



Victorian Equal Opportunity
& Human Rights Commission

gender identity
equal opportunity
sport
competition
affirmation
teams
transgender
positive
duty
inclusion
coaches
players
transition
clubs
participation

Guideline: Transgender people and sport

> Complying with the Equal Opportunity Act 2010



Victorian Equal Opportunity & Human Rights Commission

Published by the Victorian Equal Opportunity and Human Rights Commission,
Level 3, 204 Lygon Street, Carlton, Victoria 3053. January 2015.

Contact us

Enquiry Line	1300 292 153 or (03) 9032 3583
Fax	1300 891 858
Hearing impaired (TTY)	1300 289 621
Interpreters	1300 152 494
Email	enquiries@veohrc.vic.gov.au
Website	humanrightscommission.vic.gov.au

Guideline: Transgender people and sport – complying with the Equal Opportunity Act 2010

Copyright © State of Victoria 2015

This publication is copyright. No part of it may be reproduced by any process except with permission from the Victorian Equal Opportunity and Human Rights Commission (the Commission) or in accordance with the *Copyright Act 1968*.

On request the Commission may give permission for this material to be reproduced provided it is for a purpose consistent with the objectives of the *Equal Opportunity Act 2010* and the Commission is acknowledged as the source.

Contact communications@veohrc.vic.gov.au for permission to reproduce material from the publication.

Accessible formats

This document is available for downloading from our website at humanrightscommission.vic.gov.au/resources in PDF and RTF. Please contact the Commission if you require other accessible formats.

Acknowledgements

The Commission would like to thank everyone who gave generously of their time during consultations, interviews and research to develop this guideline.

Privacy

The Commission complies with Victorian privacy laws and the confidentiality provisions of the Equal Opportunity Act. Our privacy policy is available online at humanrightscommission.vic.gov.au/privacy or by contacting us.

Disclaimer

This information is intended as a guide only. It is not a substitute for legal advice. This guideline may be updated from time to time. For the latest version, check humanrightscommission.vic.gov.au/guidelines

Printed on Precision

ISBN – 978-0-9922762-0-1 (Print)

978-0-9922762-1-8 (Online)

Contents

About the guideline	3
Who is this guideline for?	3
Why do I need to follow this guideline?	3
Where can I find more advice or information?	4
Training and consultancy	4
Part A: Transgender people and sport – understanding the issues	5
1. Background	5
2. Myths and stereotypes	5
3. What terms should I know about?	6
Part B: Understanding the law	8
1. Discrimination	8
1.1 What is discrimination?	8
1.2 Gender identity – the Equal Opportunity Act	8
1.3 When do I have a legal obligation not to discriminate?	8
1.4 Are there any exceptions to the law?	11
1.5 Do I want or need to discriminate?	16
2. Sexual harassment	18
3. Victimisation	18
4. Obligations and liability	18
4.1 Who is liable and what are they liable for?	18
4.2 The positive duty – eliminating discrimination before it occurs	19
5. Federal anti-discrimination law	21
6. Drug testing and anti-doping laws	21

Part C: What do I need to do?	22
1. Review policies	23
1.1 Equal Opportunity policies	23
1.2 Collecting information	23
1.3 Use of facilities	24
1.4 Uniforms	24
2. Review practices	24
2.1 Respectful communication	24
2.2 Use of names and pronouns	25
2.3 Discussing a person's gender identity or transition/affirmation	25
2.4 Preventing discrimination against players or employees who are transitioning/affirming their gender	26
2.5 Dealing with spectator behaviours	27
3. Review staff and player knowledge and awareness	27
4. Establishing a complaints procedure	28
5. Responding to complaints and feedback and watching trends	28
6. Consult with affected groups or individuals	28
Appendix 1: Useful contacts and sources of information	29
Appendix 2: Decision-making guide	30

About the guideline

Under section 148 of the *Equal Opportunity Act 2010* (Vic), the Victorian Equal Opportunity and Human Rights Commission (the Commission) may issue practice guidelines on any matter relating to the Act.

This guideline, developed by the Commission, outlines obligations under the Equal Opportunity Act regarding discrimination against transgender people in sport. It provides practical guidance for sporting clubs and organisations about promoting an inclusive environment, being proactive in preventing discrimination and responding appropriately if it occurs.

In addition to outlining legal obligations, the guideline offers practical information about gender identity issues more broadly and provides support about how to approach issues that people might not be familiar with or find challenging.

While the Act applies to a number of attributes and areas of public life, this guideline focuses on discrimination on the basis of gender identity in sport. It also includes some information on discrimination in other areas of public life that can be relevant to sport such as employment, service delivery and club membership.

The guideline provides information on exceptions in the Act relating to participation in single-sex competitions, which may allow discrimination on the basis of sex or gender identity in some circumstances. This includes practical information on how to manage these exceptions, with a focus on facilitating participation of transgender people in all aspects of sport wherever possible.

Appendix 1 provides a list of organisations you can contact for more help.

Appendix 2 sets out an overview of the key questions to ask yourself when you are making decisions about transgender people and participation within your organisation.

While this guideline may be used in a formal

capacity by a court or tribunal, the Commission has sought to simplify the language of the law to make it as easy as possible for you to put it into practice.

As required under the Act, the Commission consulted widely to make sure this guideline is relevant and useful. Sporting clubs and bodies, and community and government organisations assisted the Commission by highlighting the issues and challenges in meeting legal obligations when it comes to discrimination against transgender people in sport.

Who is this guideline for?

This guideline is aimed at sporting organisations, clubs and staff. It can also help individuals and players to understand their rights.

Why do I need to follow this guideline?

There are a number of important reasons for using this guideline:

- it is against the law to discriminate against another person on the basis of their gender identity **in sport**, unless an exception applies
- there are exceptions in the Equal Opportunity Act relating to selection and participation in single-sex competitions which mean you can lawfully discriminate in some circumstances
- you need to carefully consider a number of factors before seeking to rely on these exceptions – otherwise you may be liable for discrimination. This guideline outlines those factors, including information about gender transition/affirmation, which may be relevant to determining whether an exception applies to your situation
- it is against the law to discriminate against another person on the basis of their gender identity **in club membership**. This may include membership of some sporting clubs

- sporting organisations and clubs may also have obligations **as employers** under the Equal Opportunity Act. This means you are acting unlawfully if you treat employees or job applicants unfavourably because they are transgender
- it is against the law to discriminate against another person **in the provision of goods and services** (including sport-related services such as coaching).

While this guideline is not legally binding, a court or tribunal may consider whether a person has complied with it when hearing a complaint of discrimination.

Where can I find more advice or information?

This guideline does not cover every situation you may encounter and sometimes you may need to seek specific advice.

For more information, contact the Commission or visit our website:

Enquiry Line 1300 292 153 or (03) 9032 3583
Email enquiries@veohrc.vic.gov.au
Website humanrightscommission.vic.gov.au

Training and consultancy

Our education, training and consultancy services conduct in-house and on-site training to help service providers, employers and sporting organisations understand their rights and responsibilities. This includes training on gender identity issues, including information on supporting players and employees in their clubs and workplaces who are transitioning to affirm their gender identity.

The Commission can also review policies and procedures for compliance with the Equal Opportunity Act.

These services are generally on a fee-for-service basis.

For more information or to register in a course, visit humanrightscommission.vic.gov.au/training or call (03) 9032 3415.

Other specialist organisations can help you with specific issues:

Transgender Victoria can provide you with information and advice on a range of issues and also provides training.

(03) 9020 4642
transgendervictoria.com

The **Zoe Belle Gender Centre** provides information and resources for anyone interested in the health and well-being of transgender, transsexual and other gender diverse people. This includes a useful 'question and answer' portal about transgender issues.

(03) 8398 4134
gendercentre.com

These organisations can also assist with referring you to other agencies, including medical clinics, if you require medical information about gender transition/affirmation.

You can find a full list of organisations that can assist you in Appendix 1 on page 29.

Part A: Transgender people and sport – understanding the issues

“The sport environment is linked to barriers transitioning and transitioned individuals encounter in everyday life ... The issue that arises is how to ensure the equality, human rights and dignity of transitioning and transitioned athletes ... in a domain where criteria for participation have always included clearly identifying athletes as physically male or physically female.”¹

1. Background

Sport is an important part of life for many people. It can help us to engage, pursue and develop our talents, and has significant health benefits. However, discrimination can affect some people’s enjoyment of sport and prevent them from participating.

Confusion about legal obligations and a lack of understanding about transgender people – both by those who are responsible for team selection and administration in sport and by other players – can lead to discrimination, bullying and exclusion.

While the *Equal Opportunity Act 2010* prohibits discrimination on the basis of gender identity, it also provides exceptions regarding competitive sporting activities and single-sex competitions including where strength, stamina or physique is relevant to participation. These protections and the exceptions are aimed at ensuring fairness by protecting players from discrimination while also ensuring individuals do not have an unfair competitive advantage. This guideline explains these exceptions and gives guidance on what they mean in practice (see Part B, sections 1.4 and 1.5).

The Victorian Equal Opportunity and Human Rights Commission’s consultations to develop this guideline revealed that some sporting organisations are unsure about their obligations regarding discrimination against transgender people and how to manage these legal exceptions.

¹ Brenda Wagman, *Including Transitioning and Transitioned Athletes in Sport: Issues, Facts and Perspectives* (2009) 6–7.

The Commission also heard that sporting organisations rely heavily on the International Olympic Committee (IOC) policy regarding sex affirmation in sports.² There have been significant legal and policy developments since this policy was issued.³ While the IOC policy offers some guidance in specific circumstances for elite level competitions, more nuanced guidance is needed to address the realities of people’s experiences and the needs of local club level sport.

This guideline attempts to address gaps in understanding and a lack of existing guidance for sporting organisations on the specific issue of participation of transgender people in sport. This includes information about the law, including exceptions – and offers practice and policy guidance to help you prevent discrimination and facilitate participation of transgender people.

2. Myths and stereotypes

Myths and stereotypes can lead some people to discriminate against transgender people. In sport, the dominant myth is that transgender people will gain or seek to gain a competitive advantage by participating as their affirmed gender.⁴

Some of the false assumptions that may lead to discrimination and exclusion of transgender people in sport include:

- that anyone exposed to testosterone at puberty will be a good athlete;

² Statement of the Stockholm consensus on sex reassignment in sports http://www.olympic.org/Documents/Reports/EN/en_report_905.pdf.

