

Guidelines for the inclusion of transgender and gender diverse people in sport

JUNE 2019



Australian
Human Rights
Commission

SPORT
AUS



The Coalition of
MAJOR
PROFESSIONAL
& PARTICIPATION
SPORTS

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ISBN 978-1-921449-93-2

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Design and layout Dancingirl Designs

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Photography The photo of boxer Nong Rose Baan Charoensuk on page 10 is included with kind permission of Onesongchai Co., Ltd.

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June 2019

Australian Human Rights Commission 2019



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Kate Jenkins

*Sex Discrimination Commissioner
Australian Human Rights Commission*



FOREWORDS

Australian Human Rights Commission

Participation in sport is a human right.¹ We are all born free and equal in dignity and rights.²

Sport provides physical, social and mental health benefits. This makes it essential that everyone has the opportunity to participate in sport, regardless of their sex or gender identity.

When Sport Australia first approached the Australian Human Rights Commission (the Commission) we welcomed this opportunity to partner with them and the Coalition of Major Professional and Participation Sports (COMPPS)³ on the development of these *Guidelines for the inclusion of transgender and gender diverse people in sport* (the Guidelines). The Commission thanks them for their commitment to promoting and facilitating inclusion in sport.

Just as we understand and accept the importance of a person being able to bring their 'whole self' to work, a person must also be able to bring their 'whole self' to any sport they participate in.

Sport 2030, Australia's national sport plan, makes clear that 'successful societies are inclusive societies'.⁴ Unfortunately transgender and gender diverse people are sometimes excluded from sport, or may experience discrimination and sexual harassment when they do participate. Through the targeted consultations we held to inform the development of these Guidelines we heard from a broad range of sporting stakeholders, including transgender and gender diverse athletes. While some reported positive experiences of inclusion, others described how they had been excluded from the sports they loved because of their sex or gender identity.

Some spoke of disengaging from sport during their transition journey because of their concern about how their team mates would treat them. We also heard about what exclusion from sport might mean for children who are transgender or gender diverse. The quotes that appear throughout these Guidelines are drawn from our consultations.

Sporting organisations indicated they are committed to ensuring the rights of all players are respected. They expressed a desire for information and guidance about how they can make their sports inclusive of transgender and gender diverse players.

The federal *Sex Discrimination Act 1984* (Cth) (the Act) prohibits unlawful discrimination on the basis of sex and gender identity in certain areas of public life. The Act has recognised the non-binary nature of gender identity since 2013. The Guidelines provide information on the operation of the Act, and practical guidance on how sporting organisations, their staff and volunteers can promote the inclusion of transgender and gender diverse people in line with human rights-based principles.

I look forward to sporting organisations using these Guidelines to ensure that their policies and practices comply with the Act, and are designed to maximise the inclusion of transgender and gender diverse people in their sport.



Kate Jenkins
Sex Discrimination Commissioner

'Culture and leadership are crucial—it is leadership that makes an organisation's culture safe.'⁵

Sport Australia

Our vision is for Australia to be the world's most active sporting nation, known for its integrity and sporting success and world leading sports industry. Underpinning this vision is the belief that every Australian, at all stages of their life regardless of gender, sexual orientation, ability, cultural background or ethnicity should be able to participate in sport and physical activity in a welcoming way.

Inclusive sport is a priority for Sport Australia, and so we are proud to have partnered with the Commission and COMPPS on the development of these Guidelines.

It is important that sporting bodies, from local clubs through to national sporting organisations, reflect the diversity of the communities of which they are a part and that together, we ensure every person is treated with respect and dignity and protected from discrimination.

These Guidelines provide practical assistance on how to create and promote an inclusive environment in Australian sport for transgender and gender diverse people. The Guidelines are relevant to all sporting organisations, from national sporting bodies, to state and local associations.

Research among gender diverse young people tells us that mental health and wellbeing concerns for this group are substantial.⁶ So the power of sport to heal and reconcile, and allow us to better understand each other's differences, has never been more important.

'If you are going to exclude someone, you need to make sure you have done everything possible to show why that is and give that person a chance to be included.'

Truly inclusive sport cannot be accomplished by a few; it must be done in partnership. Everyone across the sport sector has a part to play in being more inclusive, and there are already many great examples in sport of things that everyone can do. But there is still a long way to go. These Guidelines are designed to help us get there.

