

Submission - Review of the Anti-Discrimination Act 1977 (NSW)

Due to time constraints, in this submission we focus primarily on the sex discrimination and gender-identity discrimination components of the ADA. The goal is to prevent discrimination resulting in substantive inequality for women and men, and for gender diverse people.

This is an extremely important area to get right, as poorly conceptualised/drafted legislation runs the risk of causing multiple problems for:

- Women
- Transgender people (both trans men and trans women)
- Social cohesion
- The government and courts

Major contributors to poor conceptualisation in this area internationally are rapidly changing language and ideas around gender, alongside a lack of clarity in which groups are being protected in law and why. One of the greatest errors has been to conflate or put in conflict the concepts of sex and gender identity. This has resulted in court cases reaching the Supreme Court in the UK, and contributed to the rise of right-wing populism in the USA. Australia is at present following these countries into making the same legislative errors that those countries are currently moving away from, which has caused harms to all involved. In addition, laws that create a conflict of rights are likely a significant contributor to surveys showing decreasing support for LGBTQI people, and for components of the law that have previously been considered trans rights goals.

The major difficulty in writing laws to cover sex and gender is that while sex in itself is a relatively clear cut category, 'gender' has been approached from numerous angles, has an array of meanings, and groups people and/or ungroups people in a wide range of (sometimes conflicting) ways.

The Australian Government's Guidelines on Sex and Gender explain the distinction as follows:

"sex refers to the chromosomal, gonadal and anatomical characteristics associated with biological sex", and

"gender is part of a person's personal and social identity" and "refers to the way a person feels, presents and is recognised within the community".

We will discuss each of these in turn.

What is sex and why should we protect women on the basis of sex in law?

As noted above, sex refers to the chromosomal, gonadal and anatomical characteristics associated with biological sex, and is long established in discrimination law. There are

sex differences in size, height, weight, muscle mass, strength. There are also reproductive system differences, with only females experiencing menstruation and menopause, pregnancy and associated issues such as access to contraception, abortion, breastfeeding etc.

Some of the discrimination acknowledged in the legislation relates to specific conditions only women can experience, such as pregnancy. Other aspects relate to discrimination against women that flows from these physical differences (e.g. the physical difference of pregnancy / higher pitched voices and smaller stature) leading to a stereotypical view (women should be prioritising motherhood not their careers, men are more commanding and authoritative) resulting in discrimination (we'll promote the man as his career is more important than the female applicant's / men are better at leadership positions).

The Federal and State governments recognise that violence against women (and girls) is a serious problem in Australia, with the worst incidents resulting in a disturbing rate of women killed by their male intimate partners or other men. The issues span sexual harassment, sexual abuse and sexual violence, as well as intimate partner violence. While anyone can experience sexual or physical violence, not only are women at increased risk of these forms of violence, but IPV often begins or is exacerbated during pregnancy, and the difficulty in working to earn a sufficient income to leave their partner is substantially harder while heavily pregnant, having recently given birth or while caring for infants, making them more dependent and vulnerable to homelessness if they leave.

Female bodies differ from male bodies in numerous ways, not only the reproductive system. As male bodies have traditionally been considered the norm, women's health is sometimes impaired as a result, for example heart attack symptoms differ across the sexes and women's heart attack symptoms were sometimes overlooked as they did not follow the male pattern. In the early stages of the Covid pandemic, female doctors were reported to be at greater risk of catching Covid-19 as the PPE was in male sizes.

Although there was a trend towards blurring the concept of sex in order to accommodate gender identity, this is not the right way to improve equality as it creates many unintended consequences, including creating errors in data collection and reporting (e.g. "75% of people get a pap smear regularly") and making it harder to ensure sex-based health issues such as cervical cancer and prostate cancer are addressed.

Sex is a biological concept, and is relevant to all people's lives including those with diverse gender identities and gender expressions. For example, the only people who would ever need to seek an abortion after sexual assault, or be discriminated against at work when they fall pregnant are female people, whether their gender identity is woman/trans man / non-binary or something else. Likewise, the only people who would

be discriminated against at work when they fall pregnant are female people, regardless of their race, sexual orientation, or disability status. It makes no sense to remove the attribute of sex from the ADA, or to conflate it with another attribute such as gender identity, race or disability status, as each capture different grounds of discrimination.

