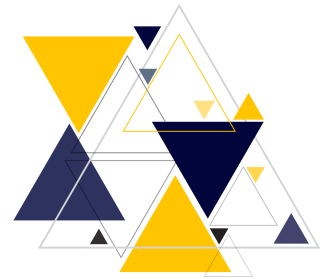


What does the law say?



This section outlines the relevant provisions of the federal *Sex Discrimination Act 1984* (Cth) (the Act) as well as providing some guidance on other areas of law which may be relevant.

In addition to the federal Act, sporting organisations also have obligations under state and territory anti-discrimination laws (see **section 4.8**). State and territory anti-discrimination laws should also be considered in the development of policies and practices by sporting organisations.

Summary of the federal *Sex Discrimination Act 1984* (Cth)

1. Discrimination

It is unlawful to discriminate on the basis of sex or gender identity in sport unless:

- the different treatment amounts to a 'special measure', or
- an exemption applies.

A **special measure** can be understood as 'positive discrimination' or affirmative action. Special measures are positive actions used to promote equity for disadvantaged groups.

An **exemption** 'exempts' a person or organisation from the operation of the Act, and means that a successful claim of unlawful discrimination cannot be brought.

There are four exemptions that are particularly relevant to sport:

1. voluntary body exemption
2. club exemption
3. competitive sporting activity exemption
4. temporary exemption.

See the diagram on **page 26** for a visual representation of how the discrimination provisions of the Act work together.

2. Sexual harassment and victimisation

It is unlawful to sexually harass or victimise someone in certain areas of public life, including in some sporting contexts.

4.1 What is discrimination on the basis of sex or gender identity?

Under the Act, discrimination on the basis of sex or gender identity can include both direct and indirect discrimination.

'Direct discrimination' occurs when a person is treated less favourably than another person on the ground of:

- sex or gender identity, or
- a characteristic generally associated with a person of that sex or gender identity

in circumstances that are the same or not materially different.¹⁶

An example of direct discrimination would be a sporting organisation refusing a trans woman's application for membership because she is transgender.

'Indirect discrimination' can be less obvious. Indirect discrimination occurs when a condition, requirement or practice that applies to everyone, disadvantages persons of a particular sex or gender identity, and the condition, requirement or practice is not reasonable in the circumstances.¹⁷

What does 'reasonable' mean?

The Act provides that the following matters are to be taken into account when deciding whether a condition, requirement or practice is reasonable:

- the nature and extent of the disadvantage
- the feasibility of overcoming or mitigating the disadvantage, and
- whether the disadvantage is proportionate to the result sought.¹⁸

An example of indirect discrimination might be a sporting organisation requiring a birth certificate upon registration, and not accepting any alternative form of documentation to verify a person's gender. This may disadvantage transgender and non-binary players if their birth certificate does not align with their gender identity. If reasonableness could not be established, the sporting organisation might be at risk of a successful discrimination claim.

4.2 When is it unlawful to discriminate?

(a) Overview

The Act makes discrimination unlawful in particular areas of public life.

Unless an exemption applies or the different treatment amounts to a special measure, it is unlawful to discriminate on the basis of sex or gender identity, including in relation to:

- the provision of goods, services and facilities¹⁹
- club membership and benefits, for members and applicants for membership.²⁰

It is also unlawful to request information from a person for the purpose of discriminating against them.²¹

What is a 'club'?

Under the Act, a 'club' means an association of 30 or more people associated together for social, literary, cultural, sporting, political, athletic or other lawful purposes, that:

- provides and maintains its facilities wholly or partly from its own funds, and
- sells or supplies liquor for consumption on its premises.²²

Sport usually involves the provision of 'goods, services and facilities' and—where the definition of 'club' is met—the provision of club membership and benefits. Participation in sport may also involve requests for information.

Discrimination in the context of sport may arise if a sporting organisation refuses to allow a transgender or gender diverse person:

- to participate in the competitions it runs, or
- to join the club it operates.

Further details on these provisions are outlined in **sections 4.2(b) to (d)**.

(b) Discrimination in the provision of goods, services and facilities

It is unlawful to discriminate against another person based on their sex or gender identity in the following ways:

- by refusing to provide goods or services, or make facilities available²³
- in the terms or conditions which apply to the use of the goods, services or facilities²⁴
- in the manner in which the goods or services are provided, or the facilities are made available.²⁵

Case study

Indirect discrimination in the provision of player facilities

Greenhill uses a ground owned by Westacre for weeknight training.

