to accommodate breastfeeding in the workplace amounted to direct sex discrimination.

Further, in *Hunter v South Australian Health Commission* (1992) EOC 92-417, the court held that disadvantaging an employee because of pregnancy constituted **direct discrimination on the ground of sex**, underscoring the intrinsic link between sex and reproductive function.

To separate these categories would **risk** eroding the foundational logic of anti-discrimination jurisprudence, which has consistently recognised that pregnancy- and breastfeeding-related harms are manifestations of sex-based disadvantage. Recognising these as independent grounds might inadvertently obscure the structural inequality women face by treating reproductive roles as disembodied or gender-neutral experiences—contrary to empirical reality and extensive legal precedent.

### **Objections to Proposed Change**

In jurisdictions where legal fictions have already been adopted, ‘gender neutral’ terminology support the notion that individuals who identify as male, but are biologically female, may become pregnant or breastfeed. However, from a biological and legal standpoint, reproductive functions such as gestation and lactation are exclusively female abilities. The High Court in *Re Marion* (1992) 175 CLR 218 confirms this biological foundation by grounding parental consent for sterilisation in the context of female reproductive function, thereby reaffirming that sex is not an abstract identity but a bodily reality with legal implications.

However, the shift by women’s organisations like the ABA towards so-called inclusive, ‘gender neutral’ terminology—such as ‘breastfeeding parents’ and ‘chestfeeding’—illustrates the material and operational consequences of ambiguous language.

Although no Australian court or tribunal has yet upheld a claim affirming a legal right of trans-identified males to access breastfeeding-specific services, the adoption of ideological language by women’s organisations foreshadows potential legal claims that may force courts to confront the tension between gender identity and biological sex within the context of anti-discrimination law.

Consistent with the reasoning in *AB v Western Australia* [2011] HCA 42, where the High Court underscored the biological characteristics of sex in determining access to legal recognition under the *Gender Reassignment Act 2000* (WA), any expansion of sex discrimination protections must not obscure the immutable biological criteria underpinning reproductive functions. To repeat, the legislature’s original intent in the *Sex Discrimination Act 1984* (NSW) was to protect individuals on the basis of sex—a term grounded in biological reality, not subjective identity.

Therefore, a coherent interpretation of the Act requires that sex, for the purposes of anti-discrimination protections, remain intrinsically linked to reproductive biology. To interpret otherwise risks collapsing legal categories into subjective self-identification, thereby eroding the very basis upon which protections for women—particularly in the domain of maternity and maternal health—are premised.

**SECTION 4.8 - Discrimination on Transgender Grounds. What changes, if any, should be made to the way the ADA expresses and defines the protected attribute of ‘transgender grounds’?**

Transgender people are already fully protected under the ADA, and no further changes are required. For example, The *Anti-Discrimination Act 1977* (NSW) (ADA) already provides comprehensive protection against discrimination on transgender grounds, notably under s 38A, which adopts a deliberately broad formulation encompassing persons who identify and live as the opposite sex, have done so in the past, or are of indeterminate sex. Given the expansive scope of this provision, any proposal to further broaden or redefine “transgender grounds” through the incorporation of the nebulous concept of “gender identity” is unnecessary and legally problematic.

Section 38A of the ADA sufficiently protects individuals who experience discrimination due to transgender status. The definition’s breadth allows for legal recognition of social transition, regardless of surgical or medical intervention. This ensures practical protection across key domains such as **employment (s 49A(c)), education (s 49A(d)), and access to services and accommodation (s 49S (2))**.

Legal doctrines require statutory terms to be coherent, justiciable, and not unreasonably vague (*Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476). The current legislative formulation meets these criteria, while the proposed amendments—predicated on subjective internal identification—fail to meet these standards.

Current law protects individuals based on **objective and immutable characteristics**, such as race, age, disability, or biological sex. In contrast, a ‘transgender’ gender identity is subjective, unverifiable and mutable, making it an unstable category for legal protection. Indeed, from a jurisprudential perspective, the category ‘transgender’ lacks the definitional precision and objective verifiability necessary for coherent legal application. For example, individuals may change their self-identification over time, detransition, or identify differently in various legal, social, or medical contexts. The unstable and contingent nature of transgender identity creates legal uncertainty in contexts requiring easily recognisable and durable classification, such as:

- Access to single-sex facilities,
- Sex-based quotas, such as workplace ‘gender equality’ measures
- Sporting categories,
- Prison placements, and
- Healthcare entitlements.

