



Victorian Equal Opportunity
& Human Rights Commission

Guideline: Trans and gender diverse inclusion in sport

> Complying with the Equal Opportunity Act 2010





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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: Trans and gender diverse inclusion in sport – complying with the Equal Opportunity Act 2010

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

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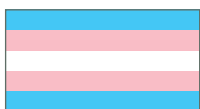
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The design of this guideline takes inspiration from the transgender pride flag, originally created by Monica Helms in 1999. The Commission recognises and respects the diversity of the trans and gender diverse community, and we wish to acknowledge the many other pride flags used by trans and gender diverse communities across the world.

Contents

About the guideline	2
Who is this guideline for?	2
Why do I need to follow this guideline?	2
Where can I find more advice or information?	3
Training and consultancy	3
Part 1: Trans and gender diverse people and sport – understanding the issues	4
What should I know?	4
What terms are commonly used?	5
Part 2: Understanding the law	7
Discrimination	7
The Charter	14
Sexual harassment	14
Victimisation	15
Who is legally responsible for discrimination?	15
Federal anti-discrimination law	16
Part 3: What do I need to do?	17
Satisfying the positive duty	17
Best practice for inclusion	18
What to keep in mind	19
Useful contacts and sources of information	20

About the guideline

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

This guideline is an update of the Commission's 2015 *Guideline: Transgender people and sport*. It outlines obligations under the Equal Opportunity Act regarding discrimination against trans and gender diverse 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.

While the Act applies to many different 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 trans and gender diverse people in all aspects of sport wherever possible.

Pages 19 and 20 provide a list of organisations you can contact for more help.

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 ensure 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 trans and gender diverse people in sport.

Who is this guideline for?

This guideline is aimed at sporting clubs, organisations and staff. It can also help individuals and players 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.
- 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.
- 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 trans or gender diverse.
- 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:

1300 292 153 or (03) 9032 3583

enquiries@veohrc.vic.gov.au

humanrightscommission.vic.gov.au

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 Collective provides information and resources for anyone interested in the health and wellbeing of trans and gender diverse people. This includes a useful 'question and answer' portal about gender identity issues.

(03) 8398 4134

zbgc.com.au

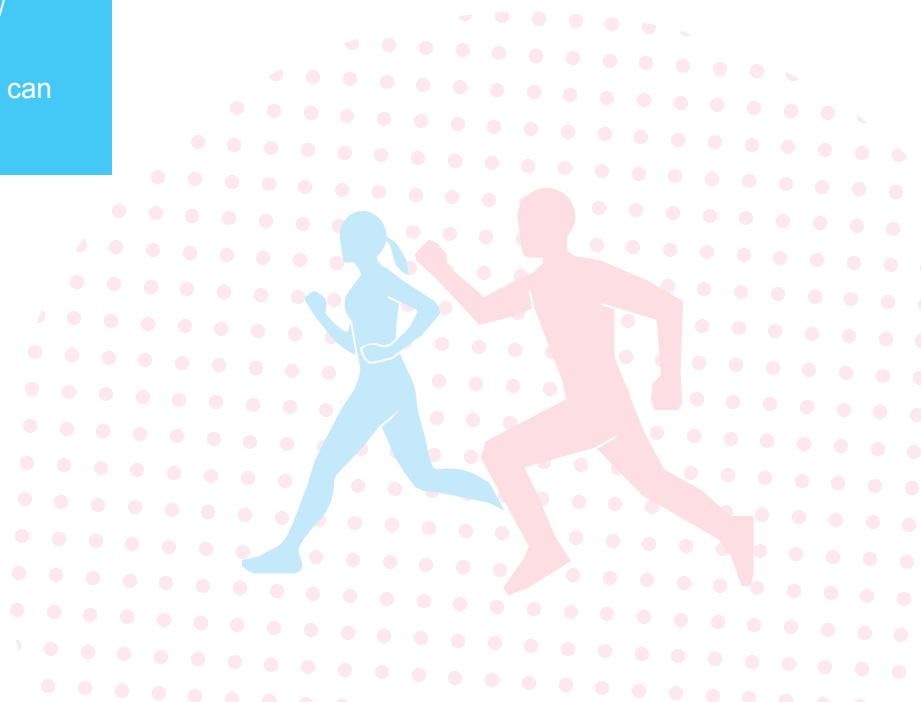
These organisations can also assist with referring you to other agencies if you require further information about gender transition/affirmation.

You can find a full list of organisations that can assist you on pages 19 and 20.

Training and consultancy

Our education, training and consultancy services conduct 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.



Part 1: Trans and gender diverse 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

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 and wellbeing benefits. For trans and gender diverse people, sport can have additional benefits, particularly in terms of building social confidence and connections.² 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 trans and gender diverse 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.