³ In particular, the focus on completion of sex affirmation surgery has become less relevant. Some transgender people may choose to avoid such surgery for a range of reasons including health choices, the cost, availability and desire for surgery.

⁴ ‘Affirming gender’ is sometimes used to describe what occurs when a person is transitioning to start living as what they identify as their true gender.

- that all males make better athletes than females;
- that males will change gender in order to reap rewards in women's sport.

These assumptions are false because:

- assumptions about the inherent characteristics of male and female bodies, including that males make better athletes than females, don't take into account the range of variations that exist in physique and capacity among males and females;
- transitioning/affirming gender is a deeply personal decision, which involves a person seeking to address a mismatch between their physical sex and gender identity. It is not something that is done on a whim. Gender Dysphoria is the medical term that is used to describe this mismatch, and transitioning/affirming gender is the process of addressing it (see the breakout box on p17). Transitioning/affirming gender is also a diverse process that can occur in a range of ways depending on the individual. Not all individuals taking steps to affirm their gender will feel 'dysphoric';
- many transgender people's physical characteristics will change as their bodies come to more closely match their gender identity as transitioning/affirming gender will often involve the use of hormones.

These are important facts to consider when attempting to facilitate the participation of transgender people in single-sex competitions where you think an exception in the Equal Opportunity Act may apply (see Part B section 1.5).

3. What terms should I know about?

The Commission acknowledges the complexities of language and identity in this area and recognises the terms we use are not applicable to everyone. We know that the term transgender encompasses a broad range of people whose gender identity is different from their sex as recorded at birth and that some people may not identify with this term. In particular, some people – particularly younger people – may prefer the term 'gender diverse'. We also know that some people prefer the term 'gender transition', while others prefer the term 'gender affirmation'. We acknowledge and respect an individual's right to identify and describe their gender identity as they choose.

This guideline focuses specifically on discrimination against transgender people under the Equal Opportunity Act. However, a broader understanding of terminology for groups of people who can face discrimination on the basis of their gender identity can also help you to meet your obligations.

This section provides some commonly used terms. It is not an exhaustive list and is intended as guidance only. There are some other terms that are declining in usage (such as 'MtF' and 'FtM'), while others are becoming more common.⁵ It is important to recognise that language used to describe gender identity is shifting over time and may also differ across cultures and generations.

It is best to ask transgender people what terms they prefer to use.

Sex

Sex refers to a person's physical sex characteristics. Traditionally this has been read as being either male or female, but courts are now recognising that 'sex' can have a broader meaning to specifically apply to people who are intersex, those who may be a combination, or on a spectrum, of being male and female or identify as being physically indeterminate.

Gender identity

While gender identity has a specific meaning under the Equal Opportunity Act (see Part B, section 1.2 of this guideline), more broadly the term refers to identifying as male or female as defined by social and cultural behaviours and assumptions about identity, roles and appearance.

Transgender

'Transgender' is an umbrella term that refers to a person whose gender identity is different to their physical sex as recorded at birth.

Transitioning refers to the process where a transgender person commences living as a member of another sex. This is sometimes referred to as the person 'affirming' their gender because transitioning means they start living in what they identify as their true gender.

For people who are transitioning/affirming their gender, having their identity fully recognised in all areas of life is a crucial part of the experience of living as their affirmed gender.

⁵ A 'MtF' transgender woman is a person whose sex is or was male who has a female gender identity. A 'FtM' transgender man is a person whose sex is or was female who has a male gender identity.

Individuals may transition/affirm their gender in different ways. You can read more about transitioning/affirming gender and what this involves in Part B, section 1.5.

Transsexual

Transsexual is a term that is sometimes used to describe a person who is taking steps or has taken steps to align their physical sex to their gender identity. Older people may be more likely to identify with the term 'transsexual' for historical reasons.⁶

Bi-gender/androgynous

A person who identifies as bi-gender or androgynous is someone who does not identify as exclusively male or female, regardless of their physical sex.

Cisgender

A person who identifies with their sex as recorded at birth.

Genderqueer

A person who does not identify or express themselves as exclusively male or female. Younger people may be more likely to identify with this term.

Gender expression

How a person presents themselves in behaviour and dress.

Gender diversity

Refers to a diverse range of different gender expressions and identities.

Intersex

Intersex refers to people who are born with physical, hormonal or genetic features that are (a) neither wholly female nor wholly male; or (b) a combination of female and male; or (c) neither female nor male.

'Intersex' is a separate protected attribute under the *Sex Discrimination Act 1984* (Cth), but not under state law.

Indeterminate sex

The term 'indeterminate sex' is used in the Equal Opportunity Act to describe a person with indeterminate sex characteristics. This is used in context of the gender identity protected attribute.

⁶ The term 'transsexual' began to be used from the 1950s. 'Transsexualism' was formally recognised in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* in 1980.

The 'gender identity' attribute protects people of indeterminate sex who identify as a member of a particular sex.

Sexual orientation

Sexual orientation refers to sexual and emotional attraction to people of a particular sex or sexes. The Equal Opportunity Act also makes it unlawful to discriminate against someone on the basis of their sexual orientation.

It is important to recognise that sexual orientation is different to a person's sex or gender identity. Some transgender people may encounter difficulties or experience discrimination because of myths and misconceptions about the correlation between their gender identity and their sexual orientation.

Note on the use of medical terminology

The Commission acknowledges that this guideline considers the medical aspects of gender transition/affirmation and that some people may not be comfortable with this. The reason we have included this information is because, to date, there has been confusion about when the exceptions in the Equal Opportunity Act regarding single-sex competitions may apply to transgender people who are transitioning/affirming their gender or have transitioned/affirmed their gender. Medical aspects of gender transition/affirmation may be relevant for organisations considering whether they can or should apply an exception, and the ability for organisations to seek further information about this may facilitate participation of transgender people in situations where they might otherwise be excluded.

For the purposes of the Equal Opportunity Act, it is important to remember that seeking medical intervention is only one aspect of gender identity and gender transition/affirmation, and simply living or seeking to live as a member of the other sex is sufficient to be protected from discrimination on the basis of gender identity.

Part B: Understanding the law

1. Discrimination

This part of the guideline will step through key obligations under the Equal Opportunity Act that are relevant to transgender people in sport. It will then give an overview of relevant exceptions under the law. These duties and exceptions are summarised in the table that follows section 1.3.

This section will help you to answer some key questions when you're making a decision in this area, such as:

- How I can facilitate the person's participation in the sport?
- Do I have a legal obligation not to discriminate?
- Is there an exception in the law that allows discrimination?
- Do I want to or need to discriminate?
- What can I do to manage and implement my decision?

1.1 What is discrimination?

Discrimination is treating someone unfavourably on the basis of a protected attribute (personal characteristic) under the Equal Opportunity Act including gender identity and sex. In determining whether a person has discriminated against someone else, the person's motive is irrelevant.

Direct discrimination is when you treat, or propose to treat, a person with a protected attribute unfavourably because of that attribute.

Indirect discrimination is when you impose, or propose to impose, an unreasonable requirement, condition or practice – which may appear to treat people equally – that has or is likely to have the effect of disadvantaging a person with a protected attribute.

1.2 Gender identity – the Equal Opportunity Act

While we acknowledge the range of terminology that may apply, the Act prohibits discrimination on the basis of 'gender identity', which refers to a person of one sex identifying as a member of another sex on a genuine basis. This may be by assuming characteristics of the other sex (through style of dressing, medical intervention or otherwise) or because the person is living or seeks to live as a member of another sex.

The term gender identity also refers to a person of indeterminate sex identifying as a member of a particular sex.⁷

It is against the law to discriminate against someone on the basis of their gender identity in sport and other areas of public life covered by the Act unless an exception applies (see section 1.4).

1.3 When do I have a legal obligation not to discriminate?

Discrimination is unlawful if it occurs in an area of public life that is covered by the Act, including sport, employment, club membership and service delivery.

Discrimination is unlawful unless an exception applies (see section 1.4).

⁷ While this guideline does not address discrimination against intersex individuals, we note that Victoria's Equal Opportunity Act does not provide discrete protections for people who are intersex. Rather, the 'gender identity' attribute protects people of 'indeterminate sex' from discrimination if they also identify as a member of a particular sex on a genuine basis. Discrete protections for intersex people exist at the federal level under the *Sex Discrimination Act 1984* (Cth).

Table: Quick Overview – What does the Equal Opportunity Act say about discrimination?

Is your activity covered by the Act?	What does the law say about sex and gender identity?	Does an exception apply?
Sport		
Single-sex competitions	<p>S 71: It is against the law to discriminate against someone on the basis of their sex or gender identity by:</p> <ol style="list-style-type: none"> 1. excluding them from a single-sex competition; or 2. excluding them from a sporting activity (such as coaching, umpiring, refereeing or administration). 	<p>S 72(1): You can lawfully discriminate against a person on the basis of their sex or gender identity if strength, stamina or physique is relevant.</p> <p>S 72(1A)-(1B): You can lawfully discriminate against a person on the basis of their sex if running a single-sex competition is necessary to progress to an elite level competition or is intended to facilitate the participation of people of a particular sex in your sport.</p> <p><i>Notes:</i></p> <p><i>Even though an exception may allow you to discriminate, the law does not require you to apply it. Think about how you can encourage the participation of transgender people in your sport.</i></p> <p><i>You may also need an exemption from the Commonwealth Sex Discrimination Act.</i></p>
Club membership (see the definition of “club” for the purposes of the Act at Part B section 1.3.2)		
Mixed clubs	S 64 and 65: It is against the law to discriminate against club members or applicants for club membership on the basis of their sex or gender identity unless an exception applies.	S 69: In some circumstances, you can lawfully discriminate against a person on the basis of their sex by limiting access to a club benefit (such as facilities) to one sex at particular times.
Single-sex clubs	S 64 and 65: In general, it is against the law to discriminate against club members or applicants for club membership on the basis of their sex or gender identity unless an exception applies.	S 68: You can lawfully discriminate against a person on the basis of their sex by limiting membership of a club to a particular sex.
Employment		
Recruitment	S 16: It is against the law to discriminate against job applicants on the basis of their sex or gender identity unless an exception applies.	<p>S 26: You can lawfully discriminate against a job applicant on the basis of their sex if it is a genuine occupational requirement for a person to be a particular sex, including:</p> <ol style="list-style-type: none"> 1. where the employee will be required to enter a toilet ordinarily used by people of that sex while it is in use by people of that sex (such as a cleaner); or 2. where the employee will be required to enter areas ordinarily used only by people of that sex while those people are undressed (such as a coach entering a change room).
Employment	S 18: It is against the law to discriminate against employees on the basis of their sex or gender identity unless an exception applies.	No. You cannot discriminate against an employee on the basis of their sex or gender identity by denying them access to promotions, training or other employment benefits, by dismissing them, or by subjecting them to any other detriment.
Services		
Including coaching, social activities and amenities	S 44: It is against the law to discriminate against a person in the provision of services on the basis of their sex or gender identity.	No. You cannot discriminate against a person on the basis of their sex or gender identity by refusing to provide them with services, in the terms on which services are provided or by subjecting them to any other detriment.