Sex therefore should be retained in the ADA and kept as a distinct, biological category based on chromosomal, gonadal and anatomical characteristics associated with biological sex.

What is gender?

Although gender is sometimes used as a polite word for sex, it is often distinguished from sex (including in the ADA consultation report) with sex a biological attribute and gender being related in various ways to social factors. We will outline several of the ways gender is conceptualised, and how that affects groupings of people and legislative protection.

Gender

Gender comprises the stereotypes associated with the male and female sexes. It is sometimes considered within a broad societal perspective, and sometimes looked at on an individual level.

The World Health Organisation states ““Gender refers to the characteristics of women, men, girls and boys that are socially constructed. This includes norms, behaviours and roles associated with being a woman, man, girl or boy, as well as relationships with each other. “

From pregnancy/birth, the expected social roles based on the child’s sex begin to be passed on to them, with baby girls more likely to be dressed in pink and adorned with headbands and bows before they even have hair. The norms of femininity begin via clothes and adornment, but continue through behavioural cues, with young boys encouraged into more active and exploratory play. Toy shops and clothes shops emphasise gendered norms. While the once rigid stereotypes of feminine behaviour expected of women and masculine behaviour expected of men have been partially broken down, with women often having short hair, opting out of makeup, and wearing trousers, it is made clear to young women that in the eyes of society their value lies in their appearance. In some ways it is harder now, with perspectives shaped by an online world with social media, filters, beauty influencers, only fans and porn too frequently accessed by children who have not even had their first kiss. For boys, the breakdown of stereotypes has not been as successful. Although there are certainly examples of very non-conforming gender expression such as model Christian Wilkins, Eurovision star Conchita, or singer Brian Molko, we have not reached the point where a male prime

minister or business person could wear a skirt suit to the office without raising eyebrows. It is easy to both find evidence of increased acceptance of diverse gender expression (masculinity and femininity), and to find evidence it still exerts a daily influence. The same parents who celebrate their toddler son’s love of princess costumes may nudge him towards spiderman as he gets older out of fear he may be bullied.

Gendered social norms and roles are not limited to appearance, and they have a significant impact on many aspects of women’s lives, for example with women in Australia still having an unfair load of domestic work, and facing greater risk of poverty and homelessness in old age. In general, gendered norms tend to function to keep women in a subordinated position, and men in a rigid role. Women who conform rigidly to gender stereotypes and expectations may experience some social approval (for beauty and selflessness) but find it comes at the cost of their health (e.g. risks associated with cosmetic surgery, eating disorders), their financial security (e.g. time spent in unpaid caring labour rather than paid work). As feminism has secured a wider range of accepted behaviour for women in Australia (though not all countries), they generally won’t be punished for masculine behaviours, but may face some discrimination eg in the same behaviours being considered ‘ assertive’ in a male employee but ‘bossy’ in a female. They are also likely to receive strong messages that they are failing to live up to beauty standards, however. Male gender conformity is rewarded to some extent in that it aligns them with the bulk of the most powerful and influential people. Male gender non-conformity is often punished socially via bullying or in some cases physical violence.

Negative gender stereotypes. While gender stereotypes in general can be harmful, there is also a specific subset of gender stereotypes that is hostile towards one sex or the other. For instance, stereotypes of women as being manipulative and untruthful, or pornified airheaded commodities, or more recently of men as being individually responsible for patriarchal oppression, male violence against women and all that is unjust in the world. A logical result of this may be a preference an alternative identity such as non-binary if a ‘woman’ identity is viewed as a symbol of objectification and a ‘man’ identity is viewed as a symbol of toxic patriarchal oppressor.

Our Watch defines stereotypes as “beliefs and assumptions about the characteristics that are considered innate or appropriate for women and men, girls and boys”