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

2 Lauryn Stewart, Paul O'Halloran and Katie Buckley, *Trans Women in Australian Sport and Group Physical Activity: A Qualitative Study* (2015).

What should I know?

False assumptions can lead some people to discriminate against trans and gender diverse people, including in sport. Key things to remember include:

There's more to sporting ability than strength and testosterone

Testosterone can increase a person's strength, but sport is about more than just strength. Fitness, training, age and experience often play a bigger part in making someone a good athlete. Recent studies have shown no significant link between testosterone and performance for elite female athletes.³

In 2015, the Court of Arbitration in Sport suspended the International Association of Athletics Federations' regulations on hyperandrogenism due to a lack of scientific evidence supporting a link between enhanced testosterone levels and improved athletic performance.⁴ This reflects increasing recognition that hormone levels may not be as relevant to participation as once thought.

3 See, for example, S Bermon et al, 'Serum androgen levels in elite female athletes' (2014) 99(11) *The Journal of Clinical Endocrinology & Metabolism*, 4328.

4 Court of Arbitration for Sport, 'CAS suspends the IAAF Hyperandrogenism Regulations' (Media Release, 27 July 2015). This matter is ongoing and not yet fully resolved.

No one ‘changes gender’ to reap rewards in sport

Transitioning or affirming gender is a deeply personal decision and is not something done on a whim. There is no evidence at the international level of boys or men ‘changing gender’ to reap rewards in women’s sport.

Trans and gender diverse people use toilets as toilets and change rooms as change rooms

There is no evidence to support the notion that trans and gender diverse people use toilets, change rooms or other facilities to assault or harass others. Trans and gender diverse people are generally at high risk of being victimised, assaulted or harassed in toilets and change rooms.⁵

No two transitions/affirmations are the same

Many trans and gender diverse people go through a process of socially, medically or otherwise transitioning or affirming their gender. This process is different for everyone and does not necessarily include hormone treatment or sex affirmation surgery.⁶

The International Olympic Committee has a new policy on elite-level trans athletes

The Commission heard from stakeholders that sporting clubs and organisations often rely on guidance from the International Olympic Committee (IOC) on trans athletes.

In 2015, the IOC significantly updated its policy

regarding sex affirmation in sports.⁷ The updated policy is less restrictive than the previous policy from 2003 and reflects a shift in trans and gender diverse inclusion in sports. The new policy notes the importance of social recognition of a person’s gender identity and removes the requirements of sex affirmation surgery and legal recognition of a person’s gender identity.

While the new IOC policy offers some guidance for elite level competitions, the Commission’s guideline aims to fill the gap in guidance for non-elite level sport.

What terms are commonly used?

The Commission acknowledges the complexities of language and identity in this area and recognises the terms we use are not applicable to everyone. We use the term ‘trans and gender diverse’ to encompass a broad range of people whose gender identity does not exclusively align with their sex as recorded at birth and that some people may not identify with this term. We acknowledge and respect an individual’s right to identify and describe their gender identity as they choose.

While current Victorian law focuses on trans men and trans women, this guideline also includes broader guidance on how to best include all trans and gender diverse people, including non-binary people, in your sport and avoid discrimination.

This section provides some commonly used terms. It is not an exhaustive list and is intended as guidance only. The language used to describe gender identity shifts over time and can differ across cultures and generations. **It is best to ask a trans or gender diverse person what terms are appropriate for them.**

Sex

A person’s biological sex traits. Sex is recorded on the basis of anatomical, chromosomal and hormonal characteristics. Sex has historically been understood as binary (that is, as exclusively female or male). It is now known that biological sex characteristics include many variations and that sex is not binary.

5 See, for example, J L Herman, ‘Gendered restrooms and minority stress: The public regulation of gender and its impact on transgender people’s lives’ (2013) 19(1) *Journal of Public Management & Social Policy*, 65.

6 The term ‘sex affirmation’ surgery is used in this guideline in accordance with the *Births, Deaths and Marriages Registration Act 1996* (Vic). The Commission recognises that some may prefer other terms, such as ‘gender affirmation surgery’. Some trans and gender diverse people may not undergo sex affirmation surgery for a range of reasons including health choices, the cost, availability and desire for surgery.

7 *IOC Consensus Meeting on Sex Reassignment and Hyperandrogenism* (2015) <<https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/IOC/Who-We-Are/Commissions/Medical-and-Scientific-Commission/EN-IOC-Consensus-Meeting-on-Sex-Reassignment-and-Hyperandrogenism.pdf>>.

Gender identity

A person's internal sense of self and how they identify, understand or perceive their gender. It is important to recognise that sex and gender identity are different and separate concepts. Gender identity also has a specific meaning under the Equal Opportunity Act (see page 7).