1.3.1 Discrimination in sport

Under the Act, it is against the law to discriminate against another person on the basis of gender identity:

- by refusing or failing to select them in a sporting team
- by excluding them from participating in a sporting activity.

'Participating in a sporting activity' is broadly defined to include the activities of people who are not 'playing' the particular sport – for example, coaching, umpiring or refereeing, or participating in the administration of a sporting activity.

The terms 'sport' and 'sporting activities' have been interpreted broadly by the Victorian Civil and Administrative Tribunal in cases before it.⁸ Such activities may include games where physical athleticism is not a factor – such as chess or debating.

Although the sport provisions only apply in limited circumstances, discrimination on the basis of sex and gender identity is prohibited in a number of related areas (such as employment, club membership and the provision of services).

1.3.2 Discrimination in club membership

It is against the law for a club or a member of the governing body of a club to discriminate against applicants for club membership (for example, by refusing to accept a person's application for membership) or to discriminate against existing members of a club (for example, by limiting a person's access to any benefit provided by the club) on the basis of gender identity. Failing to prevent harassment of a transgender person at a club may also be discrimination by subjecting the person to a detriment in club membership.

Discrimination in clubs is only prohibited for sporting clubs and organisations that meet the definition of a 'club' under the Act.

For a 'club' to be covered by the Act it must:

- have 30 or more members;
- have members associated together for social, literary, cultural, political, sporting, athletic or other lawful purposes;
- have a licence to supply liquor; and
- operate its facilities wholly or partly from its own funds.

Discrimination against applicants for club membership

It is against the law to discriminate against applicants for club membership:

- in determining the terms of a particular category or type of membership of the club
- in the arrangements made for deciding who should be offered membership
- by refusing or failing to accept the person's application for membership
- in the way in which the person's application is processed
- in the terms on which the person is admitted as a member.

Discrimination against club members

It is also against the law to discriminate against club members on the basis of gender identity by:

- refusing or failing to accept the member's application for a different category or type of membership
- denying or limiting access to any benefit provided by the club
- varying the terms of membership
- depriving the member of membership
- subjecting the member to any other detriment.

The Equal Opportunity Act provides an exception allowing organisations to discriminate against people of a particular sex by establishing and running single-sex clubs. However, this exception operates in a different way to the sport exceptions about selection and participation in single-sex competitive sporting activities. These exceptions are discussed in detail in Part B section 1.4.2

Note: Although not all sporting clubs will meet the definition of a 'club' and attract responsibilities under this part of the Equal Opportunity Act, they may be conducting activities in other areas such as sport, employment, and the provision of goods and services.

⁸ See *Robert v Australian Ice Hockey Federation* [1998] VADT 112.

1.3.3 Discrimination in employment

It is against the law to discriminate against job applicants and employees on the basis of gender identity. In employment this includes:

- denying training, promotion, or other employment benefits
- not hiring someone or dismissing someone from work
- subjecting an employee to any other detriment.

For transgender people in employment, discrimination can include not being recognised as their affirmed gender, being forced to disclose private information and missing out on employment opportunities.⁹

You can read more about discrimination against transgender people in employment in the Commission's guideline: *Transgender people at work: Complying with the Equal Opportunity Act 2010 in employment* on the Commission's website at humanrightscommission.vic.gov.au/guidelines.

1.3.4 Discrimination in the provision of goods and services

It is against the law to discriminate against another person on the basis of gender identity by:

- refusing to provide goods or services to them
- discriminating in the terms on which goods or services are provided to them
- subjecting them to any other detriment in connection with the provision of goods or services.

These service delivery obligations are relevant to sport-related services and facilities such as coaching, social activities and providing amenities.

1.4 Are there any exceptions to the law?

Yes. Some actions will not be unlawful if:

- they constitute a *special measure* to promote equality for a group of people who have one or more protected characteristics under the Act¹⁰
- an *exception* in the Act applies

⁹ Australian Human Rights Commission, *Addressing sexual orientation and/or gender identity discrimination – consultation report* (2011) 10.

¹⁰ You can find out more about special measures by visiting <http://www.humanrightscommission.vic.gov.au/specialmeasures>

- you have been granted an *exemption* from the law for a set period of time. An exemption must be specifically applied for at the Victorian Civil and Administrative Tribunal.¹¹

These exceptions *allow* discrimination by saying that it will not be unlawful if you do something that falls within their scope. They do not *require* you to discriminate and exclude people. In this area, organisations have a choice about whether they discriminate or not.

1.4.1 Special measures

The Equal Opportunity Act says that a person may take a special measure for the purpose of promoting or realising substantive equality for members of group with a particular attribute protected by the Act.

Taking steps to encourage participation of transgender people in sport may constitute a special measure under the Act. Special measures are not unlawful discrimination. If you want to take a special measure, you need to determine whether the action you take is aimed at achieving substantive equality for transgender people. You need to ask yourself whether the measure is necessary, genuine and justifiable given the needs of the group who will benefit. The essential characteristics of a special measure include that the measure is:

- undertaken in good faith to help promote or achieve substantive equality for members of the group
- reasonably likely to achieve this purpose
- a proportionate means of achieving this purpose
- justified because the members of the group have a particular need for advancement or assistance.

Example of special measures in sport

A local council has evidence of the underrepresentation of transgender people in sport. It works with a tennis club during the Midsumma festival to have special training opportunities and a friendly competition with priority places for transgender people to promote participation in the sport and opportunities for physical activity and social interaction.

¹¹ You can find out more about exemptions by visiting <http://www.humanrightscommission.vic.gov.au/index.php/exceptions-exemptions-and-special-measures/exemptions>

1.4.2 Detail of relevant exceptions

If you seek to rely on an exception as a reason for lawfully discriminating against someone, you need to be prepared to explain why the exception applies in your circumstances if someone makes a complaint against you.

This section considers the exceptions that may be relevant to the participation of transgender people in sport, including:

- the exceptions for single-sex competitive sporting activities:
 - strength, stamina or physique
 - progression to elite level competition
 - facilitating participation
- sex discrimination in employment where there are genuine occupational requirements
- single-sex clubs.

These are addressed in detail below.

a. Exception - single-sex competitions

There are exceptions in the Act relating to single-sex competitions which mean you can lawfully exclude people of a particular sex or gender identity in some circumstances.

It is important to remember that the exceptions that follow in this section only apply to *single-sex competitions*. Even if you can lawfully exclude a transgender person from participating in a single-sex competition, it is still unlawful to discriminate against that person in most other areas related to sport – such as employment opportunities, appointment as a coach or umpire, or the use of toilets, change rooms and other facilities.

There are three exceptions in the Act which allow sporting clubs to run single-sex competitions in particular circumstances:

1. Discrimination on the basis of sex or gender identity is allowed where the strength, stamina or physique of players is relevant¹²
2. Discrimination on the basis of sex is allowed if participating in a single-sex competition is necessary to progress to an elite level competition¹³
3. Discrimination on the basis of sex is allowed if running a single-sex competition will facilitate the participation of people of a particular sex in your sport, and this is a reasonable approach.¹⁴

12 *Equal Opportunity Act 2010* (Vic) s 72 (1)

13 *Equal Opportunity Act 2010* (Vic) s 72 (1A) (a)

14 *Equal Opportunity Act 2010* (Vic) s 72 (1B)

What does 'sex' mean for the purposes of the exceptions?

A person who is transgender may be subject to discrimination both because of their gender identity (defined under the Act as identifying as another sex) and because of their sex (their physical sex). The Equal Opportunity Act provides no guidance on when a person is recognised as a particular 'sex' for the purposes of the single-sex exceptions. This can make it challenging for sporting organisations to manage the participation of transgender people in sport and whether an exception may apply in the circumstances.

In Victoria, a person needs to have had sex affirmation surgery to have the sex on their birth certificate changed.¹⁵ If a person has had sex affirmation surgery, then you must let the person participate in the relevant single-sex competition or club as appropriate to their sex. While there is still an exception for gender identity discrimination for single-sex competitions, this no longer applies. If a person has legally changed their sex, then they are no longer of 'one sex' identifying as a member of the 'other sex'.

This is a complex area, so consider an example: A person who was identified as a male and had this recorded at birth on their birth certificate later affirms their sex as a woman and legally changes their sex. Legally, this person is now a woman, not a person of the male sex identifying as a woman.

Recent developments in other jurisdictions also indicate that it may not be necessary for a transgender person to have had sex affirmation surgery to be recognised as another sex and participate in a single-sex competition or become a member of a single-sex club. There is little case law giving guidance on this issue in Victoria. However, in other areas of law and jurisdictions, broader interpretations of the term 'sex' have determined that sex affirmation surgery has not been necessary for a person to be recognised as another sex.¹⁶

In most cases, other aspects of gender transition/affirmation, in particular the use of hormones and their impact on a person's physical ability – not whether a person has had sex affirmation surgery – will be more relevant to participation in sport.

Given this is a developing area of law, decisions at the Victorian Civil and Administrative Tribunal about these matters may depend on:

- a) the specific provisions of the Equal Opportunity Act under consideration. For example, the Tribunal may approach the issue differently if considering entry to a single-sex club compared to the exception about strength, stamina or physique
- b) the evidence available in an individual case, for example, about the impact of hormone therapy.

15 *Births, Deaths and Marriages Registration Act 1996* s 30A. The term 'sex affirmation' surgery is used in this guideline in accordance with this Act. The Commission recognises that some may prefer the term 'gender affirmation surgery'.

16 In *AB v Western Australia* 244 CLR 390 the High Court found that it was not necessary for the Western Australian Gender Reassignment Board to have a detailed knowledge of a person's bodily state before issuing a Gender Recognition Certificate and that a certificate could be issued without a person having undergone final surgical intervention. The decision also emphasised the importance of social recognition and other factors.

i. Exception - strength, stamina or physique

Sporting clubs may run single-sex competitions where the strength, stamina or physique of the competitors is relevant to the outcome (for example, a male swimmer may have a competitive advantage competing in an exclusively female swimming race). This exception means you may be able to exclude transgender people from single-sex competitions in some circumstances.

