



GENDER IDENTITY DISCRIMINATION

What is Gender Identity Discrimination?

Under the Victorian Equal Opportunity Act 1995, it is unlawful to treat someone unfairly or harass them because of their actual or assumed gender identity.

Discrimination on the basis of a person's gender identity may be **direct** or **indirect**.

Direct discrimination on the basis of gender identity means treating a person with a particular gender identity less favourably than a person who does not have that gender identity, in the same or similar circumstances.

Indirect discrimination happens when a requirement, condition or practice which does not appear to be unfair, in fact does discriminate against people with a particular gender identity.

Gender Identity

Gender identity means self identification as a person of the relevant gender. The Equal Opportunity Act acknowledges that a person may identify as a member of a particular gender by their style of dress, medical intervention or by other means, including a change of name. Medical intervention, in this sense, may include any relevant attention or treatment by a qualified medical practitioner, including hormone therapy, counselling and sex reassignment surgery. Other ways a person expresses their gender identity are also recognised.

Where is Gender Identity Discrimination Prohibited?

In Victoria, discrimination and harassment based on gender identity are unlawful in:

- accommodation;
- clubs and club memberships;
- education;
- employment;
- provision of goods and services;
- disposal of land; and
- sport.

Who is Protected Against Gender Identity Discrimination and Harassment?

As with any protected characteristic, the Equal Opportunity Act only recognises gender identity if it is *bona fide*. This means that you are only protected by law if your identification as a member of the relevant gender is genuine rather than fraudulent or in bad faith.

If you:

- want to live as a member of your self-identified gender (different from your gender as shown on inconsistent identifying documentation);
- are in the process of affirming your self-identified gender;

- have lived, or are currently living as a member of your self-identified gender;
- are intersexual (born with anatomy or physiology different to current ideas of what constitutes "normal" male and female) – this may mean you live as a member of your self-identified gender (which may be different to your gender as shown on any inconsistent identifying documentation) and you may not identify exclusively as male or female;
- you adopt the characteristics of the relevant gender as part of your life, for example, by "cross-dressing";

you will be protected against unlawful discrimination and harassment based on your gender identity.

To be protected by the Equal Opportunity Act, you don't have to have had or be planning surgery, hormone therapy or other treatment. It doesn't matter why you affirm a particular gender identity or what you call yourself. It doesn't matter what your previous gender (as shown on your original identifying documentation) was.

Exceptions

As well as the general exceptions that apply to all protected characteristics, the Equal Opportunity Act includes limited exceptions which specifically apply to unfair treatment and harassment based on gender identity.

Employment

In general, it is unlawful to discriminate against you or harass you because of your gender identity in employment. This covers recruitment, terms and conditions of employment, promotion and transfer opportunities, leave entitlements, redundancy, dismissal and exiting arrangements, including the provision of references and protection from "outing" by a former employer after you leave the workplace.

Adequate Notice of Gender Identity

However, if you are intending to affirm your self-identified gender in your current workplace, your present employer needs "adequate notice" of this in order to take the necessary steps to prevent discrimination and harassment based on your gender identity. Your employer is entitled to ask questions to determine what needs to be done to assist you. You do not need to tell your employer about a previous gender, or if you have already affirmed your self-identified gender, only about your intention to affirm your self-identified gender in that workplace.

Adequate notice would give your employer time to seek expert advice, talk to you about your requirements, develop a workplace policy and procedures for your affirmation of gender identity, and arrange training and other activities necessary to ensure that it occurs in a discrimination and harassment free workplace.

Adequate notice is a question of fact that would be decided by the Equal Opportunity Commission if you made a complaint of gender identity discrimination or harassment.

If you don't provide adequate notice, it may be open to your employer to lawfully discriminate against you. Note that this exception must clearly apply for it to be a defence to discrimination, since the purpose of the Equal Opportunity Act is to eliminate discrimination.

When Adequate Notice is Relevant

As mentioned earlier, you will only need to give your present employer adequate notice if you intend to affirm your self-identified gender in your current workplace. You don't need to tell your employer if you have already affirmed your self-identified gender or your current gender identity and the gender shown on any identifying documentation are different. However, if the issue arises for legitimate reasons, e.g. production of drivers licence or university degree, you may need to show that the documents are actually your own.

If your employer or colleagues discovered your previous gender and "outed" you, any unfair treatment or harassment that resulted would be unlawful and you could lodge a complaint of gender identity discrimination or harassment with the Equal Opportunity Commission. See the Frequently Asked Questions for information about privacy.