Transgender

'Transgender' or 'trans' is a term for someone whose gender identity does not exclusively align with their sex as recorded at birth.

Some transgender people may use different terms to describe themselves. These terms may be cultural (for example, some Aboriginal and Torres Strait Islander people may use the terms brotherboys or sistergirls) or they may differ between generations (for example, some older people may use the term transsexual).

Non-binary/genderqueer

Some people do not identify as exclusively female or male. As their gender identity is outside the female/male binary, they are often referred to as 'non-binary' or 'genderqueer'.

Agender

Some people do not identify with any gender or have no gender. These people are agender.

Gender diverse

This term refers to the diverse range of different binary and non-binary gender identities and expressions.

Pronouns

Pronouns are a way of referring to other people. Common pronouns are 'she/her' and 'he/his'. Some non-binary people may have gender neutral pronouns like 'they/them', use their first name instead of a pronoun, or use another pronoun. It is important to respect a person's pronoun and it is best not to assume it.

Cisgender

'Cisgender' or 'cis' is a term for someone whose gender identity exclusively aligns with their sex as recorded at birth.

Gender expression

How a person presents themselves in behaviour and dress. Gender expression and gender identity are not necessarily correlated.

Transition/affirmation

'Transitioning' or 'affirming' refers to the process where a trans or gender diverse person takes steps to live as the gender they identify as.

This process is different for every trans or gender diverse person. For some, changing their gender expression is enough and they may not want or need to seek medical assistance. This is sufficient for a person to be protected from discrimination on the basis of gender identity under the Equal Opportunity Act.

Intersex

'People with intersex variations' is an umbrella term for those born with congenital atypical sex characteristics, whether chromosomal, hormonal or anatomical.

People with intersex variations experience different issues and have different life experiences to trans and gender diverse people. For this reason, this guideline does not address discrimination against people with intersex variations.

Discrete protections for people with intersex variations exist at the federal level under the *Sex Discrimination Act 1984* (Cth). While intersex status is not a protected attribute under the Equal Opportunity Act, people with intersex variations may be protected from discrimination under the sex attribute of the Act, as Courts now accept that biological sex characteristics include many variations and that sex is not binary.⁸

Sexual orientation

'Sexual orientation' or 'sexuality' refers to sexual and emotional attraction to people of a particular gender or genders. Sexual orientation also has a specific meaning under the Equal Opportunity Act, which 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 trans and gender diverse people may encounter difficulties or experience discrimination because of myths and misconceptions about a correlation between their gender identity and their sexual orientation.

⁸ *NSW Registrar of Births, Deaths and Marriages v Norrie* (2013) 250 CLR 490; [2014] HCA 11 [1], [35], [37], citing *AB v Western Australia* (2011) 244 CLR 390, 402; [2011] HCA 42 [23].

Part 2: Understanding the law

Discrimination

This part of the guideline steps through key obligations under the Equal Opportunity Act that are relevant to trans and gender diverse people in sport, and give an overview of relevant exceptions under the law. These duties and exceptions are summarised in the table that follows on page 8.

What is discrimination?

Discrimination means direct or indirect discrimination because of an attribute (personal characteristic) such as sex or gender identity under the Equal Opportunity Act.

Direct discrimination is treating or proposing to treat someone unfavourably on the basis of a protected attribute. In determining whether a person has discriminated against someone else, the person's motive is irrelevant.

Indirect discrimination is imposing, or proposing 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.

Gender identity and sex – the Equal Opportunity Act

While the common definitions of gender identity can be quite broad (see page 6), the Act defines 'gender identity' as a person of one sex identifying as a member of the other sex on a genuine basis by assuming characteristics of the other sex (through style of dressing, medical intervention or otherwise),

or by living or seeking to live as a member of the other sex.⁹

It is against the law to discriminate against someone on the basis of their sex or gender identity in sport and other areas of public life covered by the Act unless an exception or exemption applies (see page 11).

You should consider a person's sex to be what they say it is, whether or not it aligns with their sex as recorded at birth.

When do I have a legal obligation to not discriminate?

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

Discrimination is unlawful unless an exception applies or an exemption from the Act is granted by the Victorian Civil and Administrative Tribunal (VCAT, see page 11).

