



Sexual orientation, gender identity and intersex status discrimination

The *Sex Discrimination Act 1984* (SDA) makes it unlawful to treat people less favourably than another person in a similar situation because of their sexual orientation, gender identity or intersex status.

Sexual orientation discrimination happens when a person is treated less favourably than another person in a similar situation because that person has a sexual orientation towards:

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

Same-sex couples are also protected from discrimination under the definition of 'marital or relationship status' in the SDA.

Gender identity discrimination happens when a person is treated less favourably than another person in a similar situation because of that person's gender-related identity, appearance, mannerisms or other gender-related characteristics of the person. It does not matter what sex a person was assigned at birth or whether the person has undergone any medical intervention.

Intersex status discrimination happens when a person is treated less favourably than another person in a similar situation because that person has physical, hormonal or genetic features that are:

- neither wholly female nor wholly male
- a combination of female and male, or
- neither female nor male.

The SDA also includes protection against discrimination on the basis of sex, pregnancy, breastfeeding, marital status and family responsibilities, as well as protection from sexual harassment. For more information see *Sex discrimination* at www.humanrights.gov.au/employers.

The SDA protects people across Australia from sexual orientation, gender identity or intersex status discrimination in a number of areas in public life, including employment, education, getting or using services, or renting or buying a house or unit.

Employees and potential employees

The SDA makes it unlawful to discriminate when advertising jobs, during recruitment and selection processes, when making decisions about training, transfer and promotion opportunities, and in the terms, conditions and termination of employment.





All types of employers and employment relationships are covered under the SDA, including Commonwealth Government employees and private sector employees, full-time, part-time and casual employees, contract workers and commission agents, as well as apprentices, trainees and those on probation.

The SDA also covers recruitment processes organised through recruitment and employment agencies.

Customers

The SDA makes it unlawful to discriminate in the provision of services, such as banking and insurance services; services provided by government departments; transport or telecommunication services; professional services, such as those provided by lawyers, doctors or tradespeople; and services provided by restaurants, shops or entertainment venues.



Direct and indirect discrimination

Discrimination can be direct or indirect.

Direct discrimination happens when a person is treated less favourably than another person in a similar situation because of their sexual orientation, gender identity or intersex status.

Indirect discrimination can be less obvious. It can happen when employers or service providers put in place conditions, requirements or practices which appear to treat everyone the same but which actually disadvantage some people because of their sexual orientation, gender identity, intersex status or marital or relationship status. If the condition or requirement is unreasonable, it could be unlawful discrimination.

Examples of direct discrimination



It may be direct sexual orientation discrimination for an employer not to promote a male employee to a more senior role because he is gay or bisexual.

It may be direct gender identity discrimination if a shop assistant refused to serve a person who identifies and presents as a woman but has a deep, masculine-sounding voice, which causes the assistant to feel uncomfortable about that person's gender identity.

It may be direct intersex status discrimination for a physiotherapist to refuse to treat an intersex person because the person's biological characteristics make the physiotherapist uncomfortable.

Examples of indirect discrimination

A company policy that offers benefits to an employee's husband or wife, such as discounted travel or gym membership, may disadvantage employees with a same-sex partner because of their sexual orientation and/or relationship status.

It may be indirect gender identity discrimination if an organisation's human resources policies do not permit changes to an employee's records. Such a policy may require a transgender woman to continually disclose information about her gender identity in order to explain discrepancies in personal details.

A policy that says that certain medical treatments, such as treatment for ovarian cancer, is only appropriate for women may disadvantage an intersex man who has male and female sex characteristics.

When discrimination is not unlawful

Like other anti-discrimination laws, the SDA says that, in some circumstances, it is not unlawful to discriminate against a person on the basis of their sexual orientation, gender identity or intersex status.

The SDA allows for certain acts done under statutory authority and acts conducted by certain accommodation providers, charities, religious bodies (except for intersex status in religious educational institutions), voluntary bodies or sporting organisations (except for sexual orientation). Whether these exceptions and exemptions apply will depend on the particular circumstances.

The SDA also permits the Australian Human Rights Commission to grant temporary exemptions from some provisions of the SDA under certain circumstances.

Special measures

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

The SDA provides for special measures that improve equality of opportunity for people based on their sex, sexual orientation, gender identity, intersex status, relationship status, pregnancy or potential pregnancy status or family responsibilities.

Employers' obligations

Employers have a legal responsibility to take all reasonable steps to prevent discrimination and harassment.

'Reasonable steps' may include putting in place policies and procedures to create a discrimination-free environment. It could also include procedures to deal with allegations of discrimination and harassment made by employees or customers.

It is against the law to victimise a person for making, or proposing to make, a complaint to the Australian Human Rights Commission about sexual orientation, gender identity or intersex status discrimination.

Employers can also be held legally responsible for discrimination or harassment by their employees. For more information, see the fact sheet, *Vicarious liability* at www.humanrights.gov.au/employers.



Useful links

Guideline: Transgender people at work (Victoria)
www.humanrightscommission.vic.gov.au/transitioning-workers



Further information

Australian Human Rights Commission

Level 3, 175 Pitt Street
SYDNEY NSW 2000

GPO Box 5218
SYDNEY NSW 2001

Telephone: (02) 9284 9600
National Information Service: 1300 656 419
TTY: 1800 620 241

Email: infoservice@humanrights.gov.au
Website: www.humanrights.gov.au/employers



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