Table 1: Examples of gender norms / stereotypes

Gender Stereotypes – Feminine	Gender Stereotypes – Masculine
Appearance:	Appearance:
Clothing – any but may include pink, purple, frills, lace, <i>dresses, skirts</i> (varies	Clothing – absence of feminine items (instead trousers, shorts)

across cultures eg covering hair and 'modesty' vs sexualised dress)	
Adornment – makeup, jewellery	Absence of feminine adornments
Long hair more stereotypical	Short hair more stereotypical
Greater range of accepted styling options (short hair, trousers etc) Sexualised / objectifying imagery in advertising and pornography, judged against beauty standards	More limited range of styling options – gender non-conformity accepted to a point but would raise eyebrows if a male prime minister or premier wore a dress
Behaviours & characteristics	Behaviours & characteristics
Emotional	Logical
Nurturing	Protector
Gentle	Assertive
Responsible for bulk of housework, child care, elder care	Breadwinner
Work roles – social services, arts, language, caregiving	Work roles – trades, corporate, positions of power and seniority, science and technology
Sexually more submissive, judged if considered too sexually active or not sexually available enough	Sexually dominant, sexually active
	Toxic masculinity – seen as socially powerful, benefitting from and enabling patriarchal structures, male violence against women, degrading treatment of women, engage in stereotyping and demeaning women, aggressive

The Australian Human Rights Commission’s terminology page states that “Gender - refers to the way in which a person identifies or expresses their masculine or feminine characteristics.”

Given that gender refers to masculinity/femininity, or social norms and expectations placed on the sexes, it is important to ensure any inclusion of gender in the ADA does not enshrine stereotypes, or undermine protections for women for whom both gender conformity and gender non-conformity may come at different costs (e.g. a trad-wife may be highly gender conforming in appearance and behaviour, but is in a financially vulnerable position and dependent on her husband). There should not be an assumption that gender-conforming women have achieved ‘substantive equality’ compared to other groups of men or women.

What is gender identity, why could it be included and who does it aim to protect?

Examining the history of legislation, pre-legislation consultation documents, and court cases, it is clear that the inclusion of gender identity is often an attempt to create a

broad and inclusive attribute that covers the anti-discrimination needs of various people and from various perspectives.

One group that the legislation is aiming to protect is the group referred to in court cases as 'transsexuals'. There has traditionally been what might be considered a medical model: that there is a distinct group of people who have gender dysphoria, a strong sense of having been born 'in the wrong body', who undergo genital and chest surgery to align their body with their internal sense of how it should be, take cross-sex hormones for the same reason, and choose dress and personal styling in line with the norms for the opposite sex.

Gender Dysphoria It should be noted that while a preference for stereotypical dress or activities of the opposite sex are part of a DSM-5 diagnosis of gender dysphoria, gender non-conformity alone should not be sufficient for diagnosis, it should also include a strong desire to "be the opposite gender" (Diagnostic and Statistical Manual of the American Psychological Association). A gender dysphoria diagnosis should include differentiation from those with: gender non-conformity; transvestic disorder; body dysmorphia; and psychotic disorders. The DSM-5 notes the typical progression of gender dysphoria varies by age and sex. For example, the DSM-5 states that in males "adolescents and adults with late-onset gender dysphoria frequently engage in transvestic behavior with sexual excitement", but this is not typically seen in female or early-onset male cases of gender dysphoria. Male child-onset cases and females with gender dysphoria are typically sexually oriented towards people of their own natal sex, whereas late-onset males with gender dysphoria are typically sexually oriented towards females. Gender dysphoria is accompanied by significant distress, and can be associated with adverse social and emotional outcomes: "Gender dysphoria, along with atypical gender expression, is associated with high levels of stigmatization, discrimination, and victimization, leading to negative self-concept, increased rates of mental disorder comorbidity, school dropout, and economic marginalization, including unemployment, with attendant social and mental health risks, especially in individuals from resource-poor family backgrounds."

Historic legal approach to status of 'transsexuals'

Although there were a small number of high profile transsexuals, such as Australian performer Carlotta, in 2002 a UK court case by Goodwin raised the issue of having to present documentation with the sex of male, causing embarrassment and raising the possibility of discrimination. In addition, prior to marriage equality, same-sex marriage was unlawful, which prevented some transgender people from being able to marry their partners. It was also seen as unsatisfactory that a person might exist not fully considered male or female (this was prior to legal recognition of non-binary gender identities which have now become common), and the best solution was assumed to be to fit someone into a binary sex model, but allow exceptions for a small number of post-

operative trans people at least for government documentation purposes. However, this model is not widely accepted any more for a number of reasons, mainly to create a less onerous process for 'transsexuals' and to recognise a greater range of gender diverse people. Likewise, marriage equality is now available to all same-sex couples in Australia.

Is the medical model of transsexualism too limiting?