Westacre only unlocks the men's changeroom block for Greenhill's use. A number of Greenhill's players identify as transgender and non-binary and prefer to use the women's changeroom.

Not providing access to the women's changeroom disadvantages the transgender and non-binary members of the Greenhill team. They either leave work early so they can get changed at home, or get changed in the carpark.

Westacre's actions do not constitute a 'special measure' and do not fall within any of the relevant exemptions.

Despite a number of requests, Westacre repeatedly refuses to unlock the women's changeroom. When pressed on the issue they say that Greenhill competes in the men's competition and should therefore 'only need access to the men's changeroom'. Westacre's management also mentions that they cannot be expected to open the women's changeroom because this will mean extra cleaning for their staff.

In this case, Westacre has a policy of expecting all members of men's sporting teams, regardless of their gender identity, to use the same men's changeroom. This affects the Greenhill players who identify as transgender and non-binary.

Though the players who are not transgender are treated in the same way as the players who are transgender or non-binary, the transgender and non-binary players are not able to use the changeroom that matches their gender identity. This disadvantages transgender and non-binary players.

Since the decision not to unlock the women's changeroom does not appear to be 'reasonable', this may amount to unlawful indirect discrimination on the basis of gender identity.

(c) Discrimination in club membership

It is unlawful for a club, a club's management committee or individual members of a club's management committee, to discriminate against an applicant for membership of a club, or an existing member, based on their sex or gender identity, in relation to certain activities.²⁶

The discrimination provisions regarding club membership only apply to sporting clubs and organisations that meet the definition of 'club' under the Act. See **page 17** for the definition of 'club'.

For clubs that do not meet the 'club' definition, the Act will usually still be applicable by way of the 'provision of goods, services and facilities' section.²⁷ However, if a sporting organisation is a 'voluntary body' under the Act and not a 'club' it will be exempt from the key anti-discrimination provisions of the Act (see **section 4.3(b)(i)**).

For example, a local tennis association with 400 members, which owns its own courts and operates a weekly competition, but does not sell or supply liquor, would not be a 'club' under the Act. However, a local golf club with 1,500 members, which owns and maintains its own course, and serves liquor at the club house, would be a 'club' under the Act.

(i) Discrimination against applicants for club membership

It is unlawful for a club to discriminate against an applicant for club membership based on their sex or gender identity:

- by refusing or failing to accept the person's application for membership, or
- in the terms or conditions on which the club is prepared to admit the person to membership.²⁸

Case study

Direct discrimination against an applicant for club membership

Jane is a trans woman who lives in New South Wales. She and her friend Valeria both submit applications to join their local bowls club, which meets the definition of a 'club' under the Act. For identification purposes the application form asks for a certified copy of a birth certificate.

Jane's gender marker on her birth certificate is 'male'. She is not yet at a point in her transition where she is able to change it, and notes this on the application form. Along with her birth certificate, Jane also includes a statutory declaration that outlines her affirmed gender and name.

When Jane follows up with the bowls club they tell her that her application has been rejected, as unfortunately the club is 'at capacity' and they are not taking new members. Jane is surprised by this because Valeria's application has been accepted. Since becoming a member Valeria has received several emails indicating that the club has a promotion offering a discount on membership fees as part of its 'summer membership drive'. Her neighbour, Adela, applied for membership the week after Valeria and Jane, and has just had her application accepted.

The bowls club's refusal to accept Jane's membership application is likely to amount to unlawful direct discrimination on the basis of gender identity. The club's actions do not amount to a 'special measure' and are unlikely to fall within any of the relevant exemptions.

(ii) Discrimination against club members

It is also unlawful for a club to discriminate against a club member based on their sex or gender identity:

- in the terms or conditions of membership that are afforded to the member
- by refusing or failing to accept the member's application for a particular class or type of membership
- by denying the member access, or limiting the member's access, to any benefit provided by the club

- by depriving the member of membership or varying the terms of membership, or
- by subjecting the member to any other detriment.²⁹

(d) Unlawful requests for information

It is unlawful to request or require a person to provide information if:

- the information is requested in connection with, or for the purpose of doing an act, and
- it would be unlawful (in particular circumstances) in doing that act to discriminate against a person based on their gender identity or sex, and
- people who are of a different sex or gender identity would not be asked to provide the same information.³⁰



However, it is permissible for a person to request or require:

- a person of a particular sex to provide information about their medical history where it relates to medical conditions that affect people of that sex only
- a person who is pregnant to provide medical information concerning the pregnancy.³¹

It is important to note that any information provided by a person in response to a request of this nature cannot be used for the purpose of unlawful discrimination.