In anti-discrimination law, protected attributes must be capable of consistent identification and legal recognition for claims and enforcement. The category of ‘transgender,’ as currently conceptualised in Australian law, fails on these grounds. That is not to say that trans-identified people do not deserve legal protections. Rather that all legal protections must be grounded in reality and not legal fictions.

For example, as recognised by the High Court in *AB v Western Australia [2011] HCA 42*, legal sex recognition involved objective biological and surgical criteria. While the Court permitted a legal change of sex post-surgery, it did not endorse gender identity as an autonomous legal category. The

decision upheld that sex, for legal purposes, must be anchored in biological facts and observable reality.

Legal categories must facilitate predictability and reliability. If the attribute is mutable and based solely on fluctuating identity claims, it undermines the certainty required for consistent judicial and administrative application.

The ideological reinterpretation of current discrimination law has already had a chilling effect on women's political expression and participation. For example, Anna Kerr, a solicitor and women's rights advocate, was expelled from the NSW Greens for articulating concerns about the erasure of "woman" from law and the impacts of self-identification policies on girls and women. And, The Feminist Legal Clinic, which served vulnerable women, lost its tenancy from the City of Sydney Council due to its advocacy for biological women. These events demonstrate how so-called 'inclusive' policies are being operationalised to suppress dissent, punish legitimate political speech, and marginalise those defending the legal rights of women.

Such institutional consequences reveal that the expansion of legal categories based on ideological grounds can entrench censorship and state-enforced orthodoxy, incompatible with liberal democratic principles of pluralism and freedom of conscience.

There is no compelling legal or practical justification for expanding the definition of "transgender grounds" under the ADA. The current provisions:

- Provide ample coverage for individuals undergoing gender transition,
- Maintain legal certainty and justiciability,
- Uphold the necessary distinction between biological sex and subjective identity.

Expanding this to include amorphous "gender identity" categories would jeopardise women's rights, erode clarity in law, and elevate ideological constructs above material realities. Australian anti-discrimination law must remain grounded in objective criteria that are coherent, observable, and conducive to the protection of all citizens—especially women, whose sex-based rights are increasingly vulnerable under current reinterpretations.

The adoption of 'gender identity' into legal frameworks has, in several jurisdictions, led to legal actions that significantly limit free expression, particularly in relation to biological sex. Following the enactment of Canada's Bill C-16, which amended the *Canadian Human Rights Act* and the *Criminal Code* to include these terms, individuals have faced legal action for inadvertent or non-malicious misgendering. In *Oger v Whatcott (2019 BCHRT 58)*, for example, the British Columbia Human Rights Tribunal found a Christian activist guilty of discriminatory publication for distributing pamphlets misgendering a transgender political candidate. The tribunal determined that even absent the intent to harass, Whatcott's speech constituted discrimination, thereby curtailing expression of belief.

In Brazil, feminist activist Isabella Cêpa became the subject of criminal charges—facing up to 25 years in prison—after she publicly referred to a trans-identified politician, Erika Hilton, as male. Under a 2019 jurisprudential expansion by the Supreme Federal Court, the nation's 'Anti-Racism Law' was retroactively broadened to include transphobia as 'social racism,' with severe criminal penalties. Ultimately, Cêpa was granted political asylum by an anonymous European country. But her case highlights how codified protections based on gender identity and transgender status can be deployed not only to marginalise dissenting opinions but to criminalise them, even in a democracy.

Elsewhere, similar legal regimes have led to the criminalisation of speech affirming biological realities. In Norway, a woman was investigated under hate speech laws for tweeting that ‘men cannot be lesbians’—a biologically accurate statement now framed as potentially criminal under legislation protecting “gender identity.” In Scotland, feminist campaigner Marion Millar was charged (charges were later dropped) under the Communications Act 2003 for allegedly ‘transphobic tweets,’ sparking widespread concern over freedom of expression. In Denmark, psychotherapist and blogger Lotte Ingerslev is facing civil legal action for ‘misgendering’ a trans-identified individual, Nadia Jacobsen, in a blog post. Ingerslev’s article critiqued Jacobsen’s involvement in promoting gender-inclusive policies and referencing their online content. The legal claim alleges that Ingerslev’s use of masculine pronouns and reference to Jacobsen’s biological sex constituted harassment, defamation, and a breach of personal dignity.