1 The surgery criteria – there are many reasons why an individual would choose not to undergo what is now referred to as gender affirming surgery. An Australian case was brought by two trans men who did not wish to undergo and painful surgery on their reproductive systems, and it was decided they should be allowed to change their gender markers. This was based on insistence that they would not be getting pregnant, indicating that although some of the requirements were being loosened, there was an expectation that they would not require female services. An international case was decided in the opposite direction for a trans woman who wanted to retain a sexually functioning penis. In addition, there can be waitlists and costs to undergo surgery. In addition, it is seen as a breach of human rights to require a person to sterilise themselves in order to obtain rights eg a change of gender marker. **As a result of these issues, the requirement for surgery or other medical treatments is no longer used to categorise someone as transgender or not.**

2 Gender dysphoria criteria – it is seen as gatekeeping and an onerous exercise to require a diagnosis. In addition, in reforming legislation internationally, it is frequently argued that not all trans people experience gender dysphoria and it should not be required. **Therefore the requirement for a gender dysphoria diagnosis is no longer used to categorise someone as transgender or not.**

3 Feminine/masculine dress and grooming – clearly it would be sexist to require anyone to wear feminine or masculine clothing, shoes or accessories. In addition, there is a broad degree of overlap in many of the clothes men and women wear, hair lengths etc. **Therefore the requirement for feminine/masculine dress and grooming is not used to categorise someone as transgender or not.**

4 'Passing' or appearing as the opposite sex – while international legislation has sometimes assumed that a trans person would be 'visually indistinguishable' from someone of their preferred gender, the Australian Human Rights Commission submission in the Giggle v Tickle appeal court case points out that many trans women (in this case) retain an appearance that may be seen as male, as many physical traits can not be altered even via surgery and hormone treatment. A requirement for a trans person to 'pass' would exclude a number of people from anti-discrimination protections. Furthermore, 'passing' would be an impractical criteria: who would determine whether each individual 'passed' or not. The process would also be likely to

increase distress among dysphoric individuals. **Therefore ‘passing’ or appearing as the opposite sex is not a criteria to be considered transgender.**

Criteria	Required to be considered trans?
Surgery / medical treatment	No
Diagnosis of gender dysphoria	No
Appear female (or male)	No
Feminine (or masc.) style clothes/grooming	No
Non masculine (or fem.) name or pronouns	Maybe
Claim to be trans	Yes

Difficulties arising from reclassifying sex based on trans identity

For the reasons above, there has been a move away from having any objective, external or measurable criteria for being classified as trans, and a move towards the concept of transness centred on identity. While this is beneficial for creating an open, inclusive category for people’s self-perception, it is a rather nebulous category to protect in law.

This is particularly the case if antidiscrimination law is used to reclassify natal males into the sex category of female/women. This would mean that the legal protections offered for the female sex were available to natal females who do not identify as trans or non-binary, and natal males who identify as female. The definition of ‘identify as’ can only mean ‘claims to be’ as there are no other criteria required. Therefore, literally any male person can claim access to any special measures, exemptions or legal protections of female people. Examples of where these have been an issue internationally include the convicted double rapist Isla Bryson who was placed in the female jail, female prisoners raped or impregnated in US prisons by their cellmates, convicted sex offenders making female spa-users uncomfortable due to a semi-erect penis in a women-only Korean-style nude spa. In NSW a convicted natal-male murderer recently applied to move to a female prison. Sportsgirls and women have reported feeling uncomfortable changing in front of ‘intact’ males in changing rooms at school and sports competitions. In sports, international bodies such as World Athletics and the International Olympic Committee are making moves to ensure there is a category that caters for females (as people compete with their bodies, not their identities) as there is evidence suggest a male-advantage is retained. Legislative debates include the ‘six word amendment’ that denoted whether a girl or woman who has been sexually assaulted should be allowed to request their medical practitioner should be of the female sex, vs anyone who identified as female (regardless of appearance, surgery, dress etc).

While the assumption is that the legislation simply applies to the group of people it is *intended* for, by removing all criteria, all males are eligible to claim a female identity and access to women's spaces and sports.