This exception only applies to competitive sporting activities. It does not apply to coaching, umpiring, refereeing, administration or non-competitive sport.

Case examples – the meaning of strength, stamina or physique

In *McQueen v Callisthenics Victoria Inc*,¹⁷ the Victorian Civil and Administrative Tribunal held that it was lawful to exclude Mr McQueen, a 33-year old man, from callisthenics competitions which were open to women over 14 years of age. The Tribunal held that there were differences between the sexes in strength, stamina or physique which affected participation in this sport. The Tribunal member said:

Callisthenics has been developed as a sport participated in by women only, above the age of 14 years. In its execution, competitive callisthenics requires skill, endurance, strength and coordination. It requires a high degree of physical dexterity. It is designed entirely around the female form. The introduction of males into the sport would be such as to materially change the way the sport is conducted and thus have a significant effect upon the roles of those who participate in it.

In considering the question of the relevance of strength, stamina or physique, the Tribunal has held that the question of relevance is determined by considering whether 'if both sexes were to compete against each other, the competition would be uneven because of the disparity between the strength, stamina or physique of men and women competitors'.¹⁸

By contrast to the above callisthenics example, lawn bowls has been found to be a sport in which strength, stamina or physique is not relevant in this sense.¹⁹

While this case is helpful in providing some guiding principles arising from decisions at the Victorian Civil and Administrative Tribunal, making a determination about the relevance of strength, stamina or physique will depend on your particular situation and sport. You should consider seeking legal advice or assistance from one of the organisations listed in Appendix 1 if you are proposing to exclude a transgender player on this basis.

It is helpful to remember that the purpose of this exception is to ensure players do not have an unfair competitive advantage in single-sex competitions. If you are considering whether to apply this exception, ask yourself:

- What are the key aspects of your sport that make strength, stamina or physique relevant?
- What are the relevant differences between the sexes in strength, stamina or physique? Will differences in size and strength give players of one sex a competitive advantage?

Even if you've established that the strength, stamina and physique of players is relevant to your sport, you may also want to consider whether it's necessary to apply the exception in this case. Consider:

- If a transgender person is seeking to participate, would having them involved in the competition lead to an unfair advantage? In what way?
- Does the person's individual circumstances, skill level, experience and ability indicate that the person will not have a competitive advantage in the relevant game?

You may decide you need further information about a person's gender transition/affirmation to determine this. See Part B, section 1.5 for more information.

ii. Exception – progressing to an elite level competition

Sex discrimination may be permitted if participating in a single-sex competition is necessary to progress to a national or international elite level competition. You will need to check the rules of the elite level competition.

The Equal Opportunity Act does not give guidance on when a transgender person is considered to be a particular sex for the purposes of the exceptions. If you are running a single-sex competition that feeds directly into a national or international elite

17 *McQueen v Callisthenics Victoria Inc* [2010] VCAT 1736.

18 *South v Royal Victorian Bowls Association* [2001] VCAT 207, [35].

19 See, for example, *Royal Victorian Bowls Association Inc* [2008] VCAT 2415. In later cases involving lawn bowling, exemptions were granted under the 1995 Equal Opportunity Act's equivalent to section 89

of the *Equal Opportunity Act 2010* (Vic), on the basis that certain events were part of what was described as the elite pathway leading to national and international championships.

level competition, you may need more information from individuals to determine whether they can participate (see section 1.5).

This exception only applies to competitive sporting activities. It does not apply to coaching, umpiring, refereeing, administration or non-competitive sport.

You may also need an exemption from the Commonwealth Sex Discrimination Act to run a single-sex competition on this basis. See (iii), below, for further information.

iii. Exception – facilitating participation

Discrimination on the basis of sex is also allowed if holding a single-sex competition will facilitate the participation of people of a particular sex in the sport, and this is a reasonable approach.

The intention of this exception is to encourage participation in sport by people of a particular sex in circumstances where participation has been a problem.²⁰ For example, running a women's AFL competition to encourage the participation of women in football.

When looking at whether running a single-sex competition is reasonable, you should consider:

- the nature and purpose of the activity
- the consequences of the exclusion or restriction for people of the excluded or restricted sex
- whether there are other opportunities for people to participate in the activity.

You may also need an exemption from the Commonwealth Sex Discrimination Act to run a single-sex competition on this basis.

This exception only applies to competitive sporting activities. It does not apply to coaching, umpiring, refereeing, administration or non-competitive sport.

Competitions for children under 12

These exceptions do not apply to sporting activities for children under the age of 12 years.²¹ If you are running a competition for people under 12, you need to allow children to play together unless the activity is a special measure or you have an exemption.

²⁰ Explanatory Memorandum to the *Equal Opportunity Act Amendment Bill 2011* (Vic), 7.

²¹ *Equal Opportunity Act 2010* (Vic) s 72(3).

b. Exception – genuine occupational requirements in employment

Section 26 of the Act allows employers to limit offers of employment to people of one sex if it is a 'genuine occupational requirement' that the employees are people of that sex.

The Act includes a number of examples of where it may be a genuine occupational requirement for a person to be a particular sex, including:

- where the employee will be required to enter a toilet ordinarily used by people of that sex while it is in use by people of that sex (such as a cleaner)
- where the employee will be required to enter areas ordinarily used only by people of that sex while those people are undressed (such as a coach entering a change room).

This means that it is lawful to limit employment to people of a particular sex if the person will be required to enter a toilet or change room used by people of the same sex. If a transgender person is seeking employment with your organisation and you think there is a good reason to rely on this exception to exclude them, you will need to consider whether they are a particular 'sex' for the purposes of this exception. For more information about the meaning of 'sex' for the purposes of the Act, see the breakout box on p13.

Note: This exception has been read narrowly by the Victoria Civil and Administrative Tribunal, which has looked at whether it is a genuine requirement to have the whole role as a single-sex designated job.

c. Exception – single-sex clubs

The Act includes an exception for single-sex clubs. This means it is lawful to limit membership of a club to a particular sex.

The term "club" has a special meaning under the Act. It means an association of more than 30 persons that has a liquor licence and operates wholly or partly from its own funds. A club can be associated for sporting purposes.

If a transgender person is seeking to become a member of your single-sex club, think about how you can be inclusive by recognising the person as their affirmed gender. Although the Act allows a club to discriminate against a person on the basis of their sex, a person's legally recorded sex and physical characteristics may not necessarily be relevant to your decisions about club membership. For more information about the meaning of 'sex' for the purposes of the Equal Opportunity Act exceptions see the breakout box on section p13. The information in the following sections can also assist you.

The Act also allows mixed-sex clubs to limit access to benefits based a person's sex in some circumstances. For example, a club can limit access to its facilities to members of one sex at particular times if the facilities only have a change room that is suitable for use by one sex at a time. However, if a club does restrict access in this way it would need to provide equivalent access to members of another sex. See Part C section 1.3 'Use of facilities' for more information about what this exception means for transgender people.

Example of discrimination in club membership

We recognise that this can be a complex area to navigate. The law is not always clear and our understanding of sex and gender identity is developing, both in the community and in the law. Consider the following example.

Leanne is a transgender woman and has identified this way publicly for 10 years. She has recently joined her local golf club. The club is open to men and women to join. The club is a 'club' for the purposes of the Equal Opportunity Act. Every Wednesday, the club has a 'Ladies Day' social event for the female players. Leanne asks to participate in the Ladies Day social gathering, but the club refuses her request on the basis that it is a 'ladies only event' and she is a transgender person.

The golf club could be liable for discrimination against Leanne on the basis of her gender identity. This is because the club has denied Leanne access to a benefit provided by the club. There is no exception for club membership and discrimination on the basis of gender identity.

The club might argue that it discriminated against Leanne on the basis of her sex as a male, not her gender identity. However, this is unlikely to be a legally safe option:

1. It could be hard to show that the relevant exception applied and the club bears the onus of proof for an exception. The club is not a single-sex club and it may be hard to establish that it is not practicable for men and women to enjoy the benefits of a social gathering at the same time; and
2. A court or tribunal may find that Leanne's sex is female for these purposes, whether or not she has legally changed her sex on her birth certificate in Victoria, because she has established herself to be living as a woman.

1.5 Do I want or need to discriminate?

As outlined above, discrimination on the basis of gender identity is prohibited in particular areas of public life including sport, clubs, goods and services and employment. In some limited circumstances, predominantly relating to single-sex competitive sporting activities, exceptions in the law mean sporting organisations and clubs may be able to lawfully discriminate.

Do I have to apply these exceptions?

No. While the exceptions may allow you to discriminate against transgender people, you don't have to use them and you should think about how you can encourage participation of transgender people in your sport. Even if an exception allows you to exclude a transgender person from a single-sex competition, you should talk to the person about other ways they can be involved in your sport. Remember that excluding people from other club and sporting activities on the basis of their gender identity can still be unlawful discrimination.

When deciding on whether to apply an exception, remember that individuals will often have varying levels of strength and stamina regardless of their sex or gender identity. Further, in many cases, transgender people who are transitioning/affirming their gender or who have transitioned/affirmed their gender medically will not have a competitive advantage because their strength and physique will change. In some cases, seeking information about an individual's gender identity and gender transition/affirmation may assist, but there are some things to bear in mind when doing this.

Seeking information about a person's sex or gender transition/affirmation

It is against the law to request information from a person that could be used to discriminate against them, unless you can show you need that information for a legitimate, non-discriminatory purpose.²²

You may decide you need further information about a person's gender transition/affirmation to determine whether they can participate in your single-sex competition. It is lawful to seek this information if you are using it to assess your legal obligations and determine whether an exception is relevant in your particular circumstances.

²² *Equal Opportunity Act 2010* (Vic) s 107.

You should be careful about how you request and use this information to avoid being liable for discrimination and only seek the information in these limited circumstances. You will also need to carefully consider how this information is dealt with and restrict access to the people who need to know.

Any request for information should be made respectfully and sensitively.

You also need to carefully consider what you do with this information, how you store it, and who can

access it. You should only use this information to assess whether an exception is relevant in your particular circumstances. This can be a lawful use of information to inform your decision about whether to rely on an exception or not. It is unlawful to use information in a discriminatory way once you have collected it.

Part C section 1.2 (collecting information) includes more information on how to manage personal information and your privacy obligations.