The cases above concretely illustrate how legal protections based on a transgender or gender identity can transform ordinary statements of biological fact into legal liabilities—regardless of the intent. Prosecutions and the reporting of such cases result in a ‘chilling effect’ whereby individuals restrict their own speech, and police the speech of others.

Australia is not immune to this trajectory. The recent refusal by the federal government to permit debate on Senator Alex Antic’s bill, which sought to clarify biological definitions in law, reflects an increasingly restrictive and policed legislative environment. Despite the bill’s relevance to questions of women’s rights, public safety, and legal clarity, the Senate, dominated by the Labor government, declined to debate it, citing speculative and unsubstantiated claims of ‘harm.’ Such actions signal a growing institutional unwillingness to engage in open legal and policy debate on issues that directly affect sex-based rights.

## **Recommendations**

1. Reject any proposal to introduce ‘gender identity’ as the protected attribute overriding biological sex in the ADA. Sex must be retained as the only definitive and universal attribute.
2. Enshrine legal protection for freedom of belief and expression regarding sex and gender, including refusal to affirm gender identity.
3. Preserve female-only spaces in all public services and sport, and retain ‘sex’ as an exclusionary ‘special measure’ on the grounds of safety and safeguarding
4. Protect safeguarding protocols against ideological erosion by ensuring professionals can raise questions about medical or welfare implications of gender-affirming practices without fear of legal sanction.

## **CHAPTER 5 (pg 75) — Options for New Protected Attributes**

There is a legal asymmetry in NSW anti-discrimination law due to the absence of protections for political belief or activity, particularly in relation to speech and advocacy that challenge prevailing gender ideology. This gap leaves individuals vulnerable to discrimination for expressing views on biological reality.

There is an urgent need to balance competing rights, protect political beliefs, preserve democratic safeguards, and maintain legal clarity in anti-discrimination law. In summary:

- **Political belief/activity** should be added as a protected attribute in NSW to address a clear legislative gap.
- **The legal asymmetry** in current protections disadvantages those advocating for biologically based sex rights and child safeguarding.

- **The introduction of “sex characteristics”** is unnecessary, ideologically driven, and potentially legally incoherent.
- **Open-ended attribute lists** threaten rule of law principles and democratic process and should be rejected in favour of targeted legislative amendments.

Political belief and activity protections are urgently needed to safeguard the freedom to state the simple scientific facts of biological reality.

As acknowledged in 5.56–5.60 of the consultation paper, political belief or activity is recognised in other Australian jurisdictions, but not in NSW. The absence of this protection is significant given that the NSW ADA already protects “transgender grounds” while offering no corresponding safeguard for people who hold and express the political view or the ordinary understanding?— grounded in biological reality — that sex is immutable and that “man” and “woman” are defined by biology, not gender identity.

### Legal Imbalance

Under [4.106–4.115], transgender identity is comprehensively protected, even extending to people perceived to be transgender. Yet women, lesbians, and child safeguarding advocates can face serious consequences for lawful political activity, such as campaigning against gender self-identification policies or opposing medicalised “gender affirmation” for minors. This leaves one side of a contentious public policy debate fully shielded, while the other is exposed.

### Real-world consequences

As illustrated in cases like *Tickle v Giggle for Girls Pty Ltd (No 2) [2024] FCA 960*, women who seek to maintain female-only spaces or definitions are vulnerable to legal sanction. This and similar cases show the absence of political belief protection enables discrimination against those whose views conflict with prevailing gender ideology.

### Why this is political belief/activity

The positions described above are political under the ACT Tribunal’s definition ([5.59]) — they concern the role of the state in defining sex and protecting women’s rights, as well as state involvement in medical and educational policy affecting children.

### Other jurisdictions

As [5.56–5.57] recognises, most states and territories in Australia protect political belief or activity. NSW is now an outlier, despite the NSWLRC’s own 1999 recommendation in [5.58] that “political opinion” be included in the ADA.