It is not discrimination if action is taken as a special measure to address substantive equality (see page 11).¹⁰

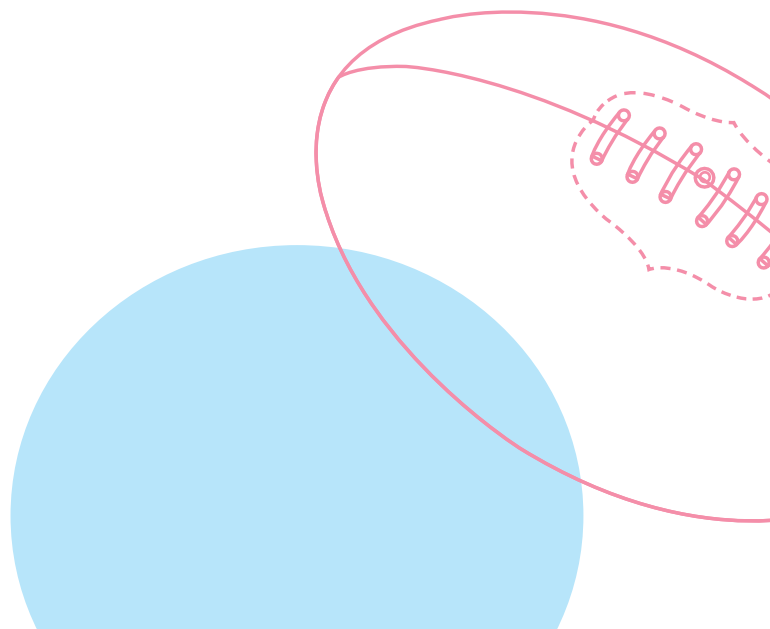
9 In the Act, gender identity also refers to a person of indeterminate sex identifying as a member of a particular sex. 'Indeterminate sex' is not defined in the Act or case law and it is yet to be clarified which attribute protects people of indeterminate sex who do not identify as a member of a particular sex.

10 The Act recognises that discrimination can disadvantage some groups and that access to opportunities is not equitably distributed throughout society. Substantive equality is about levelling the playing field to give everyone a fair go.

Table: Quick Overview – What does the Equal Opportunity Act say about sex and gender identity discrimination?

Is your activity covered by the Act?	What does the law say?	Does an exception apply?
Sport		
Single-sex competitions	<p>Section 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. refusing or failing to select them for a sporting team; or 2. excluding them from participating in a sporting activity (such as coaching, umpiring, refereeing or administration). 	<p>Section 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>Section 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>Sections 82-83: Religious bodies and religious schools can discriminate against a person on the basis of their sex or gender identity where either:</p> <ol style="list-style-type: none"> 1. the discrimination conforms to the doctrines, beliefs or principles of the religion, or 2. the discrimination is reasonably necessary to avoid injury to the religious sensitivities of people who follow the religion. <p>Section 84: You may discriminate against a person on the basis of their sex or gender identity where the discrimination is reasonably necessary for you to comply with the doctrines, beliefs or principles of your religion.</p> <p>Section 88: You can lawfully discriminate against a person on the basis of their sex or gender identity if you are providing a special service, benefits or facilities that meets the special needs of people with a particular personal characteristic and you are limiting eligibility to that service.</p>
Club membership (see section 1.3.2 for the definition of ‘club’ for the purposes of the Act)		
Mixed clubs	Sections 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.	Section 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) provided equal but separate access is given.
Single-sex clubs	Sections 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.	Section 68: You can lawfully discriminate against a person on the basis of their sex by limiting membership of a club to a particular sex.

Is your activity covered by the Act?	What does the law say?	Does an exception apply?
Employment		
Recruitment	Section 16: It is against the law to discriminate against job applicants on the basis of their sex or gender identity.	Section 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: <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	Section 18: It is against the law to discriminate against employees on the basis of their sex or gender identity.	You can only 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, if one of the general exceptions applies (for example, section 75, sections 82-84 or section 88 described above).
Services		
Including coaching, social activities and amenities	Section 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.	You can only 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, if one of the general exceptions applies (for example, section 75, sections 82-84 or section 88 described above).



Discrimination in sport

Under the Equal Opportunity Act, it is against the law to discriminate against another person on the basis of their sex or 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 VCAT.¹¹ Such activities may include games where physical athleticism is not a factor, such as chess or debating.

Discrimination on the basis of sex or gender identity is prohibited in a number of areas related to sport, such as employment, club membership and the provision of services.

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 sex or gender identity.

Harassment of a trans or gender diverse person could amount to discrimination if the club has not taken adequate steps to prevent it.

Discrimination in clubs is only prohibited for sporting clubs and organisations that meet the definition of a 'club' under the Act. Under the Act, a 'club' 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
- operate its facilities wholly or partly from its own funds.

Although not all sporting clubs will meet this definition and attract responsibilities under this part of the Act, they may have responsibilities arising from activities in other areas such as sport, employment, and the provision of goods and services.

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 sex or 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, including humiliation and denigration.

Discrimination in employment

It is against the law to discriminate against job applicants and employees on the basis of sex or gender identity. 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 trans and gender diverse 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.¹²

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

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

You can read more about discrimination against trans and gender diverse 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.