For example, if a sporting organisation permissibly requests medical information in line with the above from a player for health and safety reasons, they cannot use that information to unlawfully discriminate against the player.

4.3 When is discrimination allowed?

Discrimination on the basis of sex or gender identity in sport will be permitted under the Act if:

- the different treatment amounts to a 'special measure', or
- an exemption applies.

(a) Special measures

Special measures are positive actions used to promote equality for disadvantaged groups. They are often referred to as 'positive discrimination' or 'affirmative action', and address the unequal position of two groups of people (for example, women and men) by implementing a practice which favours the disadvantaged group.

The Act allows for a special measure to be taken for the purpose of achieving substantive equality between women and men, and people of different gender identities.³²



While the Act does not define 'substantive equality', the Federal Court has held that 'substantive equality' means equality in substance, rather than 'formal' equality.³³ Equality in substance recognises that, for disadvantaged groups, formal equality before the law—or treating everyone the same—is not always sufficient to eliminate the effects of historical discrimination, and may actually entrench existing discrimination. Positive actions that confer an extra benefit on members of a disadvantaged group may be required to attain 'real' or substantive equality.

Depending on the circumstances, taking steps to encourage the participation of transgender and gender diverse people in sport may constitute a special measure under the Act. If a sporting organisation wants to adopt a 'special measure', it will need to determine that the action it is taking is for the purpose of achieving substantive equality between women and men, or people of different gender identities. Examples of potential special measures are set out below.

Special measures

The following are examples of actions which may, depending on the circumstances, be regarded as a special measure:

- setting targets for the minimum number of transgender and gender diverse players a sporting organisation seeks to sign up to its membership list
- offering allocated training sessions for transgender and gender diverse players, with a view to encouraging participation
- offering a pre-season trial program for prospective players who are transgender or gender diverse, with the aim of showing that there are no barriers to their participation.

The Commission does not have the power to certify special measures under the Act, nor does any other body. Instead, a sporting organisation should satisfy itself that a proposed measure constitutes a special measure. Even if a sporting organisation has determined that an action it has taken is a 'special measure,' this action could still be the subject of a complaint to the Commission by someone who disagrees with the organisation's characterisation of its actions as a special measure. **Section 7** includes further information about the Commission's complaints process.

The Commission has published **guidelines** on special measures under the Act, which provide detailed guidance to assist individuals and organisations to assess their own equity initiatives for consistency with the Act.³⁴

(b) Exemptions

The Act provides for both temporary and permanent exemptions from the operation of the anti-discrimination provisions of the Act.³⁵ An exemption makes certain conduct lawful under the Act and prevents a person from successfully claiming that an action is unlawful discrimination.

A sporting organisation must apply to the Commission to obtain a temporary exemption. A sporting organisation does not need to apply to the Commission to rely on a permanent exemption.

If a sporting organisation wishes to rely on a permanent exemption it will need to make its own assessment that the exemption applies.

Relying on an exemption is not mandatory. Sporting organisations may choose to comply with the core anti-discrimination provisions of the Act even when it is possible to rely on an exemption.

(i) Permanent exemption—voluntary body

Under the Act it is permissible for a 'voluntary body' to discriminate against a member or a person seeking to become a member on the basis of the person's sex or gender identity, as well as in the provision of benefits, facilities or services to members.³⁶

What is a 'voluntary body'?

A 'voluntary body' is an association or other body (incorporated or unincorporated) 'the activities of which are not engaged in for the purpose of making profit'.³⁷

A voluntary body does not include:

- a 'club' (see definition in **section 4.2(a)**)
- a 'registered organisation'
- a body established by a law of the Commonwealth, of a State or a Territory
- an association that provides grants, loans, credit or finance to its members.³⁸

A 'registered organisation' means 'an organisation registered, or an association recognised under the *Fair Work (Registered Organisations) Act 2009* (Cth)'.³⁹

Some sporting organisations will be 'voluntary bodies' under the Act. For example, a small local soccer association that operates on a not-for-profit basis may be a 'voluntary body'.