Opposition to adding “sex characteristics” as a separate protected attribute (paras 5.87–5.93) While framed as a discrete protection for people with innate variations in sex development, the proposal in [5.87–5.93] risks importing ambiguous, ideologically loaded language into the ADA that would further erode clarity on sex-based rights.

### Federal law already provides protections

The *Sex Discrimination Act 1984 (Cth)* and the *Fair Work Act 2009 (Cth)* already include “intersex status” ([5.89]), using a clear, objective definition tied to physical, hormonal or genetic features. NSW residents therefore already have a legal pathway to pursue such claims without duplicating this

attribute in state law. The push to insert it into the ADA appears politically driven, not a response to any actual legislative gap.

### Ambiguity and ideological framing

The shift from “intersex status” to “sex characteristics” ([5.90]) is not value-neutral — it reflects terminology promoted by international advocacy groups seeking to collapse biological sex into a spectrum. This framing is now used in law and policy to justify removing sex-based rights and protections for women, under the guise of “inclusivity.”

### Comparator Test Problems

At [5.92], the paper concedes that because everyone has ‘sex characteristics,’ the comparator test under direct discrimination may fail. If the law is so ill-defined that it risks being legally unworkable on its own terms, it self-evidently should not be included.

### Existing overreach in the ADA

As noted earlier in [4.106–4.115], the ADA already contains strong, explicit protections for “transgender grounds” — protections not balanced by equivalent, explicit recognition of women’s rights to single-sex services or the right to state biological reality without penalty. Adding another attribute linked to contested sex/gender ideology further tips the scales against women, lesbians, and others advocating for sex-based protections.

### No demonstrated need in NSW

The consultation paper cites [5.87] “preliminary submissions” claiming discrimination against people with innate variations in sex characteristics but does not provide evidence that the ADA as currently drafted — alongside existing federal protections — has failed to provide redress. Legislative reform should be evidence-based, not ideologically motivated.

### An “open-ended” list of protected attributes (5.118–5.122 / page 88) is a bad idea

The proposal to move from a defined set of attributes to an open-ended list would fundamentally change the *ADA*’s nature and operation and original intent.

### It removes democratic safeguards

The current system — where Parliament must amend the ADA to add new attributes ([5.118]) — is not a flaw but a safeguard. It ensures that any change is subject to public consultation, parliamentary debate, and evidence-based justification. An open-ended list bypasses these democratic processes, allowing quasi-legislative expansion through tribunal or court decisions without community discussion, input or parliamentary scrutiny.

### It invites legal uncertainty

As noted in [5.122], other reviews have rejected this model due to uncertainty and complexity. If any other attribute can be protected, duty holders — including small businesses, schools, and community groups — will face unpredictable obligations. The scope could continually expand to cover subjective, highly politicised concepts, with no clear limits.

### It risks ideological enforcement

International law’s “other status” provision 5.121 has been used in some jurisdictions to protect categories that are ideological rather than immutable, such as “gender identity” interpretations that

conflict with biological reality, or lifestyle preferences unrelated to historic disadvantage. This trend shows how open-ended provisions can be weaponised to silence lawful belief, speech, and association.

#### No evidence NSW needs this

The consultation paper gives no concrete examples where urgent protection was needed but could not be delivered through ordinary parliamentary amendment. Where genuine gaps exist, they can be addressed through targeted, democratically enacted amendments — not a permanent blank cheque to expand the law in unpredictable ways

#### It undermines confidence in the law

For anti-discrimination law to work, people need to know what is covered and what is not. An open-ended list removes this clarity, eroding public trust

### **SECTION 6- Sport and Women’s Sex-Based Rights - paras 6.182–6.190**

While the ADA currently includes a sport-specific exemption (s 22I) to preserve female-only competitions, the consultation paper proposes expanding the Act to expressly list sport as a protected area of public life, either as part of “services” or as a distinct category. On its face this appears innocuous, but the proposal is presented without reaffirming or strengthening the existing sex-based exceptions.

This omission is not a minor drafting gap — it is a structural risk. Any expansion of coverage that does not simultaneously hardwire the right to exclude men and boys from female sporting categories will expose female sport to legal challenge under the protected attribute of “gender identity.”