Conversely, natal females with trans or non-binary gender identities risk losing rights and protections based on their identities. In the UK Supreme Court case (*For Women Scotland vs the Scottish Government*), the Scottish government, in arguing to protect gender identity as over-riding biological sex, actually stated that trans men (who are capable of pregnancy unless medical interventions have prevented it) should lose all rights to pregnancy and maternity protections (even if they fall pregnant) "because they are men". Given that Australia recognises non-binary identities, this risk may extend to non-binary females who may be even more likely to become pregnant or face discrimination based on their female sex. In order to protect trans women (who can not become pregnant, but could be at risk of pregnancy discrimination if *perceived* as female and therefore capable of pregnancy), there is value in ensuring legislation protects not only those who *have* an attribute, but also those who are *perceived* as having the attribute. This is the case across multiple attributes, for example if an employer refused to hire an employee they *perceived* to be a gay man, the harm has been done regardless of whether the applicant was actually gay or not.

Other reasons for a move to gender identity

Aside from easing the burden for transgender individuals, and allowing a more inclusive definition of transness that is not contingent on medical, surgical, psychological, appearance or dress-based criteria, the gender identity model was adopted to protect a greater range of gender diversity.

The 2011 consultation report by the Australian Human Rights Commission prior to adding gender identity to the sex discrimination act shows some of the gender identities that could be covered in the definition provided by A Gender Agenda:

"Gender Identity: This refers to how an individual identifies in their own gender – for example as a man, woman, transgender, transsexual, intersex, genderqueer, non-binary." (Note, the consultation reported people with intersex conditions preferred intersex to be defined as a biological condition not a gender identity, and is therefore included in that form in the Sex Discrimination Act as a separate attribute).

A Gender Agenda aimed to ensure people are protected from discrimination on the basis of:

- being intersex
- being transsexual, transgender
- being gender fluid or gender queer (includes androgynous and cross-dressing)
- expressing a non-traditional gender (eg. a feminine man who is not trans)

- being perceived as any of the above (even if this is not an accurate perception)
- [and] to ensure that people are protected from discrimination without reference to:
- a binary construct of gender which only protects individuals who identify and present consistently as either male or female
- a binary construct of sex characteristics which fails to protect intersex individuals
- the legal sex currently recorded on a person's birth certificate (which some people are unable to change and some people do not wish to change).

This reflects (alongside intersex conditions) a broad range of situations where people may be discriminated against in gender-related ways.

Compare this also The Australian Human Rights Commission's terminology that "Gender - refers to the way in which a person identifies or expresses their masculine or feminine characteristics."

They attempted to capture the many ways that regardless of birth sex, an individual may have different internal sense of identifying with masculinity or femininity, they may express themselves in masculine or feminine ways, and they may be seen by others in ways that align or not to their own internal sense of self or gendered expression. People can vary on each of these constructs separately, for example a natal female non-binary person may express their gender in masculine/feminine or mixed ways, and may or not be seen by others as non-binary.

Difficulties in the 'gender identity' concept – what are we aiming to protect?

It is important to think about whether it is the label/identity that is to be protected, or the behaviour. Take for example a natal male who is wearing eyeliner and a silky purple top, or a dress. This person could fit into many identity categories: non-binary, man (who likes feminine clothes), man (who is a drag queen), trans woman, gender fluid, gender queer/ androgynous/ cross-dresser. The same gender expressions may be read multiple ways by an external person. Likewise, given that there are no objective criteria for how we assess and label different facets of our own our own identities, the same characteristics could be assigned different identity labels by different individuals.

Should gender non-conformity be protected across all identities, or only for some?

One alternative approach would be to include gender non-conformity as a protected attribute as a separate characteristic from sex (or indeed to take the Bostock ruling approach and include under the sex discrimination attribute clarify that sex discrimination occurs when people are discriminated against for not conforming with gender stereotypes). The benefits of this approach are that it is in keeping with A Gender Agenda's goal of protecting across the broad range of gender diversity, and that it

explicitly opposes rather than enshrines gender stereotypes in law, in keeping with CEDAW.

Difficulties in the ‘gender identity’ concept – logically flawed

The circular definition

Another problem with the concept of gender identity is it is unable to come up with logically sound definitions to categorise groups of people for treatment in law. For example, a typical gender identity categorisation goes something like this “A woman is anyone who identifies as a woman” or “a trans person is anyone who identifies as trans”. However, this is circular logic – if someone is identifying as for eg a woman, then a woman must be something definable. Compare this to a sexed definition, where a woman is defined by reproductive, chromosomal and anatomical features – there are clear criteria that include and exclude people from the group in question. Law generally requires clear groupings, for example to identify who falls within a protected characteristic, who is in the comparator group etc. This is lost if words don’t have (non-circular) definitions.