I urge all sports to make themselves familiar with the Guidelines. Strong leadership in their implementation is critical to ensuring sporting organisations in Australia welcome all people, regardless of their sex or gender identity.



Kate Palmer
Chief Executive Officer



Coalition of Major Professional and Participation Sports (COMPPS)

The Coalition of Major Professional and Participation Sports (COMPPS) is pleased to partner with the Commission and Sport Australia to develop these important Guidelines.

COMPPS is made up of the following member organisations:

- Australian Football League
- Cricket Australia
- Football Federation Australia
- National Rugby League
- Netball Australia
- Rugby Australia
- Tennis Australia.

Over 9 million people participate in COMPPS sports, through 16,000 clubs. As the custodians and national governing bodies of their sports, COMPPS members play an important leadership role in promoting the benefits of participation in sport for individuals and communities. Partnering to develop the Guidelines demonstrates the commitment of COMPPS members to the inclusion of transgender and gender diverse people in sport.

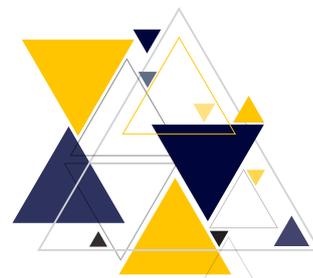
The Guidelines provide a significant opportunity for all of those involved in Australian sports—from grassroots participants and clubs to governing bodies—to reflect on how they can facilitate diversity and inclusion.

COMPPS encourages all of its members to take active steps to welcome and encourage transgender and gender diverse people to participate in their sports.



David Gallop AM
Chairman





These Guidelines have been developed by the Australian Human Rights Commission (the Commission) to provide guidance to sporting organisations on promoting the inclusion and participation of transgender and gender diverse people in sport.

The Guidelines provide:

- information about the operation of the federal *Sex Discrimination Act 1984* (Cth) (the Act) in relation to:
 - » unlawful and permissible discrimination on the basis of sex and gender identity
 - » sexual harassment
 - » victimisation
- practical guidance for promoting inclusion in line with fundamental human rights-based principles:
 - » equality
 - » participation in sport
 - » freedom from discrimination and harassment
 - » privacy.

Other relevant areas of law are also considered.

1.1 A need for guidance

In 2015 the Commission published a report based on consultations with lesbian, gay, bisexual, transgender and intersex (LGBTI) communities.⁷ Those surveyed raised concerns about the lack of participation of transgender and gender diverse people in sport.⁸

Sporting organisations have identified the need for national guidance on how they can be inclusive of transgender and gender diverse people, and the operation of relevant anti-discrimination laws, while also protecting the health and safety of all players.

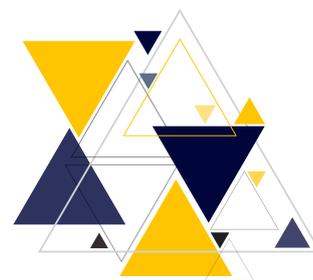
In addressing any concerns about player health, safety and wellbeing, sporting organisations should have regard to the relevant laws, rules, regulations, policies and practices for their sport. It should be noted however that these do not displace the obligations that sporting organisations have under the Act.

1.2 The development of the Guidelines

In developing the Guidelines the Commission consulted with a broad range of stakeholders, including representatives from national sporting organisations, state sporting organisations, government sports and recreation departments, player associations, non-government organisations, other human rights agencies, academics, legal advisers, medical experts, and athletes.

The Guidelines are informed by the following key themes from the consultations:

- The opportunity to participate in sport should be available to everyone in the community, regardless of their sex or gender identity.
- It is problematic to draw a distinction between community sport and elite sport, because for some athletes, participation at a community level is the first step on a pathway to elite sport.
- There is a need for education and guidance about the practical steps that sporting organisations can take to ensure that transgender and gender diverse people are included in sport.
- Competition is an important part of all levels of sport.



These Guidelines are issued under section 48(ga) of the *Sex Discrimination Act 1984* (Cth) (the Act). This provision gives the Commission the power to publish guidelines ‘for the avoidance of discrimination’ on the grounds of sex and gender identity.⁹

2.1 Who are the Guidelines for?

The Guidelines are intended to provide guidance to sporting organisations at all levels, from community sport to elite sport across Australia.

These Guidelines have been developed for sporting organisations, and their staff and volunteers. This includes:

- boards, management committees and their members
- coaches
- staff and volunteers
- umpires and other officials.