What is gender transition/affirmation?

This section provides information about gender transition/affirmation to assist sporting organisations to facilitate participation of transgender people in single-sex competitions wherever possible – and provides a process for seeking further information from individuals where this may be necessary.

Gender transition/affirmation is a process where a transgender person commences living as another sex. Individuals transition/affirm their gender in different ways. For some, dressing as the gender they feel themselves to be is enough and they may not need to seek medical assistance to live permanently as a member of another sex. Further, this is all that is required for a person to be protected from discrimination on the basis of their gender identity under the Equal Opportunity Act. Medical intervention is included as only one aspect of gender transition/affirmation under the Act.

For those who do transition/affirm their gender medically, the steps are likely to include the following:

- the person consults with a medical professional to discuss the individual's gender identity and possible steps to transition/affirm their gender
- the aim of this consultation process is to ensure the individual can make an informed choice about their gender transition/affirmation
- following the consultation, the medical professional may begin with a recommendation about the use of hormones
- a person may or may not choose to have sex affirmation surgery as part of the gender transition/affirmation process.

How can I ask for more information about gender transition/affirmation?

If you decide you need more information from a transgender person to help you to decide whether an exception applies in the circumstances, you can follow these steps:

1. Politely let the person know you may need further information from them to determine whether a legal exception may be relevant in the circumstances. Reinforce to them that your policy is to ensure that transgender people can participate wherever possible.
2. If the person is happy to provide further information, tell them you will need a letter from a relevant medical professional (most likely the person's GP) saying that:
 - a) the person has undergone/is undergoing clinical treatment to transition/affirm their gender
 - b) given the person's gender transition/affirmation status and the tasks involved in the sport, they can participate in a single-sex competition as appropriate to their affirmed gender.

The medical professional providing this evidence may need further information about the nature and rules of the sporting activity before providing it. **By agreement with the individual concerned**, you can either provide this information to them to pass on to the relevant medical professional; or directly to the medical professional CCing the individual so the information and process is transparent.

A full list of organisations who can assist you is provided in Appendix 1.

Continued overpage

You can contact the Commission or Transgender Victoria as a starting point if you are considering asking an individual for medical information:

Victorian Equal Opportunity and Human Rights Commission

You can call the Commission's Enquiry Line on 1300 292 153 or (03) 9032 3583, or download the Equal Opportunity Act and find information on the Commission's website at humanrightscommission.vic.gov.au.

Transgender Victoria

(03) 9020 4642
transgendervictoria.com

Transgender Victoria can provide you with information and advice on a range of issues and also provides training.

2. Sexual harassment

Sporting organisations and clubs also need to know about their legal obligations regarding sexual harassment.

The Equal Opportunity Act prohibits sexual harassment when it occurs in relation to employment, education, the provision of goods and services, accommodation, and in clubs.

Sexual harassment is unwelcome sexual behaviour that could be expected to make a person feel offended, humiliated or intimidated. Sexual harassment can be physical, verbal or written and may include comments online or in social media. It may include a range of behaviours including comments about a person's private life or the way they look, sexually suggestive behaviour such as leering or staring, or sexually suggestive comments, notes or emails.

Sexual harassment could also include sexually suggestive or invasive questions, such as asking a transgender person about their sex life, or interrogating them about their physical characteristics. This kind of bullying and harassment can also be discrimination.²³

Volunteers are also protected from sexual harassment under the Act.

²³ Under the Equal Opportunity Act, discrimination in employment, club membership and goods and services is defined broadly to including subjecting a person to 'any other detriment'.

Sporting organisations and clubs need to have clear policies and procedures in place to prevent and respond to sexual harassment. You can include this information in your equal opportunity policy (see Part C, section 1).

You can read more about sexual harassment in the Commission's guideline: *Sexual Harassment: Complying with the Equal Opportunity Act 2010* on the Commission's website at humanrightscommission.vic.gov.au/guidelines.

3. Victimization

Under the Equal Opportunity Act, a person victimises another person by subjecting them to a detriment (or threatening to do so) because the person or someone associated with them made a complaint about discrimination or sexual harassment, brought a complaint to the Commission, or helped someone else to make a complaint.

For example, if a coach doesn't select a transgender player for a game after the person has made a complaint of discrimination, the coach could be liable for victimisation.

Victimisation is unlawful under the Equal Opportunity Act.

4. Obligations and liability

4.1 Who is liable and what are they liable for?

4.1.1 Individuals can be liable

If a person or organisation discriminates against another person, they may be directly liable for their actions. This means they can be legally responsible for their conduct and may be ordered to pay compensation to the person they discriminated against if the matter proceeds to a court or tribunal.

An individual or organisation can also be liable if they requested, instructed, induced, encouraged, authorised or assisted unlawful conduct of another person.

4.1.2 Organisations can also be liable for the actions of employees and agents

Organisations are generally responsible for the unlawful actions of a person acting in the course of their employment or a person acting on the organisation's behalf. This is called vicarious liability. For example, a sporting club could be liable for discrimination or sexual harassment by any of its staff (including administrators, coaches and groundskeepers) or its contractors.

An organisation will not be vicariously liable for the unlawful conduct of its employees or agents if they can show they have taken reasonable precautions to prevent unlawful conduct. Part C: 'What do I need to do?' sets out the kind of reasonable precautions that organisations may take to prevent vicarious liability.

Under the Act, organisations also have a positive duty to take reasonable and proportionate steps to prevent discrimination, sexual harassment and victimisation from happening in the first place. See the next section for information on how the positive duty can help organisations to avoid vicarious liability.

Example of individual and vicarious liability

A netball club employs a coach, Pam. A transgender woman, Jackie, complains to the general manager of the club, Ricky, saying that Pam has verbally harassed her during matches saying she will be off the team if she wants to 'play rough and manhandle the girls'. Jackie says that on another occasion Pam said 'If you don't like it then go and join the local footy team. This is a game for real women'. Pam could be liable for discrimination by subjecting Jackie to a detriment in the area of service delivery (providing coaching services). Pam's employer could also be vicariously liable for discrimination if it cannot show that it took reasonable steps (such as having appropriate policies in place and training coaches and staff – see Part C) to prevent discrimination against transgender players.

4.2 The positive duty – eliminating discrimination before it occurs

Section 15 of the Equal Opportunity Act requires all those with duties under the Act – including sporting clubs and employers – to take reasonable and proportionate steps to prevent discrimination, victimisation and sexual harassment. This 'positive duty' focuses on eliminating the causes of discrimination, not just responding to complaints that arise, and can help clubs ensure that they won't be liable for discrimination.

The positive duty means you need to have policies, practices and procedures in place that deal with gender identity discrimination. This may be part of your broader equal opportunity policy (this could be called something different or form part of your Member Protection Policy or Code of Conduct). You also need to make sure your members, staff and players know about these policies and that they understand that they need to comply with them. You can provide this information in induction materials – and then through regular updates or refresher training. Given the turnover in membership for sports, revisiting this on at least an annual basis would be necessary to ensure appropriate awareness among all members.

You should also have a process for responding to complaints if discrimination and sexual harassment does occur (see Part C, section 5).

4.2.1 What is reasonable and proportionate?

Determining if something is reasonable and proportionate requires balancing the need for change with the expense or effort involved in making this change. A measure that is reasonable and proportionate for one sporting organisation may not be achievable in another and depends on all the relevant circumstances, including:

- the size of your organisation
- the resources of your organisation
- the nature of your organisation
- the practicability and cost of the measures.

See the next section for tips on how to meet the positive duty and avoid vicarious liability.

4.2.2 How to meet the positive duty and avoid vicarious liability

The positive duty requires employers to take similar steps to those it may take to reduce the risk of vicarious liability. For example, to meet its obligations under the Act, an organisation may need to:

- conduct an audit of existing policies and practices to identify any existing or potential discrimination, sexual harassment or victimisation (for example, by reviewing existing complaints procedures and outcomes)

- develop or update policies and procedures on discrimination, sexual harassment and bullying
- conduct regular equal opportunity training for staff, volunteers, players and club members
- review or develop effective complaint handling policies and procedures
- have a process for regularly reviewing and improving compliance.

The positive duty in practice

A basketball club decides to review its policies and practices around gender identity discrimination to increase the participation of transgender people at the club. The club establishes a working group to develop an action plan. The working group is made up of senior staff, interested players and a transgender person who has expressed interest in joining the club.

The group develops a written policy clearly stating that discrimination against transgender people is against the law. The policy includes statements about diversity and welcoming people from a range of backgrounds as part of the club's core values. It also states that where a transgender person is seeking to participate in a single-sex competition, the organisation will facilitate participation wherever possible and assess each matter on a case by case basis.

The group also develops an action plan which includes:

- reviewing and updating existing policies and procedures to ensure that they comply with equal opportunity laws and promote equal opportunity for all people, including transgender people
- developing and delivering equal opportunity training for staff and players
- developing an effective complaint-handling procedure
- undertaking regular reviews of policies and procedures.

A netball club reviews staff and player knowledge about discrimination law and gender identity matters. The club develops a simple survey asking about awareness of legal obligations, gender identity and the club's discrimination policy. The survey reveals players have little understanding of these issues and that many are not aware of the club's written policy or don't understand it.

In response, the club revises its policy in consultation with internal and external stakeholders. The club holds sessions for staff and players to explain the revised policy and makes sure it is readily available (by emailing it to staff and players and putting a copy on the club's website and its notice board). The club also establishes an equal opportunity officer as a 'go-to' person to lead the equal opportunity work and help deal with any queries or complaints by staff and players.

5. Federal anti-discrimination law

Discrimination is also prohibited under these federal laws:

- *Sex Discrimination Act 1984* (Cth)
- *Age Discrimination Act 2004* (Cth)
- *Disability Discrimination Act 1992* (Cth)
- *Racial Discrimination Act 1975* (Cth)
- *Australian Human Rights Commission Act 1986* (Cth)
- *Fair Work Act 2009* (Cth).

Under the Sex Discrimination Act, it is against the law to discriminate against someone on the basis of their sex or gender identity. It is also against the law to discriminate against someone because of their sexual orientation or because they are intersex.

The Sex Discrimination Act includes a similar exception to Victoria's Equal Opportunity Act for running single-sex competitions where strength, stamina or physique is relevant. Under the Sex Discrimination Act, it is not unlawful to discriminate on the ground of sex, gender identity or intersex status by excluding people from participating in a competitive sporting activity where the strength, stamina or physique of competitors is relevant.