The stereotyping definition

Furthermore, if gender is (as defined by the World Health Organisation) the behaviours, norms and roles expected of men and women (which can largely be summarised as sex-based stereotypes), and one is defined as having a gender identity (internal sense of self) that aligns or differs from one’s sex, then people are being categorised into groups depending on whether or not they feel they align with the stereotypes of their sex (trans and non-binary = don’t align, cis = do align). From a feminist perspective, linking sex to stereotypes has always been seen as best avoided. CEDAW calls for a reduction in gender stereotypes as they are particularly harmful to women. Likewise the Victorian human rights commission refers to stereotypes in relation to sex discrimination, stating “Outdated gender stereotypes can lead to sexist attitudes and discriminatory behaviour”. Family and Domestic Violence groups such as Our Watch highlight the role of stereotypes in contributing to violence against women. Categorising people based on whether they feel their internal sense of self aligns with the stereotypes about their race or their disability would be equally harmful and it is hard to imagine it would ever be considered an appropriate step.

A rapidly changing landscape

Another consideration in creating legislation is the rapidly changing social landscape. Terminology around gender has changed multiple times over the last 10-20 years. Some transgender writers are beginning to criticise the concept of gender identity in describing the trans experience, and it too may fall by the wayside along with terms such as transexual, transvestite and cross-dresser. The concept of non-binary has

rapidly risen and expanded, and is sometimes considered as a transgender identity and sometimes not. A range of novel gender identity labels have been adopted, particularly by young people exploring how they perceive themselves. It is unclear which labels and concepts will last and which will fall out of fashion. WPATH suggests in the latest Standards of Care that 'Eunuch' is novel gender identity that could be socially and medically affirmed – time will tell whether this survives critical appraisal, or whether it is better classified elsewhere by the medical community. Legislative drafting needs to provide clarity and be likely to make sense and avoid unwanted consequences in 5 or 10 years.

Other Considerations - Promoting Social Cohesion

As noted in the consultation report, sex is a long-established attribute in discrimination legislation. Indeed, it may be one of the most permanent categories, for even in an utopic world where humans did not mistreat each other, where human bodies functionally differ (as in the case of sex) what they need to obtain substantive equality differs. Unfortunately, we also live in a world that is not a utopia, and across the globe women are affected by issues ranging from infanticide of female babies, to sex trafficking, forced marriage, female genital mutilation, sexual abuse and assault, sexualisation and objectification, unrealistic beauty standards that contribute to poor mental health and eating disorders, and family and domestic violence. The need for a clear category of protection against discrimination based on sex is evident.

Unfortunately, due to regressive and binary ideas about gender, there has been a tendency to closet transgender people and squish them into legal and social boxes based on a notion of 'sex attached to stereotypes', which then fails to meet their needs. Although this was an advance in that it afforded some social recognition and social position, it has been a clear failure in many ways. Firstly, it fails to recognise that transpeople, despite their dysphoria, still are affected by their (natal) sex and require health care and legal protections that account for their sex. There have been cases where recording trans men's gender/sex as male has resulted in severe adverse health outcomes, such as late detection of ovarian cancer, and late detection of a pregnancy resulting in miscarriage. There is a risk that trans men could be excluded from sex discrimination protections, not only pregnancy and breastfeeding, but also standard sex discrimination based on the AHRC's information that many trans people (especially non-medicalised) may still be perceived as their natal sex.

In addition, conflating sex and gender identity allows any and every man who chooses to do so to enter women's spaces (change rooms, prisons, rape support services) and sports purely based on his say so. This causes several problems. Firstly, it directly impacts on women's safety and privacy, as there will always be a proportion of men who will take advantage of such a large loophole, and even with regards to genuine trans women, many girls and women will feel uncomfortable being expected to share

