

5 problems with narrowing the meaning of "sex" in the Sex Discrimination Act (SDA)



1. It changes the meaning for everyone

Changing the meaning of sex in the law so that it refers only to biological characteristics would only weaken protections for everyone the SDA was designed to protect.

Discrimination rarely occurs because of a person's anatomy, hormones or chromosomes alone. More often, it arises because of gendered assumptions, stereotypes or gender norms about how women and men should act, appear and behave.

The following are examples of conduct that courts have found to constitute sex discrimination, none of which were based on whether a person had certain chromosomes, hormones or anatomy:

- A school requiring girls to study home economics, and boys to study industrial arts.
- Requiring all partners in a law firm to work full time, even though women are more often carers for children.
- Telling a man that he can't wear an earring to work, whereas women can wear earrings in the same workplace.
- Exposing female workers to a workplace where there are misogynistic comments, sexist posters and graffiti.

In addition, narrowing the meaning of sex would place over forty years of established case law at risk by requiring courts to reinterpret the SDA using the new definition, with potential unclear consequences.

For trans people, the impact would be immediate and profound. Much of the discrimination they are currently protected from would become lawful overnight. They would also lose access to protections from sex discrimination where the discrimination is based on sexist assumptions and gendered stereotypes, rather than discrimination based on their gender identity.

2. It's hard to define, without leaving someone out

There is a good reason why "sex" in Australia law does not simply mean "biological sex": biology itself is far more complex than many people assume.

People do not all fit neatly into one of two biological categories. Around 1.7% of the population have innate variations in sex characteristics (also called "intersex"). A narrow biological definition of sex could arbitrarily place some people into a legal sex category that is inconsistent with how they have been raised and recognised. For example, a woman who has always been recognised as female but has XY chromosomes could be considered male under the law.

The law also recognises the reality that trans people exist, and that sex characteristics can change over time. Some trans people undertake hormone replacement therapy and other medical treatments that alter their physical sex characteristic and outward appearance (the basis on which discrimination generally occurs).

That is why Australia's highest court has consistently found that a person's legal sex is not necessarily fixed at birth and can change over the course of their life, consistent with the intention of parliaments and operation of governments over decades. Requiring trans men to be treated as legally female, or trans women as legally male, would ignore both legal reality and lived reality.

The consequences would be both impractical and harmful. For example, trans men who have undergone hormone therapy commonly develop masculine physical characteristics, including facial hair, a deeper voice and other male-typical features. Treating these men as legally female could force them into women's facilities where they do not belong, creating confusion and potentially difficult situations for everyone involved.

A rigid biological definition of sex would not simplify the law. It would create uncertainty, exclude people whose lives do not fit simplistic categories, and undermine protections that currently reflect the diversity and complexity of human experience.

3. We all deserve to feel safe

Women's concerns about safety are legitimate and should never be dismissed.

However, evidence consistently shows that violence against women is overwhelmingly perpetrated by men who are known to the victim. Attacks by strangers are also overwhelmingly carried out by men (not transgender women). There is no evidence that inclusive policies for trans people increase attacks on women.

In fact, all evidence points to trans people being most at risk in public spaces, experiencing disproportionately high rates of verbal abuse, physical assault and sexual violence.

Laws in Australia already protect public safety and address sexual offending, harassment or assault.

The question is whether an entire group of people should be excluded from public spaces despite a lack of evidence that they pose a risk. In a democratic society, laws must be based on evidence. We do not deny people equal participation in public life because of assumptions or fears about who they are, and trans people should be no exception.

4. It doesn't work in reality

A person's anatomy, hormone levels, or chromosomes cannot be determined by their appearance. As a result, there is no practical way to enforce single-sex spaces based on such characteristics.

Additionally, the more these issues are framed in public debates as requiring enforcement, the greater the risk of creating a culture of 'gender policing' in which women and men are judged on whether they conform to societal expectations of how they should look and behave.

This can have serious consequences, particularly for women who do not fit narrow or stereotypical notions of femininity. Women who are perceived as too masculine, too tall, too muscular, too hairy, too androgynous or otherwise outside conventional gender norms, may be subjected to scrutiny, exclusion, or humiliation simply because their appearance does not align with the expectations of others.

5. Trans people deserve dignity, like everyone else

Finally, there is a broader principle at play: the kind of society we want to live in. A decent and fair society is one in which every person is treated with dignity and respect and is free to live as themselves.

Yet trans people are increasingly being singled out in public debate and portrayed as less deserving of equal treatment. In some cases, they are subjected to rhetoric that questions their legitimacy, denies their existence or seeks to exclude them from public life altogether.

The way trans people are discussed in public discourse causes real harm to real people, particularly for trans young people who see these messages reflected in the media, politics and public institutions.

History shows that when society starts treating one minority group as a problem to be managed or excluded, the effects rarely stop there. A society that values fairness and inclusion should resist those impulses, not reinforce them.