Para 7.137–7.138: The transgender exception in s 38P is not “too broad” — it is the minimum safeguard needed to preserve female categories. Without it, women and girls would be compelled to compete against male-bodied athletes post-puberty, regardless of safety or fairness.

#### Examples from across Australia clearly demonstrate that the risk is not hypothetical:

- Hannah Mouncey: a transgender woman athlete, who represented Australia in both men's and women's handball teams, played women's football (VFLW), and has been at the centre of AFL and Handball Australia inclusion debates.
- Flying Bats FC: Sydney’s lesbian and queer women's football club, openly includes trans-identified males as part of its ethos of diversity and inclusion.
- Sasha Lowerson: a champion Australian male longboard surfer, who won a women’s division title after transitioning from M to F.

#### On sports governance

Football Australia, Netball Australia, Basketball: Each code has developed or is refining transgender inclusion policies, following guidance from anti-discrimination laws and consultation with trans athletes and experts.

Weakening these provisions is unacceptable. Repealing the transgender exception entirely, as in the ACT, NT, Tasmania, and SA, has caused confusion and controversy in those jurisdictions. This “no exception” model is incompatible with women’s right to single-sex sport. Narrowing the exception or imposing a “reasonable and proportionate” requirement creates a litigation trap. These vague legal

tests encourage complaints and force small clubs into costly defence of straightforward eligibility decisions.

Instead, ss 38 and 38P must be retained in full – as currently drafted.

### **Recommendations**

1. Protect administrators and sporting bodies from liability when applying eligibility rules grounded in evidence and safety. Affirm female-only categories in both elite/professional AND community / school sport as a matter of public policy and safeguarding.
2. Any attempt to repeal or weaken these exceptions would amount to state-mandated unfairness against women and girls in NSW sport — and would contradict the ADA’s original purpose of removing, not creating, disadvantage.

### **Legal clarity best preserved by keeping protections within sex discrimination**

The comparator test in s 24 is clear and enforceable when pregnancy and breastfeeding are understood as characteristics of the female sex. Removing them as separate attributes would weaken the link between biological sex and maternity rights, create ambiguity about who is entitled to pregnancy- and breastfeeding-related accommodations, increase the risk of litigation from individuals seeking to expand these terms beyond their biological meaning.

### **The dignity, privacy, and safety of women must remain paramount.**

Pregnancy and breastfeeding often occur in contexts involving medical care, bodily exposure and vulnerability. Ensuring that these protections remain tied to female sex discrimination is critical to safeguarding women’s rights to privacy, dignity, and same-sex care

### **Any amendments to the SDA must therefore include the following:**

1. The use of clear and common-use language in the SDA, wherever sex is a relevant component, including definitions of homosexuality and sexual orientation
2. Retain the discreet constituency of ‘woman’ to mean biological female, and the corresponding retention of the biologically-based comparator test, to ensure fairness.
3. The SDA should guarantee the rights of biological women to female-only spaces and service provisions.
4. The provision of urgent guidance on how any conflicts of rights (between females and trans-identified males, for example) may be resolved for service users and providers across NSW, whilst guaranteeing the rights of all service users and providers to such services.
5. The SDA should protect the rights of biological women and girls to sport at all levels by restricting eligibility for the female category to those born female, excluding all males however they identify.
6. The SDA must reflect that sex is always relevant in healthcare, and patients need to know that their health records are accurate and a reflection of their biological reality. Patients must know that when they are asked about their sex or request a career of the same sex, everyone is talking about biology, not identity.
7. Sex also matters whenever a crime is committed. Imprisoning trans-identifying men in women’s prisons is a breach of female inmates’ human rights. The rights of female inmates should never be overridden by claims of ‘discrimination’ by trans-identified males.

8. The SDA must allow for diversity of opinion and freedom of association. It is not for the NSW government to police the thoughts, speech and community groups of the citizens and residents of NSW. Social engineering through the manipulation of discrimination law will not lead to social harmony.

9. The legal absurdity of women having to seek 'special measures' to have female only spaces, services and experiences must end. Any amendment to the SDA must provide for and protect female-only services, spaces and experiences, without the risk of prosecution. Any and all guidance should be clear to this end.

Human Rights Collective