The strength, stamina or physique exception is the only sport exception under the Sex Discrimination Act. This means that if your activity falls within one of the other sport exceptions under the Equal Opportunity Act (see Part B, section 1.4.2) you may still have to apply to the Australian Human Rights Commission for an exemption from the Sex Discrimination Act.

You can find out more about federal discrimination laws on the Australian Human Rights Commission website at www.humanrights.gov.au and the Fair Work Commission website at www.fwc.gov.au.

6. Drug testing and anti-doping laws

Drug testing laws may be relevant to participation of transgender people in sport where hormone treatment is an issue. Usually, they will only be relevant in elite level competitions and even then only in very limited circumstances.

Australian Sports Anti-Doping Authority Act 2006 (Cth) (ASADA Act)

The ASADA Act is a Commonwealth Act that defines the Australian Sports Anti-Doping Authority's (ASADA) powers, functions and responsibilities. The Act includes a National Anti-Doping Scheme providing for the testing of athletes in Australia in certain circumstances. Under the Act, the definition of 'athlete' includes those who are not competing in elite level competitions. However, in practice, ASADA rarely requires testing below the elite or sub-elite level.

You can find more information about federal drug testing and anti-doping laws by visiting www.asada.gov.au

Sports Anti-Doping Act 2005 (Vic)

This is the Victorian Act dealing with drug testing in sport. A Victorian Government policy – *Victorian Sports Anti-Doping Policy 2012* - also exists. This Act recognises ASADA as the primary organisation with responsibility for testing in Australia. It provides that sporting organisations funded by the Victorian Government must follow the policies of their national sporting organisation. The Victorian anti-doping policy also states that it is not expected that national doping control programs should apply in the same way in non-elite and community level sport.

This means that the federal laws and drug-testing regime are most relevant and will generally only apply to elite level competitions.

Therapeutic Exemption Use

These anti-doping laws also provide for a means for transgender athletes who are taking substances as part of their gender transition/affirmation to obtain permission for the use of such substances. This includes a Therapeutic Exemption Use process through the World Anti-Doping Agency.

This guideline does not consider these laws and processes in detail. You can find more information about anti-doping laws and policies by contacting one of the relevant organisations in Appendix 1.

Part C: What do I need to do?

This section provides specific information on how you can develop policies, practices and procedures to prevent discrimination on the basis of gender identity in sport. You can find similar guidance with specific detail on how you can prevent discrimination against transgender people in employment in the Commission's guideline *Transgender people at work: complying with the Equal Opportunity Act 2010 in employment*. Visit humanrightscommission.vic.gov.au/guidelines for more information.

This section includes general and specific information about what sporting organisations and clubs need to do to prevent discrimination in sport. This includes things all sporting organisations should have in place regardless of whether they have transgender players seeking to participate or existing players who are transitioning/affirming their gender.

In general, all sporting organisations should:

- review and update existing policies and procedures to ensure that they comply with equal opportunity laws and promote equal opportunity for all people, including transgender people
- have an equal opportunity policy which includes information about gender identity discrimination. While you don't necessarily need to have a discrete gender identity policy, you can include information about it in your general policy
- ensure forms and recruitment material do not contain information or categories that may indirectly discriminate against people on the basis of their gender identity or deter them from applying for jobs or participating in sport (for example, by only including 'male' and 'female' categories)²⁴

²⁴ An easy way to ensure you include everyone and do not discriminate is to use 'male' 'female' 'other' (please specify) and 'other' (prefer not to specify).

- have an effective complaints process and respond appropriately if discrimination occurs
- have safeguards in place and encourage awareness among staff about the use of confidential information, including information about a person's gender transition/affirmation if this circumstance arises
- ensure staff are trained and aware about discrimination, including discrimination on the basis of gender identity
- have a nominated contact in your organisation as the 'go-to' person for these issues. This could be someone like an existing diversity or inclusion officer or your Member Protection Information Officer.

When you are responding to the individual circumstances of transgender people, organisations should:

- not discriminate against them because of their gender identity, unless an exception applies. This is unlawful in sport, employment (including recruitment), service delivery (including services associated with sport, such as coaching services) and club membership. See Part B for further discussion on areas where discrimination is unlawful
- talk to the person early on to find out what they want and consider developing a gender transition/affirmation plan for new or existing players if they wish to do so (see section 2.4). Think beyond simply participating in your sport – What name or pronoun does the person prefer? Which toilets or facilities would they prefer to use?
- follow the process outlined in Part B, section 1.5 if a transgender person is seeking to participate in a single-sex competition and an exception may apply
- draw the person's attention to the section in your policy outlining how the organisation will respond in these circumstances and clarify

that the goal of your organisation is to facilitate participation wherever possible

- remember – you will only ever need to engage in this discussion and potentially seek further information in the limited situations where an exception in the law may apply (see Part B, section 1.5)
- be careful about how you manage information about a person's gender transition/affirmation and make sure that you only ask for and use that information for a lawful reason (see section 1.2)
- consider developing a specific gender identity policy and training for your staff about gender identity discrimination and gender identity issues more broadly
- carefully follow the process in this guideline and ensure you communicate in a sensitive and respectful manner to avoid unfavourable treatment that may constitute discrimination.

Steps you need to take to prevent discrimination are outlined in detail below.

1. Review policies

1.1 Equal Opportunity policies

Does your sporting organisation or club have policies about discrimination and diversity? If you do not have an equal opportunity policy (or address equal opportunity in another policy such as a Member Protection Policy or Code of Conduct), you should develop one for your organisation.²⁵ The policy should:

- include a clear opening statement that discrimination, sexual harassment and victimisation on the basis of personal attributes, including gender identity, is against the law under the Equal Opportunity Act
- include a statement about diversity and welcoming people from a range of backgrounds as part of the organisation's core values
- address rights and responsibilities in all areas that are relevant to your organisation including sport, employment, administration, club membership and service delivery
- if relevant, include information on single-sex competitions and state that where a transgender person is seeking to participate in a single-sex competition, the organisation will facilitate participation wherever possible and assess each matter on a case-by-case basis

²⁵ You can download a template policy to adapt to your sport at humanrightscommission.vic.gov.au/guidelines/transgenderpeopleandsport

- provide details about how to get more information or raise any complaints or concerns under the policy.

You should also review your forms and documentation to ensure they do not ask for discriminatory information, are accessible and do not unnecessarily exclude people. For example, you should review categories in any forms to determine whether information about a person's sex or gender is relevant before asking for it. If you need to ask about a person's sex or gender, provide the option to self-identify, or not identify at all, rather than only including 'male' and 'female'. Only including these categories may discourage or disadvantage people who do not identify as either male or female.

Discriminatory requests for information can form the basis for a complaint under the Equal Opportunity Act.²⁶ When seeking information from people – whether they are job applicants or new and existing players and members – you need to be able to show you need the information for a legitimate and lawful purpose. See the next section for more information.

1.2 Collecting information

Your organisation may be subject to privacy legislation and have to comply with either federal or state privacy principles. Privacy legislation regulates the way organisations collect, use, disclose and manage personal information and health information. You should separately seek advice on your privacy obligations as this guideline provides general principles only.

In practice, you may need to request information from players about health, injuries or other personal medical information. You may need some medical information about people's gender transition/affirmation status if you are deciding whether an exception is relevant in the circumstances (see Part B section 1.5).

However, you need to be careful about how you manage this information once you have collected it. As a general rule, you should:

- only collect the information with consent and after you have explained why you need it and how you will use it
- only use information about the status of a transgender person's sex or gender transition/affirmation to assess whether an exception under the Act may be relevant. Using this information for an unrelated purpose (such as deciding whether to employ a person) may be unlawful discrimination and may breach any privacy obligations you have

²⁶ *Equal Opportunity Act 2010* (Vic) s 107.

- restrict access to the information to the people who “need to know” (for example, the managers who are responsible for assessing whether to apply an exception in the particular circumstances)
- store the information securely to protect it from misuse, loss or unauthorised disclosure (such as in a locked filing cabinet or a secure electronic file)
- make sure that any communication about the information is private (for example, make sure that no one can overhear you if you are having a conversation that relates to the information)
- destroy the information when it is no longer required.

When seeking information from people, including any identity documents, you should be aware that some transgender people may have inconsistent information appearing on their records due to barriers imposed by policies and practices, and by legislation.

For example, under Victoria’s *Births, Deaths and Marriages Registration Act 1996*, a transgender person is unable to change the sex on their birth certificate unless they have had sex affirmation surgery. This means that while some people may have transitioned to affirm their gender, this is not reflected on some of their identity documents.

1.3 Use of facilities

You should include information in your policies about the use of toilets and facilities, including change rooms. Transgender people should be able to use toilets, change rooms and facilities that are appropriate to their affirmed gender. This may be challenging at first. For example, others may:

- feel uncomfortable about the idea of using the same toilets and facilities as a transgender person
- openly oppose the person using the toilets or facilities that are appropriate to their affirmed gender
- ridicule the person and make them feel uncomfortable and unwelcome when using the facilities.

If you encounter resistance from others about the use of toilets and facilities:

- meet with them to discuss their concerns and attempt to resolve the issue
- remind them that you both have legal obligations to prevent discrimination and that this includes allowing transgender people to use the appropriate facilities.

In most situations, allowing transgender people to use toilets and facilities that are appropriate to their

affirmed gender should not affect others and not allowing them to do so may be distressing for the individual and potentially unlawful. However, there may be situations where you need to consider the particular needs and circumstances of others. You can seek further guidance from the organisations listed in Appendix 1 if you are unsure about how to respond in your situation. Do not leave it up to the individuals concerned to resolve these issues.

When you are building or upgrading toilets and change room facilities – you can help to meet your positive duty obligations by creating an environment that will help prevent discrimination. Try to create private spaces for everyone to use rather than large open areas.

It is generally not appropriate to ask that a transgender person use the accessible toilet, as this may send the message that being transgender is a disability. However, there may be situations where, for a transgender person, using an accessible toilet is their preferred option.

1.4 Uniforms

Where relevant, transgender players or employees should be given the choice to wear the uniform that is appropriate to their affirmed gender.

2. Review practices

2.1 Respectful communication

You should examine communications between your staff and new or existing players, including language between players during matches. Sporting organisations should be mindful of the following:

- communications between employees
- communications as an employer with job applicants and existing employees
- communications between players or between players and spectators
- communications between other participants such as coaches and umpires.