Discrimination in the provision of goods and services

It is against the law to discriminate against another person on the basis of sex or 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.

Can discrimination ever be allowed?

Discrimination will be allowed if:

- an exception in the Act applies
- an exemption has been granted by VCAT for up to 5 years.¹³

While exceptions and exemptions make certain discrimination lawful, organisations are not required to use them to discriminate and exclude people. In this context, organisations have a choice about whether they discriminate or not.

Special measures

Action taken as a special measure for the purpose of promoting or realising substantive equality for members of a group with one or more attributes protected by the Equal Opportunity Act¹⁴ does not amount to discrimination.

Taking steps to encourage participation of trans and gender diverse people in sport may constitute a special measure under the Act and therefore will not amount to discrimination. If you want to take a special measure, you need to determine that the action you take is for the purpose of advancing

substantive equality for trans and gender diverse people. The essential requirements of a special measure include that the measure is:

- taken for the purpose of promoting or realising substantive equality for members of a group with a particular attribute, such as sex or gender identity
- 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 trans and gender diverse 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 trans and gender diverse people to promote participation in the sport and opportunities for physical activity and social interaction.

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.

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*. It is still unlawful to discriminate against that person in most other areas related to sport – such as non-competitive sport, employment, appointment as a coach or umpire, or the use of toilets, change rooms and other facilities.

¹³ You can find out more about exemptions at <http://humanrightscommission.vic.gov.au/index.php/exceptions-exemptions-and-special-measures/exemptions>.

¹⁴ You can find out more about special measures at humanrightscommission.vic.gov.au/specialmeasures.

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

1. Exclusion of people of one sex or with a gender identity from participating in a competitive sporting activity in which the strength, stamina or physique of players is relevant.¹⁵
2. Exclusion of people of one sex from participating in a competitive sporting activity if participation in the activity is necessary for progression to an elite level competition and the exclusion is necessary to enable participants to progress to national or international elite level competition.¹⁶
3. Exclusion or restriction of one sex from participating in a competitive sporting activity is intended to facilitate the participation of people of a particular sex, and this is a reasonable approach.¹⁷

These exceptions do not apply to sporting activities for children under the age of 12 years.¹⁸

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 trans and gender diverse people from single-sex competitions in some circumstances.

However, the skill and competition level of the activities should be carefully considered when deciding whether it is appropriate to use this exception (see section 1.5). The relevance of strength, stamina or physique will also depend on the sport. Past case law has determined they are relevant for callisthenics¹⁹ but not lawn bowls.²⁰

15 *Equal Opportunity Act 2010* (Vic) s 72 (1).

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

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

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

19 See, for example, *McQueen v Callisthenics Victoria Inc* [2010] VCAT 1736.

20 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.

You should consider seeking legal advice or assistance from one of the organisations listed in on pages 19 and 20 if you are proposing to exclude a trans or gender diverse player on the basis of strength, stamina or physique.

The purpose of this exception is to ensure players do not have an unfair competitive advantage in single-sex competitions. Before considering whether to apply this exception, you should ask what evidence supports the relevance of strength, stamina and physique to your sport. You should also ask how a trans or gender diverse person's participation might lead to an unfair advantage, whether their individual circumstances give them a competitive advantage, and what the impact would be of excluding them from participation – both for the person and for your club or organisation.

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

iii. Exception – facilitating participation

Sex discrimination is also allowed if holding a single-sex competition will facilitate the participation of people of a particular sex in the sport, and any exclusion or restriction is reasonable. This exception is intended to encourage participation in sport by people of a particular sex in circumstances where participation has been a problem.²¹ 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.

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

Exception – genuine occupational requirements in employment

Section 26 of the Act allows employers to limit recruitment to people of a particular sex to preserve decency or privacy in work such as entering gendered toilets or change rooms. To rely on the sex discrimination exception you would need to show that it is a genuine occupational requirement that an employee has to be of a particular sex.

Before seeking to rely on this exception, organisations should carefully consider whether its requirements are satisfied; in some situations relying on this exception may lead to gender identity discrimination.

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.

Best practice is to recognise a trans or gender diverse person as their identified 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.

The Act also allows mixed-sex clubs to limit access to benefits based on 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.

Example of discrimination in club membership

Leanne is a trans woman who socially transitioned 10 years ago. She has recently joined her local golf club. The club is open to men and women to join. The club meets the definition of 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 trans.

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 attempt to deny that it discriminated against Leanne on the basis of her gender identity. It might argue that it discriminated against her on the basis of her sex (as it is recorded on her birth certificate as male) and is therefore operating within an exception for single sex clubs. However:

- It could be hard to show that the relevant exception applied and the club is responsible for proving an exception applies. 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.
- 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.

