



Sexual orientation, gender identity and intersex status discrimination

What is sexual orientation, gender identity and intersex status discrimination?

Under the *Sex Discrimination Act 1984* (Cth) (**SDA**) it is unlawful to discriminate against a person on the basis of sexual orientation, gender identity and intersex status.

Most states and territories also have some form of protection against discrimination on the basis of sexual orientation and gender identity.

Sexual orientation discrimination occurs when a person is treated less favourably, or not given the same opportunities, as others in the same or similar situation, because that person has a sexual orientation towards:

- persons of the same sex; or
- persons of a different sex; or
- persons of the same sex and persons of a different sex.

Gender identity discrimination occurs when a person is treated less favourably, or not given the same opportunities, as others in the same or a similar situation, because of that person's gender-related identity, appearance, mannerisms or other gender-related characteristics.

Gender identity includes the way people express or present their gender and recognises that a person's gender identity may be an identity other than male or female. It does not matter what sex a person was assigned at birth or whether the person has undergone any medical intervention.

Intersex status discrimination occurs when a person is treated less favourably, or not given the same opportunities, as others in the same or a similar situation, because the person has physical, hormonal or genetic features that are:

- neither wholly female or wholly male; or
- a combination of female and male; or
- neither female or male.

Direct and indirect discrimination

Sexual orientation, gender identity and intersex status discrimination can be direct or indirect.

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Direct discrimination occurs when a person is treated less favourably than another person in the same or a similar situation because of the person's sexual orientation, gender identity or intersex status.

Indirect discrimination is focused on the impact of rules, practices or policies that are applied equally but which have a disproportionate impact on some people because of their sexual orientation, gender identity or intersex status. If the requirement is not reasonable in the particular circumstances, it could be indirect discrimination.

Examples of direct discrimination

Direct sexual orientation discrimination - Tom has recently joined a soccer team. Tom's boyfriend comes along to one of the team's games to cheer Tom on. After the game, the team's coach tells Tom that he doesn't want a gay person on the team because it might upset some of the other team members.

Direct gender identity discrimination - Sam identifies as female. Her teammates keep referring to her as 'him'. Sam has asked her teammates to address her appropriately but they have refused to do so.

Direct intersex status discrimination - Sally approaches a tennis coach to ask about getting tennis lessons. The tennis coach refuses to coach Sally because Sally's biological characteristics make the coach uncomfortable.

Examples of indirect discrimination

Indirect sexual orientation discrimination - a community swim centre has a policy of offering discounted entry fees to a member's husband or wife. This policy may disadvantage members with a same sex partner because of their sexual orientation (and/or relationship status). This may be indirect discrimination depending on whether the policy is reasonable.

Indirect gender identity discrimination - a sport club's dress code contains strict rules in respect of what men and women can wear at the club. This policy may disadvantage transgender individuals. This may be indirect discrimination depending on whether the policy is reasonable.

Indirect intersex status discrimination - a sport club's policies require members to record their gender as 'male' or 'female'. These policies may disadvantage people who have both male and female characteristics. This may be indirect discrimination depending on whether the policies are reasonable.

What is harassment based on sexual orientation, gender identity and intersex status?

Harassment based on sexual orientation, gender identity and intersex status is any unwelcome conduct, verbal or physical, that intimidates, vilifies, offends or humiliates another person and which happens because of the person's sexual orientation, gender identity or intersex status.

In determining whether a person has engaged in harassment towards another person it is irrelevant whether or not the first person is aware of the harassment, and whether or not the behaviour is intentional.

Behaviour need not be repeated or continuous to constitute harassment, a single incident or comment can amount to harassment.

Examples of behaviours that could amount to harassment include:

- a coach teasing a member of the opposing team because he/she is gay;
- a team manager imitating a person's gender-related mannerisms;
- a sports administrator telling a joke about a transgender person; and
- an athlete calling a player an offensive name or using unsuitable language because he/she has both male and female characteristics.

Vilification

Vilification based on a person's sexuality or gender identity is unlawful in several states and territories. Regardless of whether specific legislation exists this behaviour is harmful, destructive and undesirable, and therefore should not be accepted or tolerated.

Unlawful vilification is any act or form of behaviour that occurs publicly, as opposed to privately, which could incite hatred towards, serious contempt for, or serious ridicule of a person because of the person's sexuality or gender identity.

Examples of things that could be vilification include:

- a tennis club displaying a homophobic poster in a change room;
- a hockey coach making homophobic statements at a team meeting in an effort to encourage hatred and contempt for an opposing team member because of his/her sexual orientation; and
- an athletics association publishing a homophobic cartoon in its newsletter.

When is discrimination not unlawful?

Anti-discrimination laws set out certain limited circumstances in which it is not unlawful to discriminate against a person on the basis of their sexual orientation, gender identity or intersex status.

Exceptions in relation to sporting activity participation

Under the SDA, it is not unlawful to discriminate against a person on the ground of gender identity or intersex status by excluding persons from participation in any competitive sporting activity in which the strength, stamina or physique of competitors is relevant.

This exception does **not** apply in relation to the exclusion of persons from participation in:

- the coaching of persons engaged in any sporting activity;
- the umpiring or refereeing of any sporting activity;
- the administration of any sporting activity;
- any prescribed sporting activity; or
- sporting activities by children who have not yet attained the age of 12 years.

This exception also does **not** apply in relation to discrimination against a person on the ground of sexual orientation.

Special measures

Another exception to discrimination on the grounds of sexual orientation, gender identity and intersex status involves 'special measures'.

Special measures have the goal of fostering greater equality by assisting groups of people who face, or have faced, entrenched discrimination so they can have similar access to opportunities as others in the community.

In this context, special measures may be taken for the purpose of achieving substantive equality between:

- people who have different sexual orientations; or
- people who have different gender identities; or
- people who are of intersex status and people who are not.

What can I do if I experience discrimination or harassment because of my sexual orientation, gender identity or intersex status?

If you consider that you have experienced discrimination or harassment because of your sexual orientation, gender identity or intersex status there are several options available to you.

Your options include:

- seeking to deal with the situation yourself by raising your concerns directly with the person or people involved;
- discussing your concerns with a friend, family member or club/team member or official;
- contacting your Member Protection Information Officer (MPIO). If your club/association does not have an MPIO you may try contacting your state/territory sports association;
- contacting your state/territory department of sport and recreation to obtain further information and/or clarify the options available to you;
- lodging a complaint under an applicable member protection policy;
- contacting the equal opportunity/anti-discrimination commission in your state or territory to obtain further information and/or make a complaint; or
- contacting the Australian Human Rights Commission to obtain further information and/or make a complaint.

A person who makes a complaint, or intends to make a complaint about discrimination or harassment is protected from being victimised. Victimisation is unlawful under both state and federal laws.

Useful links and further information

Australian Human Rights Commission

www.humanrights.gov.au/employers

Victorian Equal Opportunity and Human Rights Commission

www.humanrightscommission.vic.gov.au

Anti-Discrimination Board of New South Wales

www.antidiscrimination.justice.nsw.gov.au

Anti-Discrimination Commission of Queensland

www.adcq.qld.gov.au

South Australia Equal Opportunity Commission

www.eoc.sa.gov.au

Equal Opportunity Commission Western Australia

www.eoc.wa.gov.au

Northern Territory Anti-Discrimination Commission

www.adc.nt.gov.au

ACT Human Rights Commission

<http://hrc.act.gov.au>

Office of the Anti-Discrimination Commission (Tasmania)

<http://equalopportunity.tas.gov.au>