If a sporting organisation meets the definition of a 'club', it cannot be a 'voluntary body'.

(ii) Permanent exemption—club

Under the Act there are particular circumstances where it is permissible for a club to discriminate on the basis of sex (although not on the basis of gender identity) in relation to club membership and benefits:

- if the membership of the club is only available to persons of a different sex,⁴⁰ or
- if it is not practicable for both men and women⁴¹ to use or enjoy the benefit at the same time or to the same extent and either:
 - » men and women are provided with the same benefit (or an equivalent benefit) separately, or
 - » they are entitled to a 'fair and reasonable' proportion of the use and enjoyment of the benefit.⁴²

The use and enjoyment of a benefit for both women and men at the same time, or to the same extent, will likely only be treated as 'not practicable' if it creates a situation of practical difficulty. A mere social preference (in other words, men not wanting to play a sport with women or vice versa) is unlikely to meet the criteria.

When deciding whether it is 'practicable' for men and women to use or enjoy the benefit at the same time or to the same extent, the following factors will be considered:

- the purpose for which the club is established
- the membership of the club, including any class or type of membership
- the nature of the benefits provided by the club
- the opportunities for the use and enjoyment of those benefits by men and women, and
- any other relevant circumstances.⁴³



(iii) Permanent exemption—competitive sporting activity

The Act contains a permanent exemption in relation to ‘competitive sporting activity’.⁴⁴ This is commonly referred to as the ‘single-sex competition’ exemption, although it does not operate to make all single-sex or single-gender sporting competitions lawful.

The exemption allows for discrimination on the grounds of sex or gender identity only in ‘any competitive sporting activity in which the strength, stamina or physique of competitors is relevant’.⁴⁵

The words ‘strength’, ‘stamina’ and ‘physique’, and the term ‘competitive sporting activity’, are not defined in the Act. Their meanings have not been conclusively settled by the Federal Court of Australia.

However, in considering an equivalent exemption in the Victorian legislation, the Victorian Civil and Administrative Tribunal has stated that the exemption will operate if, when both sexes competed against each other, the competition would be uneven because of the disparity between the relative strength, stamina and physique of male and female competitors.⁴⁶ This interpretation was approved by the Federal Court of Australia⁴⁷ and the reasoning is likely to extend to people of different gender identities.

The objective of the exemption is to restrict competitive sporting activity to people who can ‘effectively compete’⁴⁸ with each other. This is intended to recognise that ‘biological differences between men and women are relevant to competitive sporting activities’.⁴⁹ It can be understood as ensuring a ‘level playing field’.

If a sporting organisation decides to rely on the 'competitive sporting activity' exemption to exclude a person from a particular competition, it will need to satisfy itself that 'strength', 'stamina' or 'physique' are relevant and how the organisation assesses this. See **page 36** for guidance on factors to consider when seeking to rely on the 'competitive sporting activity' exemption. Given the diversity of sports and the role of different skills and physical characteristics (strength, stamina, physique) in each sport, the assessment should be specific to the sport in question.

Additionally, the exemption is limited to competitive sporting activities and does not apply to:

- coaching
- umpiring or refereeing
- administration
- 'prescribed sporting activities'⁵⁰
- sporting activities by children who are younger than 12 years of age.⁵¹

Case study

Competitive sporting activity and children who are younger than 12 years of age

Xanthe is ten years old, and was assigned as male at birth but identifies as a girl.

Xanthe plays water polo. Xanthe's team is playing in the local girls tournament next weekend. The tournament organisers have contacted Xanthe's club to explain that because her birth certificate indicates her gender as 'male,' she won't be able to participate. When Xanthe's club asks for an explanation the organisers explain that there is a concern that the competition won't be 'fair' because Xanthe is 'too strong' and that 'the competitive sporting activity exemption allows for her exclusion on this basis'.

Xanthe's club writes to the tournament organisers indicating that the Act specifically provides that the competitive sporting activity exemption does not apply to 'sporting activities by children who are younger than 12 years of age'.

Xanthe is able to participate in the tournament.