We recommend that you talk to your employer about your intention to affirm your self-identified gender. You don't need to provide formal written notice, but it will help the workplace transition if you let your employer know what you require; for example, time off before returning to work presenting in the relevant gender, the date you will be affirming your self-identified gender in the workplace, the name you will be known by, how you would like your affirmation of self-identified gender communicated, whether you will be available to discuss the issue with colleagues and any other relevant information. Note that your employer must treat any discussions confidentially and protect your privacy. Your employer is obliged to take reasonable precautions to provide you with a discrimination and harassment free workplace.

If Gender Identity Cannot Be Accommodated

If you have given your employer adequate notice of your intention to affirm your self-identified gender but they are not able to accommodate you, they may lawfully discriminate against you if it is reasonable for them to do so taking into account:

- the cost of not discriminating;
- the feasibility of not discriminating;
- the financial impact of not discriminating;
- your employer's financial circumstances;
- the impact of the proposed discrimination on you;
- any other relevant factors.

Note, however, that these factors must be weighed against how the proposed discrimination will affect you.

We have also produced guidelines for employers. You may like to give your employer a copy of these.

Sport

In the same way as sex discrimination is permitted in this situation, the Equal Opportunity Act also allows the exclusion of people on the basis of gender identity from a sport in which the strength, stamina or physique of the competitors is relevant.

Frequently Asked Questions

May I use toilets and other facilities at work appropriate to my self-identified gender?

Yes. If your workmates have any concerns about this they should have the opportunity to discuss these with a suitable member of staff or management.

Can I ask HR to change my employment records to reflect my self-identified gender?

Yes. Refusing to change your records may be discriminatory.

What if someone discovers my previous gender and "outs" me at work?

"Outing" you at work may be discriminatory. If your employer or any member of staff or management uses information about your previous gender in a discriminatory or harassing way, you may be able to lodge a complaint under the Equal Opportunity Act against your employer and anyone else involved. "Outing" you could also breach your contract of employment, in particular, your right to quiet enjoyment of the workplace.

What about other identifying documentation?

You will be counted legally as your self-identified gender in Victoria. However, this will not always be the case under federal laws. Centrelink will identify you as a member of your self-identified gender. You can also get a new passport showing your self-identified gender. However, to open a bank account, take out a loan, get a new Medicare card or drivers licence you will need proof of your identity such as a birth certificate or passport. In all Australian states, apart from Queensland, you cannot be discriminated against on the basis of your gender identity.

Do I have to tell a doctor that I am in the process of affirming or that I have already affirmed my self-identified gender during a pre-employment medical test?

A doctor may ask questions which are relevant to the genuine requirements of the job. If gender is part of the genuine requirements of the job, you will need to tell the doctor about any relevant therapy and your intention to affirm your self-identified gender. You don't need to tell them about previously affirming your gender identity. If the doctor or employer uses the information you provide in a discriminatory way, then you may be able to lodge a complaint under the Equal Opportunity Act against them. You may find it helpful to talk to your own doctor before attending a pre-employment medical test.

What about other employment-related medical testing?

If employment-related testing revealed that you were in the process of affirming or had already affirmed your self-identified gender, your employer could not treat you less favourably than any other employee. A doctor, your employer and anyone else who uses such information in a discriminatory way may be liable under equal opportunity law.

Can I ask to be put in the hospital ward appropriate to my self-identified gender?

Yes, where such facilities are available. A hospital is a provider of goods and services and is covered by the Equal Opportunity Act. However, note there are some exceptions that may apply. The answer may depend on your circumstances. Contact us for advice.

I am a teacher. Can I be excluded from working with children because of my gender identity?

No. However, your employer may require adequate notice of your gender identity in order to make arrangements regarding your teaching responsibilities. The Equal Opportunity Act also contains an exception which allows an employer to discriminate where care of children is involved if the employer genuinely believes discrimination is necessary to protect the physical, psychological or emotional well-being of the children, but only if there is a rational basis for that belief. The test for whether or not a belief is rational is objective.

Can I have time off work to attend medical appointments related to my gender identity?

You should be offered the same leave options as any other employee.

What about life insurance and superannuation?

Specific exceptions apply to life insurance and superannuation. Contact us for information.

Need to know more?

The Equal Opportunity Commission monitors equal opportunity and human rights issues and works to eliminate unlawful discrimination and harassment in Victoria. It does this by:

- providing free and confidential telephone advice on equal opportunity rights and responsibilities;
- helping to resolve complaints made under the Victorian Equal Opportunity Act;
- providing training and running public education campaigns;
- producing a range of publications; and
- conducting research and providing legal and policy advice.

Contact us

Equal Opportunity Commission
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380 Lonsdale Street
MELBOURNE VIC 3000

Advice: (03) 9281 7100 or

toll free 1800 134 142 (country callers)

General enquiries: (03) 9281 7111

TTY: (03) 9281 7110

Training and information: (03) 9281 7142

Publications: (03) 9281 7151

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Other advice and assistance can be provided by a number of support groups. Ask us for contact details.