Do I want or need to discriminate?

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. You do not have to use these exceptions, and you should think about how you can encourage participation of trans and gender diverse people in your sport.

Should I ask for information about a person's 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 Asking for private medical information may seem invasive and unnecessary to a trans or gender diverse person. As a matter of best practice, self-identification of a person's gender identity is sufficient, particularly for non-elite level sport. Guidance in other jurisdictions has advised that:

- in developmental and recreational sport, trans and gender diverse people should not be required to either disclose medical information related to their transition/affirmation or undergo hormone therapy
- in high performance sport, trans and gender diverse people should not be required to undergo hormone therapy unless the sporting club or organisation can prove that it is a reasonable requirement for participation.²³

You can contact the Commission or Transgender Victoria as a starting point if you are considering asking an individual for information about their transition/affirmation (see pages 19 and 20 for contact details).

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.

The Charter

Under the Victorian *Charter of Human Rights and Responsibilities Act 2006* (the Charter), public authorities have a duty to act compatibly with human rights and give proper consideration to human rights when making a decision. Some public authorities operate sporting activities, clubs and competitions, such as government schools and leisure centres run by local councils. These organisations may therefore have additional obligations to consider when making decisions that might result in discrimination.

Sexual harassment

Sporting organisations and clubs also have 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. Volunteers are also protected from sexual harassment under the Act.

Sexual harassment is unwelcome conduct of a sexual nature that could be expected to make a person feel offended, humiliated or intimidated. Sexual harassment can be physical, spoken or written and may include comments online or in

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

²³ See, for example, Canadian Centre for Ethics in Sport, *Creating Inclusive Environments for Trans Participants in Canadian Sport* (2016) <<http://cces.ca/gender-inclusivity>>; *United Nations General Assembly, Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health* (2016) <<http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/HRC/32/33&Lang=E>>.

social media. It may include a range of behaviours including requests for sex, intrusive comments about someone's private life, sexually suggestive behaviour such as leering or staring, sexually suggestive comments or jokes, brushing up against someone, repeated requests to go out, sexually explicit messages, or sexual assault, indecent exposure, physical assault and stalking.

Sexual harassment could also include sexually suggestive or invasive questions, such as asking a trans or gender diverse person about their sex life, or interrogating them about their physical characteristics. This kind of harassment can also be discrimination.²⁴

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.

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.

Victimisation

Victimisation is unlawful under the Equal Opportunity Act. Under the 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 trans or gender diverse player for a game because the person has made a complaint of discrimination, the coach could be liable for victimisation.

Who is legally responsible for discrimination?

Legal responsibility – often described as 'liability' – determines who has to pay compensation or take other actions as a result of any discrimination. There are three potential forms of legal liability under the Equal Opportunity Act: personal, accessorial and vicarious.

Direct liability (personal)

A person who discriminates in sport, employment, club membership or service delivery can be personally or directly liable for their conduct. 'Person' is defined in the Act to include an individual, as well as an unincorporated association. It has also been held to include companies which provide services and employ frontline staff that engage in discriminatory conduct.²⁵

Direct liability (accessorial)

A person can also be directly liable if they requested, instructed, induced, encouraged, authorised or assisted unlawful conduct of another person.²⁶ This is sometimes known as accessorial liability. For example, if a manager instructed an employee to refuse services to a person because of their sex or gender identity, they would be liable for proposing to treat a person unfavourably in contravention of the Act. A person can bring a claim against either or both the person who discriminates and the person who authorised the conduct.²⁷

Liability for employees and agents (vicarious)

Employers are legally responsible for the unlawful actions of their employees or agents, where the employee/agent is acting in the course of their employment, or is acting on the organisation's behalf. The Equal Opportunity Act states that both the employee/agent and the employer will be taken to have breached the Act, and a person can bring a claim against either or both of them. This is known as 'vicarious liability'.²⁸ An employer can avoid vicarious liability if they can prove they have taken reasonable precautions to prevent unlawful conduct.²⁹

24 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'.

25 *Christian Youth Camps Limited & Ors v Cobaw Community Health Services Limited & Ors* [2014] VSCA 75 [111], [379].

26 *Equal Opportunity Act 2010* (Vic) s 105.

27 *Equal Opportunity Act 2010* (Vic) s 106.

28 *Equal Opportunity Act 2010* (Vic) s 109.

29 *Equal Opportunity Act 2010* (Vic) s 110.

Example of individual and vicarious liability

A netball club employs a coach, Pam. A trans 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) to prevent discrimination against trans and gender diverse players.