(iv) Temporary exemption

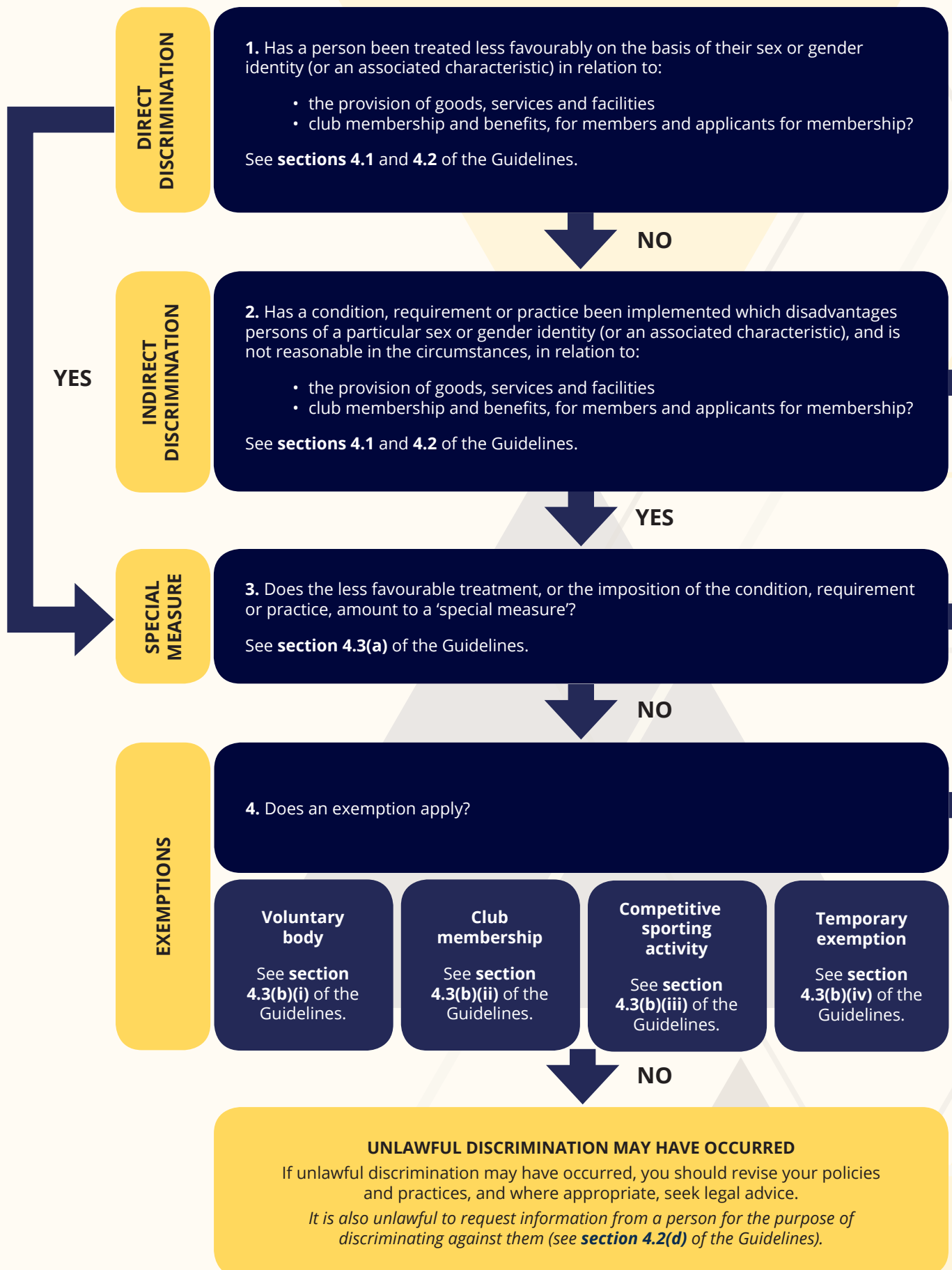
A sporting organisation may apply to the Commission for a temporary exemption. Given the permanent exemptions that already exist in the Act, the Commission grants temporary exemptions sparingly. The Commission has published **guidelines** about how it assesses applications for temporary exemptions under the Act.⁵²