Whether you have obligations for spectator behaviour may depend on the context and the degree of control you have over this behaviour and entry to events. See section 2.5 for more information about spectator behaviour.

While sports generally pride themselves on principles of fairness and positive team values, sport can also be a hostile environment where

teasing or ridicule occurs. This may be particularly pronounced for people with protected attributes (characteristics) under the Equal Opportunity Act, including transgender people.

Sporting organisations and those who may observe or have control over these communications – such as administrators and team coaches – should set clear expectations about respectful communication and the consequences of disrespectful communication or other behaviours. This may be a principle you wish to state explicitly in your equal opportunity policy (see section 1). Appropriate disciplinary action should also be taken to respond to any abuse or disrespectful behaviour.

2.2 Use of names and pronouns

The use of names and pronouns is crucial for all of us, but for transgender people especially. Failing to recognise a person's identity through the appropriate use of names and pronouns may be unlawful. You should always ask individuals what name and pronoun they wish to use and, for people who are transitioning/affirming their gender, when they wish to start using it. You may also wish to ask if there are other terms the person identifies with, or which may cause offence.

You should ask transgender team players, club members or employees how they would like others to refer to them and then communicate this to others. If the person is changing their name, ask them when they would like others to start using their new name and how they would like you to communicate this information to others.

Some people may 'slip up' and use the wrong name or pronoun if they are used to using the person's previous name and pronoun. While this is understandable, you should make it clear to staff and players that there is a clear difference between 'slipping up' and deliberately using the wrong name.

Once you know what name the person wishes to use, you should make sure accurate names and pronouns appear in any documentation or computer systems, such as employment documents or team lists and rosters.

Case study – dealing with inappropriate language

Maurice has been going to his local outdoor pool for almost a decade. Maurice knows and has a friendly relationship with the staff at the front counter. However, since Maurice transitioned to affirm his gender their attitude towards him has changed. On one occasion, two of the staff members tease Maurice referring to him by his previous name 'Marie' and using the pronoun 'she'. Maurice makes a complaint to the manager of the centre, Reg. Reg apologises to Maurice for the behaviour and meets with the staff members to discuss the situation. When Maurice attends the centre again, Reg and the two staff members issue him with an apology and stress that the same thing will not happen again. The incident also leads Reg to remind his employees about their equal opportunity policy and the consequences of disrespectful behaviour. He also provides refresher training for his staff about equal opportunity with specific detail on gender identity and respectful, non-discriminatory behaviour in service delivery.

2.3 Discussing a person's gender identity or transition/affirmation

Not all transgender people will want or need to discuss their gender identity or gender transition/affirmation. Some may consider discussion about their gender identity is no more relevant than it would be for people who are not transgender and may also find such discussions distressing.

In the context of sport, you will not need to ask new or existing players about their gender identity or transition/affirmation status unless you are running a single-sex competition and you want to determine whether an exception in the Equal Opportunity Act might apply (see Part B, section 1.5). In employment, you will generally not need to ask job applicants or employees about their gender identity because it will not be relevant to their ability to perform the genuine requirements of the job (see Part B, section 1.3.3).²⁷

²⁷ You may need information from transgender employees to prevent discrimination or to support and plan for employees who are transitioning/affirming their gender. You can find detailed information about this issue in the Commission's guideline *Transgender people at work: Complying with the Equal Opportunity Act 2010 in employment*, available on the Commission's website at humanrightscommission.vic.gov.au/guidelines.

If you have an existing employee or player who is transitioning/affirming their gender – you should ask them how they would like you to respond – particularly when it comes to telling others about their gender transition/affirmation. It is generally not appropriate to discuss the specific details of this process. For example, it is not appropriate to ask questions about a person’s physical characteristics and the specifics of any surgery or other treatment unless the person is comfortable disclosing that information or you are seeking information to determine whether an exception in the Equal Opportunity Act might apply (see part B section 1.5).

2.4 Preventing discrimination against players or employees who are transitioning/affirming their gender

You should consider developing a plan together with individual players or employees who are transitioning/affirming their gender to support them and prevent discrimination from occurring. If the player or employee does not want to develop a formal plan with you, these guiding questions can help you determine your plan of action for your whole organisation, including people who are transitioning/affirming their gender. Some of this information will be more relevant for existing players or employees who are transitioning/affirming their gender .

This section focuses on information you might need to know about players or employees who are transitioning/affirming their gender, separate to considerations about participation in single-sex competitions and whether an exception in the law might be relevant (this is dealt with in Part B, sections 1.4 and 1.5).

How do I find out what I need to know?

Firstly, you should ask the person what they want. Not all people will wish to disclose information about transitioning/affirming their gender or feel they need to develop a formal plan with you. Some players or employees may also find these discussions difficult or intimidating. A good starting point is to ask them if they would like a support person to attend before discussing the issue or developing a plan. You can seek further information and advice from the organisations listed in Appendix 1.

It may seem odd to you that a person who has chosen to make something so personal so public still wishes to keep certain aspects of themselves private. It is important for the person’s health and safety that they get to control the flow of information about themselves.

What should I do if the person does not want to develop a plan?

Your organisation should still have a management plan in place for players or employees who are transitioning/affirming their gender. Your plan will include strategies for managing other employees or players as well as support strategies for the individual.

If the person does not want to develop a formal plan with you, reassure them that they should tell you straight away if they experience discrimination or negative attitudes from others and let them know that developing a formal plan remains an option.

Download materials

A range of materials that can help you to prevent discrimination against transgender people – both in sport and employment – are available from the Commission’s website at www.humanrightscommission.vic.gov.au/guidelines. This includes the guideline *Transgender people at work > Complying with the Equal Opportunity Act 2010 in employment* and a document that can assist you with developing plans for individuals who are transitioning/affirming their gender.

Who else needs to know?

You should not disclose any personal information about a person’s gender identity or transition/affirmation to others without first discussing it with the individual concerned. If the person wants to inform others, then you should ask them how they would like this to occur.

The person might want to inform others themselves or you can reach an agreement about how you will inform others about their gender transition/affirmation. Some people may be happy to share information about themselves and be approached with questions while others might not be.

What do other players and employees need to know?

You should consult with the individual to agree on an approach for advising others about their gender transition/affirmation. You may wish to come up with questions or topics of discussion that are/are not acceptable as part of your plan and communicate this to others.

You should avoid relying on the person to inform you and others in your organisation about gender identity issues. While the person may wish to

discuss their own situation with others, it is your responsibility to ensure that other players and staff know about discrimination and gender identity issues generally.

Let others in your organisation know they can come to you with any questions or issues if they are unsure about raising something with the individual concerned. An option may be to bring other people in your organisation together and give them the opportunity to ask any questions. Again, it is important that you reach an agreement with the individual concerned about how this occurs.

You should set a clear expectation that people in your organisation must respect the privacy of an individual who is transitioning/affirming their gender and that discrimination against players or employees on the basis of their gender identity will not be tolerated. Remind people in your organisation about their legal obligations and draw their attention to your equal opportunity and anti-discrimination policies (see Part C, section 1).

Key elements of the gender transition/affirmation plan

You can include key dates in a gender transition/affirmation plan, such as starting dates or timeframes for when the person will:

- begin using a different name or pronoun
- adopt the dress code that is appropriate to their gender identity
- use toilets and facilities that are appropriate to their gender identity
- take time off work for treatment if necessary (where relevant to employees).

2.5 Dealing with spectator behaviours

You have a positive duty to prevent discrimination from occurring. While dealing with spectator behaviours may be difficult to control and won't necessarily give rise to legal liability, there are steps you can take to prevent players experiencing discrimination in the form of verbal abuse from spectators (as this kind of harassment can be a detriment to the person who experiences it):

- provide statements wherever possible – such as in terms and conditions of entry, signs or policies – which outline that discrimination and discriminatory verbal abuse on the basis of protected attributes including gender identity will not be tolerated at sporting events. Many clubs and sports grounds may already have signage about inappropriate behaviour and language and could include discrimination on a list of inappropriate behaviours

- while it may not be possible to include detailed information about discrimination in terms and conditions or ticketing information – you can limit the information by simply outlining that discrimination will not be tolerated – or go further by naming protected attributes including gender identity, sexual orientation or race. You could include this information in any email attachments to e-tickets
- outline the repercussions if this kind of behaviour does occur
- ensure you have staff and established processes to respond appropriately to any incidents.

3. Review staff and player knowledge and awareness

You should review any training you provide for staff or players about discrimination. In addition to training about legal rights and responsibilities, consider developing training about gender identity issues more broadly to address any myths or misconceptions. To improve staff and player knowledge and training you should:

- seek information about how much they know about gender identity matters and what they would like to hear about in training
- take positive steps to train staff and players about gender identity matters and equal opportunity law
- provide refresher training on gender identity discrimination
- shape the content of your training and deliver it in a way that is engaging and easy to understand.

If relevant, all players and staff members – including administrators and team coaches – should read this guideline about their responsibilities. You should consider including this guideline and other information about discrimination – including your equal opportunity policy – in any induction materials. Continue to raise awareness about discrimination and your policy at least once a year and consider providing training on discrimination every two years.

The Commission can provide you with specific training on gender identity discrimination in sport and related areas of public life and can tailor aspects of this training to meet your needs (see Appendix 1 for contact details). The Commission can also review policies and procedures for compliance with the Equal Opportunity Act. This work is generally done on a fee-for-service basis.

4. Establishing a complaints procedure

An effective complaints process helps you to deal with complaints of discrimination, sexual harassment and victimisation quickly, fairly, impartially and transparently.

The Equal Opportunity Act does not prescribe what a complaints process should include. However, an internal complaints process can be strengthened by:

- including information about the complaints process in any equal opportunity policy
- dealing with complaints in a way that is fair, prompt, transparent and confidential
- listening to the complainant in an open and impartial way
- keeping complaints confidential
- communicating about the progress of complaints
- ensuring that the person who has made a complaint or their friends or relatives are not victimised because they made a complaint.

5. Responding to complaints and feedback and watching trends

Look at complaints systems if there are some in place. Have you received complaints? What is the nature of the complaints? Have they been responded to? Do they reflect any trends that require action more broadly?

Any feedback about your complaints procedure can be a valuable source of information to improve quality, respond to people's needs and prevent discrimination. You can seek feedback by talking to people and through questionnaires or feedback forms, or sections on your website offering people the opportunity to make suggestions about whether information was helpful. If you want to survey your staff or players about gaps in understanding and training opportunities, you can also ask about their awareness of your complaints procedure and any feedback they have.