Eliminating discrimination – the positive duty

Section 15 of the Equal Opportunity Act requires all organisations covered by the law – including accommodation and service providers – to take reasonable and proportionate measures to eliminate discrimination, sexual harassment and victimisation as far as possible. This is called the 'positive duty'.

It means instead of simply reacting to complaints of discrimination when they happen, the Act requires organisations to be proactive about discrimination and take steps to prevent it from occurring.

Steps you can take to satisfy the positive duty are outlined in Part 3.

Federal anti-discrimination law

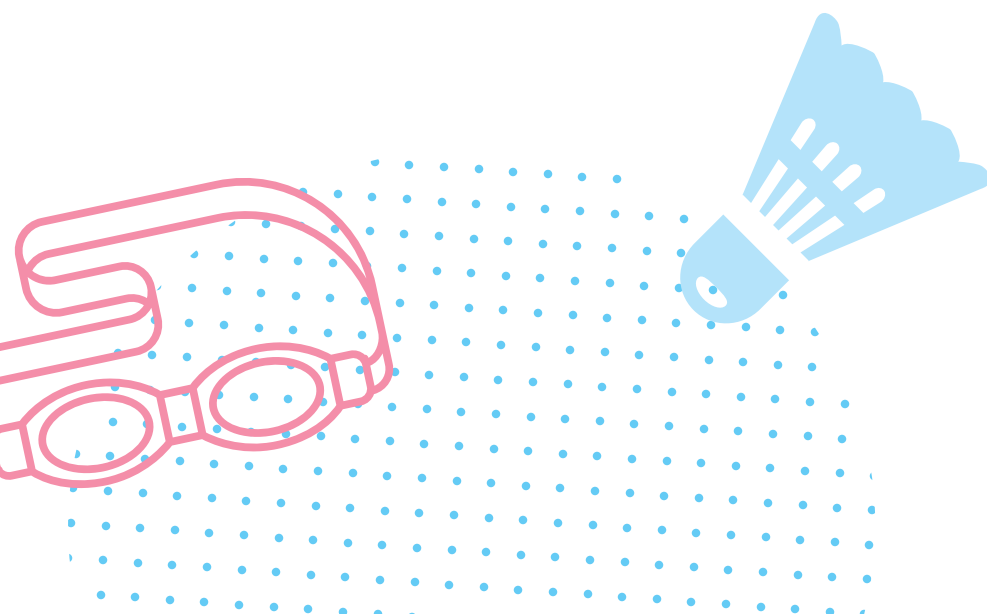
Discrimination is also prohibited under these federal laws:

- *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. 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. If your activity falls within one of the other sport exceptions under the Equal Opportunity Act, 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 humanrights.gov.au and the Fair Work Commission website at www.fwc.gov.au.



Part 3: What do I need to do?

If someone in your sport is undergoing transition/ affirmation or a new trans or gender diverse person is entering your sport, you can take a range of measures to ensure that your club or organisation is inclusive and satisfies the positive duty under the Equal Opportunity Act (see page 16).

The most important thing is to treat the person like you would anyone else. A trans man is a man, a trans woman is a woman and a non-binary or agender person is a person.

Always put the person first and ensure that whatever you do enables them to participate in your sport.

Satisfying the positive duty

The steps taken to satisfy the positive duty will be different for every organisation. What is 'reasonable and proportionate' will depend on the size of the organisation and the resources available.

Factors that must be considered include the:

- size of the business or operations
- resources of the business
- nature of the business
- business and operational priorities, and
- practicability and cost of the measures in question.³⁰

This means there can be some flexibility in the measures taken to satisfy the positive duty. Smaller organisations with fewer resources can still undertake a range of practical measures to achieve this. Every club or organisation regardless of size should take the following minimum steps to comply with the positive duty:

- Develop a policy that deals with equal opportunity in sport, employment, club membership and service delivery.³¹
- Ensure the policy is communicated to all players and staff at induction and through refresher training, and that players and staff understand their obligations and what they mean in practice.
- Review the policy at regular intervals to ensure it is up to date.
- Ensure players and staff know their rights and responsibilities, as well as your policies on inclusion and member protection.
- Develop a fair, effective and confidential complaints procedure for players and staff, and make sure people know about it.
- Regularly monitor your club or organisation's activities, employee knowledge of legal obligations and any complaints received, in order to promptly deal with any issues that arise and improve compliance.

30 *Equal Opportunity Act 2010 (Vic)* s 15.

31 You can download a template gender identity policy at <<http://humanrightscommission.vic.gov.au/guidelines>>. You can adapt this to your sport as a separate policy or as part of your equal opportunity policy.

The positive duty in practice

A basketball club decides to review its policies and practices around gender identity discrimination to increase the participation of trans and gender diverse 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 non-binary person who has expressed interest in joining the club.