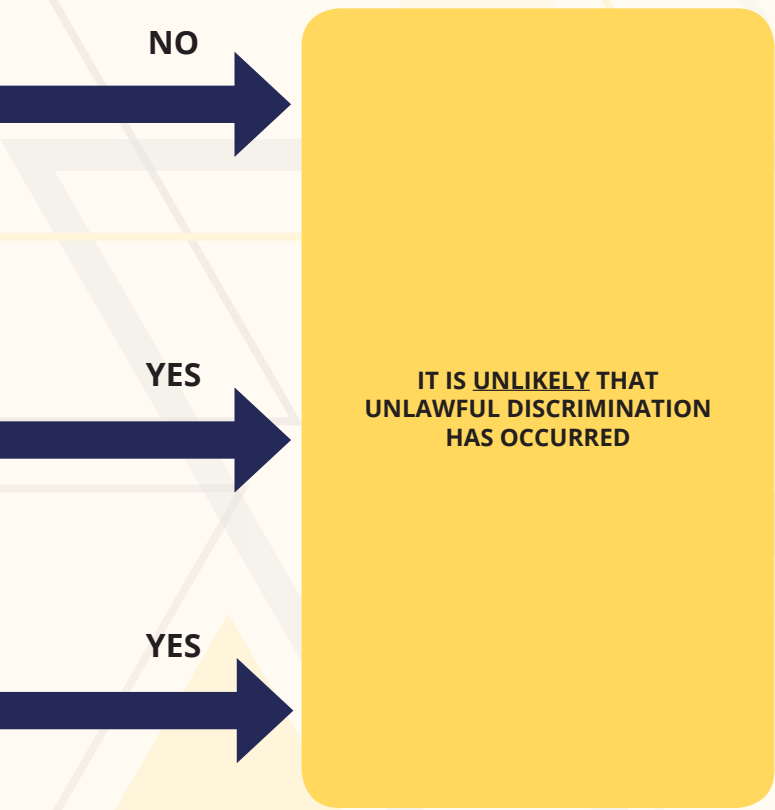
Temporary exemptions can be granted:

- subject to certain terms and conditions, and
- for a period of up to five years.⁵³

If a temporary exemption is granted, it will not be possible for a successful complaint to be brought in relation to the circumstances covered by the exemption.

4.4 Discrimination and sport under the *Sex Discrimination Act 1984* (Cth)





4.5 What is sexual harassment?

Sexual harassment is unlawful under the Act in certain areas of public life, including in the provision or receipt of goods, services and facilities.⁵⁴ It is also unlawful for a member of the management committee of a club to sexually harass a member, or applicant for membership, of the club.⁵⁵

'Sexual harassment' is defined in the Act as an unwelcome:

- sexual advance
- request for sexual favours, or
- conduct of a sexual nature,

in circumstances in which a reasonable person would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.⁵⁶

The sex and gender identity of the person who is harassed are relevant circumstances to be taken into account in determining if a person has been sexually harassed.⁵⁷

Sexual harassment can be physical, spoken or written, and may include comments online or in social media. It may include a range of unwelcome 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
- repeated requests to go out
- sexually explicit messages.⁵⁸

Sexual harassment can also include sexually suggestive or invasive questions, such as asking a transgender or gender diverse person about their sex life, or asking them about their physical characteristics.

Case study

Sexual harassment

Lindsay is a trans man and has recently joined a cycling 'club', as defined in the Act.

While most club members have been very welcoming, one of the club's directors George, rode up next to him and asked him a number of detailed questions about his sex life. Lindsay told George his questions were inappropriate and asked him to stop. George shrugged so Lindsay assumed he had gotten the message. However, on the club's latest ride George asked Lindsay more questions about his sex life in the context of his transition. Lindsay asked him to stop again.

George's repeated questioning is likely to amount to sexual harassment. It is unlawful for the member of a club's Board or management committee to sexually harass a member of a club.

4.6 What is victimisation?

Victimisation is an offence under the Act⁵⁹ and the Commission can also inquire into complaints of victimisation. A person will be taken to have victimised another person if they threaten to, or do, subject that person to a detriment because they have either made a complaint under the Act, or have engaged with the Commission's complaints process in some other way (for example, as a witness in proceedings).⁶⁰

This applies to complaints of discrimination and sexual harassment.⁶¹

Case study

Victimisation

Finn is a trans man. He recently lodged a complaint with the Commission. In his complaint Finn alleges that the archery association that he is a member of has unlawfully discriminated against him on the basis of his gender identity.

