

Submission to the Review of the Anti-Discrimination Act

Protected Attributes & Definitions

The terms 'sex' and 'gender' have been increasingly conflated and used interchangeably, including in some legislation, and this has created conceptual slippage. Further slippage occurs when 'gender' is conflated with 'gender identity'.

There needs to be consistent and clear definitions and use of terms relating to sex, gender identity, and sexual orientation to support a coherent legislative framework that can differentiate between when sex is an important characteristic (attribute) in law and policy and when 'gender identity' is an important characteristic (attribute). This is required to deliver on obligations under the Convention on the Elimination of All Forms of Discrimination Against Women - CEDAW (CEDAW is based on sex-based rights).

“Gender” and “Gender Identity”

The term 'Gender Identity' is employed in various ways and for various purposes legally and socially. The Anti-Discrimination Act's use serves a particular purpose and does not address the way that some people now identify with various gender-related identities including 'non-binary'.

The term 'gender identity' has more recently been employed to cover the personal relationship that some people have to the concept of gender (as per the Public Health Act's use) but this could equally be described as 'gender belief' – and be protected in a way that is akin to 'religious belief' or 'religious activity' or 'political belief or activity'.

The key features defining this broader conception of 'gender identity' (as per the Public Health Act's use) is that they are personal beliefs and activities that can be held regardless of the sex of the person holding them. Labelling this attribute as 'Gender Identity – beliefs and activities' rather than simply 'gender identity' would make clear that it is possible for people to not hold 'gender beliefs' at all, in a similar way that some people do not hold religious beliefs.

A defining point about this broader conception of the term gender identity is that it relates to how people see themselves, not to objective or observable measures that can be made by others. This is an important factor that must be considered in situations where there are competing rights claims arising from the protected attributes of 'sex' and 'gender identity'.

'Gender identity' or 'gender belief' as an attribute could serve to protect people from discrimination based on their beliefs and activities, whether they be gender conforming or gender non-conforming, but this would not override any particular situations where 'sex' at a protected attribute may qualify or preclude this.

For example, if sex is a determining factor, in an allowable special measure to employ a woman to work in a particular role (responding to the safety, privacy or equity outcomes of the disadvantaged group, in this case women), then 'gender identity' would not override 'sex'. Other

examples would involve single sex provision, for example prisons, accommodation, some healthcare or sport.

The Public Health Act's definition of 'gender identity' (copied in blue below) refers to 'gender' and 'sex' but neither is defined.

The definition also describes sex as being 'assigned to the person at birth', this is an example of where sex and gender are unhelpfully conflated. Biological sex is observed at birth (or before on ultrasound), it is only when the child is being dressed, spoken to, and treated differently on the basis of their sex that 'gender' can be considered as being 'assigned' by others.

- 1) *Gender identity*, of a person, is the person's internal and individual experience of gender, whether or not it corresponds with the sex assigned to the person at birth.
- (2) Without limiting subsection (1), the *gender identity*, of a person, includes—
 - (a) the person's personal sense of the body; and
 - (b) if freely chosen—modification of the person's bodily appearance or functions by medical, surgical or other means; and
 - (c) other expressions of the person's gender, including name, dress, speech and behaviour.

Sexuality/Sexual Orientation & Sex Characteristics

Substituting the word 'gender' for 'sex' in the definition of sexual orientation impacts negatively on a historically marginalised group to self-define as same-sex attracted. It is not clear there is a any need to protect people with respect to 'gender orientations.'

Intersex variations of sex characteristics are not 'gender identities' and should be a separately protected attribute specifically for people with differences or disorders of sexual development. The Yogyakarta definition of 'sex characteristics' fails to capture the specificity of the group of people who should be protected.

Other jurisdictions and notes

It is useful to consider other jurisdictions who are navigating tensions between protecting both 'sex' and 'gender identity' in legislative and policy frameworks.

- The US Supreme Court has acknowledged that biological 'sex' is a conceptual prerequisite, a referent, in order to define what 'homosexuality' or 'transgender' means in practice.¹ The decision protected transgender status (within the workplace) whilst not precluding women preserving sex-segregated realms.
- In the UK, the Government has not taken forward the proposal to redefine 'sex' as a matter of self-identification after consulting on the Gender Recognition Act (2004), stating "The Equality Act 2010 clearly protects transgender people from discrimination. The same act allows service providers to restrict access to single sex spaces on the basis of

¹ Bostock v Clayton County, No. 17-1618 (U.S. Jun 15, 2020)

biological sex if there is a clear justification".²

- In Scotland, the effect of conflating the protected characteristics of 'gender reassignment' and 'sex', through expanding the definition of woman from 'female of any age' to include transgender women, has been recently considered, and rejected on appeal as breaching equalities law.³
- The Yogyakarta Principles⁴ have not been adopted by the United Nations and are no more binding on laws made in Australia than the principles set out by other interest groups, including the Women's Declaration of Sex Based Rights⁵, made by Women's Declaration International.

R. Harrison. 03/2022.

² <https://www.gov.uk/government/speeches/response-to-gender-recognition-act-2004-consultation>

³ <https://www.judiciary.scot/home/sentences-judgments/judgments/2022/02/18/for-women-scotland-v-the-la-the-scottish-ministers>

⁴ <https://yogyakartaprinciples.org/>

⁵ <https://womensdeclaration.com/en/declaration-womens-sex-based-rights-full-text/>