The group develops a written policy clearly stating that discrimination against trans and gender diverse 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 trans or gender diverse 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 trans and gender diverse people
- developing and delivering equal opportunity training for staff and players
- developing an effective complaint-handling procedure
- undertaking regular reviews of policies and procedures.

Best practice for inclusion

Sporting clubs and organisations can also consider the following steps as part of a systematic and well-planned approach that you can review and update as needed.

- Scan your sport and organisation's culture and environment to identify any barriers to inclusion or factors that could lead to discrimination.
- Review player and staff knowledge and awareness of trans and gender diverse issues.
- Discuss a plan with any players or staff who are transitioning or affirming their gender of how to advise others, who will do it and when.
- Ensure forms and recruitment material do not contain information or categories that may indirectly discriminate against people on the basis of their gender identity (for example, by only including 'female' and 'male' categories).³²
- Ensure names and pronouns are accurate in conversation, documentation and systems, such as employment documents, team lists and rosters. If you make a mistake, it's best to apologise promptly and move on.
- Ensure that people can use toilets, change rooms and other facilities that are appropriate to their identified gender. Also ensure that people have the choice of wearing the uniform appropriate to their identified gender.
 - Consider making facilities like toilets and change rooms more inclusive by using gender neutral signage where possible.
 - If you are building or upgrading facilities, consider creating private and gender neutral spaces.
- Check in with trans and gender diverse players or staff periodically to make sure they're comfortable and address any concerns or issues.

32 An easy way to ensure you include everyone and do not discriminate is to have a blank field for people to self-identify in their own words instead of single category options for any questions about sex or gender. If your system is limited to category options, consider using 'female', 'male' and 'other'.

What to keep in mind

- Do not ask about medical or personal information unless it's necessary for a non-discriminatory purpose – this could be unlawful.
- Only collect medical or personal information with consent and make sure you protect the person's privacy.
- Always ask if someone is comfortable discussing their gender identity or transition/affirmation.
- Do not discuss someone's gender identity or transition/affirmation with anyone else unless you have explicit permission. Always ask the person how they would want a discussion, if any, to take place.
- Be mindful of respectful communications and language between staff and players, as well as spectators where possible.
- Do not rely on trans and gender diverse players or staff to educate you or others in your club or organisation about gender identity issues.
- You have a positive duty to prevent discrimination from occurring. This can include ensuring spectators are aware that verbal abuse will not be tolerated at sporting events, as well as of the repercussions of inappropriate behaviour – these could be noted in terms and conditions or ticketing information.

Useful materials

A range of materials that can help you to prevent discrimination against trans and gender diverse people are available on the Commission's website at humanrightscommission.vic.gov.au/guidelines

These include:

- A quick reference version of this guideline
- A guide on responding to common scenarios with trans and gender diverse people in sport
- The guideline *Transgender people at work > Complying with the Equal Opportunity Act 2010 in employment* and its companion document on developing transition/affirmation plans.
- A gender identity policy template that you can adapt to your sport as a separate policy or as part of your equal opportunity policy.

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.

The Commission's training and consultancy services can provide training, as well as assistance and advice when developing your policies.

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

In addition to seeking assistance from the Commission, you should aim to develop relationships with other organisations that specialise in discrimination and issues for trans and gender diverse people, such as Transgender Victoria.

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.

Gender Dysphoria Clinic – Monash Health

(03) 9556 5216
monashhealth.org/page/gender_dysphoria

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.

GLHV (Gay and Lesbian Health Victoria)

(03) 9479 8760
glhv.org.au

GLHV is an organisation that conducts research, develops policy and provides training on LGBTI health and wellbeing.

Minus18

minus18.org.au

Minus18 provides support and resources, runs events and advocates for young LGBTI people.

Parents of Gender Diverse Children

pgdc.org.au

Parents of Gender Diverse Children provides peer support for parents of trans and gender diverse children.

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.

Proud2Play

proud2play.org.au

Proud2Play focuses on inclusion and participation of young LGBTI people in sport.

The Royal Children's Hospital Gender Dysphoria Service

(03) 9345 4719

rch.org.au/adolescent-medicine/gender-service

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.

Sport and Recreation Victoria (Department of Health and Human Services)

1300 650 172

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.

Transcend

transcendsupport.com.au

Transcend is a parent-led support network for trans and gender diverse children and their families.

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.

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.

Ygender

ygender.org.au

Ygender is a peer-led support and advocacy organisation for young trans and gender diverse people.

Zoe Belle Gender Collective

(03) 8398 4117

zbgc.com.au

The Zoe Belle Gender Collective provides information and resources for anyone interested in the health and wellbeing of trans and gender diverse people. This includes a useful 'question and answer' portal about gender identity issues.





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