Since lodging his complaint, the association's president has indicated to Finn that, despite him being the best archer, 'it will be very difficult' to select Finn for the state team because of the complaint. The president has the final say on the composition of all state teams.

This suggestion that Finn will be subjected to a detriment (not being selected for a team) because of the complaint he has made is likely to amount to victimisation. It is unlawful to victimise a person under the Act.

4.7 Who is legally responsible under the Act?

Legal responsibility—often described as liability—determines who has to pay compensation or take other actions because of a finding of unlawful discrimination or sexual harassment.

Discrimination

Both an individual or an organisation who discriminates against an individual, and a person who aids or permits the unlawful discrimination, can be held liable under the Act.⁶²

It is also important to note that a sporting organisation can be vicariously liable for the actions of their employees or agents where these amount to unlawful discrimination, or an unlawful request for information.⁶³

Sexual harassment and victimisation

The person who sexually harasses or victimises another person is liable for their own actions.

An employer may also be liable where an employee, acting in connection with their employment, sexually harasses another person. An employer will not be liable if it is established that the employer took all reasonable steps to prevent the sexual harassment.⁶⁴

4.8 What about state and territory laws?

In addition to the provisions of the Act, as the federal anti-discrimination law, sporting organisations also have legal obligations under state and territory anti-discrimination legislation. These Guidelines do not cover the obligations that sporting organisations have under state and territory legislation.

The Act does not exclude the operation of state and territory anti-discrimination legislation that is capable of operating alongside the Act.⁶⁵ This means that state and territory anti-discrimination legislation might impose different, or stricter, obligations.

A person is not entitled to make a complaint to the Commission in relation to unlawful discrimination if they have already:

- made a complaint
- instituted a proceeding, or
- taken any other action,

in relation to the same act or omission under the law of a state or territory which deals with the same matter.⁶⁶



Both the Victorian Equal Opportunity and Human Rights Commission and the Australian Capital Territory Human Rights Commission have also produced guidelines on the inclusion of transgender and gender diverse people in sport.⁶⁷

See **section 7** for the contact details of the state and territory human rights commissions.

4.9 Are there any other laws or regulations that are relevant?

In addition to the federal Act, and state and territory anti-discrimination legislation, other areas of law are also relevant to the inclusion of transgender and gender diverse people in sport.

(a) International sporting regulations

International federations and other international sporting bodies, such as the International Olympic Committee, have their own regulations that govern gender-based eligibility.

Some international regulations require athletes who wish to compete in the female category of a sport to have testosterone levels below a certain measurement. For example, the International Olympic Committee's statement from its 2015 *Consensus Meeting on Sex Reassignment and Hyperandrogenism*, requires an individual who wishes to compete in the female category to have a total serum testosterone level below 10 nanomoles/L for at least 12 months prior to their first competition in that category.⁶⁸ This level must be maintained for the duration of the competition period.

When Australian-based sporting organisations develop their own policies, they will likely consider the regulations that are in place for international competitions. Any eligibility policy that is developed will need to comply with the Act.

(b) Privacy law

Sporting organisations should protect the privacy of players. This is particularly important when dealing with any personal or sensitive information that the organisation may hold regarding a person's gender identity, or transition or affirmation process.

When developing information and record-keeping systems, and considering the use and any disclosure of the personal information held by the organisation, the sporting organisation should consider the provisions of the *Privacy Act 1988* (Cth), the 13 Australian Privacy Principles (APPs), and the relevant legislation and regulations of the states and territories.

Further information is available from the Office of the Australian Information Commissioner at www.oaic.gov.au/privacy-law.

(c) Anti-doping laws

Anti-doping laws may be relevant to transgender and gender diverse people who are accessing hormone therapy as part of their transition or affirmation. Usually this will only be relevant in elite-level competitions and even then only in very limited circumstances.

When developing policies and procedures in relation to drug testing and anti-doping laws, organisations will need to consider the *Australian Sports Anti-Doping Authority Act 2006* (Cth), the *Australian Sports Anti-Doping Regulations 2006* (Cth), and the associated National Anti-Doping Scheme.⁶⁹

These anti-doping laws allow athletes to obtain permission to use prescribed substances for therapeutic purposes. This publication does not consider these laws and processes.

Further information is available from the Australian Sports Anti-Doping Authority at www.asada.gov.au.