Use knowledge you gather from staff, players and officials to review the effectiveness of your approach and identify any issues that may warrant further attention over time.

6. Consult with affected groups or individuals

Consult with affected groups or individuals when developing or reviewing your approach. For example, when developing your equal opportunity policy, you can submit drafts to affected people or organisations for comment and input. Individuals who play your sport or who are employed with you may also be able to provide you with their views on your policies, practices and complaints processes so you can identify opportunities for improvement. Where possible, consult with transgender individuals – such as those who may already be involved in your sport – to inform your approach.

In addition to providing training, the Commission's training and consultancy services can provide you with assistance and advice when developing your policies.

Our education, training and consultancy services conduct in-house and on-site training to help service providers, employers and sporting organisations understand their rights and responsibilities. This includes training on gender identity matters more broadly including information on supporting players and employees in their clubs and workplaces who are transitioning to affirm their gender identity.

In addition to seeking assistance from the Commission, you should aim to develop relationships with other organisations that specialise in discrimination and issues for transgender people, such as Transgender Victoria, who can also assist you (see Appendix 1 for the Commission's contact details and other useful contacts).

Appendix 1: Useful contacts and sources of information

Victorian Equal Opportunity and Human Rights Commission

You can call the Commission's Enquiry Line on 1300 292 153 or (03) 9032 3583, or download the Equal Opportunity Act and find information on the Commission's website at humanrightscommission.vic.gov.au

To be updated with regular information about the Commission, you can also follow us on Twitter, LinkedIn, Facebook and Instagram.

Transgender Victoria

(03) 9020 4642
transgendervictoria.com

Transgender Victoria can provide you with information and advice on a range of issues and also provides training.

Zoe Belle Gender Centre

(03) 8398 4134
gendercentre.com

The Zoe Belle Gender Centre provides information and resources for anyone interested in the health and well-being of transgender, transsexual and other gender diverse people. This includes a useful 'question and answer' portal about transgender matters.

Sport and Recreation Victoria (Department of Transport, Planning and Local Infrastructure)

(03) 9208 3333
sport.vic.gov.au

Sport and Recreation Victoria (SRV) is the Victorian Government department with policy and program responsibilities for sport and recreation. SRV can also provide information about laws and policies dealing with anti-doping and drug testing.

VicHealth

(03) 9667 1333
vichealth.vic.gov.au

The Victorian Health Promotion Foundation (VicHealth) is the Victorian Government health promotion agency. VicHealth also has responsibilities for a range of sport-related policies and programs.

Australian Sports Commission

(02) 6214 1111
ausport.gov.au

The Australian Sports Commission is the federal statutory authority with policy and program responsibilities for sport.

Play by the Rules

playbytherules.net.au

This website provides a range of useful resources to educate and assist sporting clubs and players about discrimination, bullying and promoting an inclusive environment.

Gender Dysphoria Clinic – Monash Health

(03) 9556 5216
Email genderclinic@southernhealth.org.au

The Gender Dysphoria Clinic provides an intake service for people who are seeking advice or treatment for Gender Dysphoria, including training for employers on the medical aspects of gender transition/affirmation for individual employees.

The Royal Children's Hospital Gender Dysphoria Service

(03) 9345 5890

The RCH Gender Dysphoria Service provides advice, assessment and ongoing care for children, adolescents and their family where there are concerns regarding the young person's gender identity.

Appendix 2: Decision-making guide

Key questions to ask when applying equal opportunity laws to transgender people in sport.

I'm selecting players for my sport ...

1. Are you running a competitive sporting activity?

Note: This includes any exhibition or demonstration of a sport but does not include coaching, umpiring or refereeing, administration or the non-competitive practice of a sport.

If yes, the primary rule is that you must not discriminate against a person by refusing or failing to select them in a sporting team. However, under the law there are some exceptions to this rule which mean that you can discriminate on the basis of sex and gender identity in some circumstances. To see if any exceptions can apply to you, consider the questions below.

If no, consider the questions in the other boxes – are you doing other things that are covered by the *Equal Opportunity Act 2010*, such as running a non-competitive sporting activity or providing a service? For example, a yacht club is running a 'have a go day' where people can come and learn about sailing. There is no competition involved. The exceptions under the Equal Opportunity Act for single-sex competitions do not apply. The obligations for service provision will be relevant.

2. Is the competition for players aged under 12?

If yes, then there are no relevant exceptions which allow you to discriminate because of someone's sex or because they are transgender. You cannot lawfully exclude the player for these reasons. The law expects that children can play sport fairly together.

If no, then the law allows you to treat people differently in some circumstances. You will need to consider the questions below.

Note: Sometimes, where sports are able to indicate a need to run a single-sex competition for players under the age of 12, for example, to increase participation of girls in Australian Rules Football, they can make out a case for special measures under s 12 of the Act or apply for an exemption from VCAT.

3. Is strength, stamina and physique relevant to your competition?

If yes, then you may lawfully exclude people on the basis of sex or gender identity. The law does not require you to discriminate, but the law doesn't make it unlawful if you do. There are tips in this guideline about how you can include a transgender person in fair competition in your sport.

If no, then you must not discriminate against the person on the basis of sex or gender identity.

If you're not sure, think about where you could find more information. Talk to people who are experts in your sport, such as coaches or your state or national sporting association.

I'm deciding on whether to admit a club member or the terms of their club membership ...

1. Does your club have over 30 members, a liquor licence and operate wholly or partly from its own funds?

If yes, then you must not discriminate against applicants for club membership or existing members on the basis of sex, gender identity or any other attribute under the Equal Opportunity Act, unless an exception applies. Discrimination can include refusing to accept a person's application for membership or unfavourable treatment during their membership (for example, limiting a person's access to benefits provided by the club or varying the terms of their membership). There are some exceptions set out in the law which mean that you can discriminate on the basis of sex. You may choose to apply these in some circumstances. To see if any exceptions apply to you, consider the questions below.

If no, consider the questions in the other boxes – are you doing other things that are covered by the Equal Opportunity Act such as running a non-competitive sporting activity or providing a service?

2. Are you running a single-sex club?

If yes, there is an exception in the law which means you can exclude people of a particular sex from participating in your single-sex club.

If no, this exception is not relevant and you need to consider whether any other exceptions apply.

Note: Remember that a transgender person may be legally recognised as another sex from that recorded at their birth. This means that it may be unlawful to exclude them from participating in your single-sex club when they are recognised as a member of the sex of your club's members. Part B, section 1.4.2 (a) of this guideline provides information on the meaning of 'sex' for the purposes of the single-sex exceptions.

3. Do you want to limit access to club benefits to people of a particular sex?

If yes, there is an exception in the law allowing you to do this in some circumstances. For example, a club can limit access to its facilities to members of one sex at particular times if the facilities only have a change room that is suitable for use by one sex at a time. However, if a club does restrict access in this way it would need to provide equivalent access to members of the other sex.

If no, you should provide the same benefits and facilities to all members, regardless of their sex or gender identity.

Note: Transgender people should be allowed to use change rooms and facilities that are appropriate to their affirmed gender (see Part C, section 1.3).

I'm employing someone to work in my sporting organisation ...

1. Are you thinking of employing someone in your organisation?

If yes, the primary rule is that you must not discriminate against a person on the basis of their sex or gender identity when you are recruiting for a role or once a person is employed by your organisation. Discrimination in employment can include not hiring someone, denying a person training, promotion or benefits, or subjecting a person to any other detriment. There is a limited exception to this rule if it is a genuine occupational requirement of the job to limit employment to people of a particular sex. See question 2.

Remember that employers must take reasonable and proportionate steps to eliminate discrimination in employment. This could include developing an equal opportunity policy, training staff about discrimination, and having an effective complaint handling process. Taking proactive steps to eliminate discrimination can also help you to avoid vicarious liability for the actions of your employees. See Part B, section 4.2.2 of this Guideline for more information.

See the Commission's *Guideline: Transgender People at Work – Complying with the Equal Opportunity Act 2010 in Employment* for more information about complying with the Equal Opportunity Act in employment.

2. Is it a genuine occupational requirement to employ someone of a particular sex?

If yes, then you may lawfully exclude people from employment on the basis of their sex. For example, it may be a genuine occupational requirement for an employee to be a particular sex if the employee will be required to enter areas ordinarily used by people of that sex when they are unclothed (such as a coach or cleaner entering a change room). But remember that the Victorian Civil and Administrative Tribunal has read this exception narrowly and looks at whether the whole role needs to be a single-sex identified position.

If a transgender person is seeking employment with your organisation and will be required to enter a toilet or change room as part of their role, you will also need to consider whether the person is a particular 'sex' for the purposes of this exception. See the breakout box on p13 of this guideline for more information.

If no, then there are no relevant exceptions which allow you to discriminate in employment because of someone's sex or because they are transgender. Remember that this exception is unlikely to be relevant to most roles in your organisation (including management and administration roles).

I'm providing services to members of the public ...

1. Are you offering coaching services to individuals?

If yes, then you are providing a service that is covered by the Equal Opportunity Act and you must not discriminate against transgender players by refusing to provide them with coaching, in the terms on which coaching is provided, or by subjecting them to another detriment (such as not recognising a person as their affirmed gender).

As a service provider, you also have an obligation to take reasonable and proportionate steps to eliminate discrimination in the provision of your services. This could include developing an equal opportunity policy, training staff about discrimination, and having an effective complaint handling process. See Part C of this Guideline for more information.

It is also against the law to exclude a transgender person from participating in a non-competitive sporting activity (such as coaching, umpiring or refereeing). See Part B of this Guideline for more information.

If no, consider what other services you are providing to the public that could be covered by the Equal Opportunity Act.

2. Are you providing other services to members of the public (such as access to a recreation centre)?

If yes, then the same rules apply. You must not discriminate against transgender people by refusing to provide them with services, in the terms on which services are provided, or by subjecting them to any other detriment.

Remember that most of the services you provide will be covered by the Equal Opportunity Act. For example, if a staff member at a local gym or swimming pool refuses entry or treats a person unfairly because they have an attribute under the Equal Opportunity Act, including being transgender, then this is against the law.



**Victorian Equal Opportunity
& Human Rights Commission**

Contact us

Enquiry Line	1300 292 153 or (03) 9032 3583
Fax	1300 891 858
Hearing impaired (TTY)	1300 289 621
Interpreters	1300 152 494
Email	information@veohrc.vic.gov.au
Website	humanrightscommission.vic.gov.au