changing rooms or rape support groups with people who appear male and have male genitalia. Regardless of the opinion of legislators, given the clearly obvious male advantage boys and men have, the current state of research, and consequent moves by international sports bodies, it becomes difficult to persuade people that female people require separate sports categories from males who identify as males, but not natal males who identify as females. Likewise opinion, even among those who are left-leaning and support trans equality, tends to shift when parents realise their daughters are sharing dorm rooms with people capable of impregnating them, or competing in sports against people who share all the male physical characteristics of the boys competing in the male category. Surveys in the UK for example have shown a steady decrease in support for trans women to be treated as women in sports and single sex spaces as awareness of these issues has reached the public consciousness. In the US there has likewise been documented decreases in support for LGBTQ over recent years, and surveys showed that the gender identity based approach implemented by the Democratic Party was among the factors that led to Trumps election win. Unfortunately by failing to take an approach that protected women's rights *alongside* transgender rights, the democrats handed the election to a party that has removed rights from many minority groups. The failure to recognise women's rights in implementing gender self-id was also part of Nicola Sturgeons downfall in Scotland, with great embarrassment caused on the eve of bringing in self-id when (intact male) double rapist Isla Bryson was placed in a women's jail and sturgeon refused to say whether the rapist was male or female.

This regressive approach of trying to address the needs of a complex range of gender diversity including transgender people, non-binary, gender queer and gender fluid people by shoving them in binary sex-boxes and keeping them closeted is no longer in keeping with a progressive approach that celebrates diversity and recognises the complexity of people's intersecting attributes. It is harmful to women's rights, the rights and acceptance of trans and gender diverse people, ignores non-binary and fluid gender identities that can't be cross-mapped onto sex, reduces social cohesion and pits women's rights and gay rights against trans rights, enshrines gender stereotypes into law, and has led to scandals, expensive court cases and election losses for Government's internationally.

A progressive approach would contain the following components:

- 1) A clear, biologically based sex attribute to ensure women are protected against discrimination**
- 2) No undermining of sex attribute rights through a gender identity attribute that allows males to access female rights thereby circumventing sex exemptions and special measures**

- 3) **Ensure pregnancy and breastfeeding are included as part of sex discrimination and are available to all females regardless of gender identity (eg inclusive of trans men and non-binary identifying females)**
- 4) **Consider whether there is a need to add protections on the grounds of perception** (as in UK legislation) if not already in place to protect someone perceived to be the opposite sex
- 5) Decide whether to limit gender protections to only trans people or expand across a greater range of gender diversity, decide whether to protect based on identity groups / identity claims, or to all people that might exhibit the characteristic on which people are discriminating (such as gender non-conforming dress). A broad and inclusive measure could be to include discrimination based on gender non-conformity either as a separate attribute or within sex. Alternatively either transgender people, or broader gender diverse categories could be included as a separate characteristic that does not undermine sex based exemptions and special measures. **The simplest, clearest and most inclusive approach would be to simply clarify that it is sex discrimination to discriminate against people for non-conformity to gender stereotypes – this would cover all people regardless of their sex, gender identity, and gender expression.**
- 6) **Be aware that for women, both gender conformity and gender non-conformity can be associated with reduced equality in different ways** (adhering to gender norms does not necessarily create gender privilege)
- 7) People with intersex conditions have lobbied for these to be included as a separate attribute, recognising that such a condition does not mean they do not have a sex of male or female, and that intersex is not a gender identity but a biological attribute. People with intersex conditions should be protected from discrimination. The ADA should ensure the wording does not make it illegal for example to discriminate between men and women – i.e. it should never be considered discrimination on the grounds of sex characteristics for women to have separate changing facilities that men are not welcome in, otherwise sex offenders will simply claim it is discrimination based on their male genitalia if they are not given access to women's changing facilities. Again, keep in mind that the protections written with intersex people in mind will apply to everyone unless the wording is clear.

Final note – other attributes

As a social researcher I have noticed that there appears to be a rise in the social acceptability of some forms of discrimination, including age discrimination (particularly against older people), and towards people with various political or philosophical beliefs, and religious groups (Christians, Muslims and Jewish people) across various groups of people even among those who would find other forms of discrimination abhorrent. The UK has added protected beliefs such as ethical veganism and gender

critical belief, and it is note-worthy that a Brazilian feminist was recently granted refugee status in Europe after facing a 25 year prison sentence for expressing views on sex and gender. A tolerant and cohesive society must recognise that diversity of viewpoints are not a liability but a strength, and ensure freedom of expression, belief and association. I have no specific recommendations for the ADA in this regard beyond noting these appear to be current issues for consideration.