The Guidelines may also assist players and members in understanding their rights under the Act.

The Guidelines may also be useful to members of the public, including parents and caregivers of players, interested in the legal obligations of sporting organisations and the need to ensure sport is inclusive and welcoming to all.

The Guidelines are designed for sporting organisations in their capacity as administrators and do not address issues specific to employment. For some sporting organisations, particularly at the elite level, provisions of the Act relating to employment may also be relevant. Organisations should seek legal advice about the application of these provisions.

2.2 Why should I follow the Guidelines?

These Guidelines provide information to assist decision makers to comply with their legal obligations under the Act, and to maximise the inclusion of transgender and gender diverse people in sport.

There are important reasons for following the Guidelines. It is against the law:

- to discriminate against another person on the basis of their sex or gender identity in the provision of goods, services and facilities, unless a special measure is in place or an exemption applies (see **sections 4.2(b) and 4.3**)
- to discriminate against another person on the basis of their sex or gender identity in relation to club membership or benefits, unless a special measure is in place or an exemption applies (see **sections 4.2(c) and 4.3**)
- to request personal information from a person for the purpose of discriminating against them on the basis of their sex or gender identity (see **section 4.2(d)**).

The Guidelines do not provide a definitive legal answer to all of the issues of discrimination, harassment or victimisation involving sex or gender identity that may arise under the Act. Organisations and individuals should seek their own independent legal advice if they have concerns regarding their compliance with the Act or with relevant state or territory anti-discrimination legislation.¹⁰

An organisation or individual will not be protected from a finding of unlawful discrimination if they claim that they complied with, or relied on, these Guidelines. However, the Commission considers that implementing the Guidelines will minimise the likelihood of a successful discrimination claim being made.

03 Commonly used terms



The Commission acknowledges that terminology can have an impact on a person's identity, wellbeing and inherent dignity. Using appropriate terminology respects individuality and enhances the visibility of transgender and gender diverse people in the community.

The Commission recognises that terminology in this area is evolving and contested. The following section provides general guidance on relevant terminology. An understanding of these terms can help prevent discrimination and create an inclusive environment.

Please note that when the terms 'man' and 'woman' or 'trans man' and 'trans woman' are used in these Guidelines, the discussion is also generally applicable to boys, girls and trans children respectively.

Gender identity

'Gender identity' is defined in the Act as 'the gender related identity, appearance or mannerisms or other gender related characteristics of a person (whether by way of medical intervention or not), with or without regard to the person's designated sex at birth'.¹¹

For example, a person's birth certificate may include a marker which indicates that the person's designated sex is female when that person identifies as a man (in other words, their gender identity is that of a man).

Gender diverse

'Gender diverse' is an umbrella term that includes all the different ways gender can be experienced and perceived. It can include people questioning their gender, those who identify as trans/transgender, genderqueer, non-binary, gender non-conforming and many more.¹²

Intersex status

'Intersex status' is a protected attribute under the Act. Under the Act 'intersex status' means the status of having physical, hormonal or genetic features that are:

- neither wholly female nor wholly male
- a combination of female and male, or
- neither female nor male.¹³

These Guidelines do not specifically address people born with variations in sex characteristics (intersex variations).

The term 'intersex' does not describe a person's gender identity (man, woman, neither or both). A person born with a variation in sex characteristics may identify as a man, woman, neither or both.

LGBTQI

'LGBTQI' (or variations of it) is an acronym for lesbian, gay, bisexual, transgender, queer/questioning and intersex. It is used to refer collectively to these communities. The 'LGB' refers to sexuality/sexual identity; the 'T' refers to gender identity; and the 'I' refers to people who have an intersex variation. 'Q' can refer to either gender identity or sexuality.

Non-binary

'Non-binary' is a term used to describe a person who does not identify exclusively as either a man or a woman.

Pronouns

'Pronouns' are a grammatical means of referring to a person or persons. Conventional pronouns are 'she/her/hers' and 'he/him/his'. Some people prefer to use gender neutral pronouns, such as 'they/them/their'. The pronoun a person uses to describe themselves generally reflects their gender identity.

Sex

'Sex' refers to a person's biological sex or sex characteristics. These may be genetic, hormonal, or anatomical.¹⁴

Unlike 'gender identity', 'sex' is not defined in the Act.

Sporting organisations

'Sporting organisations' include, but are not limited to, clubs, associations, national sporting organisations, state sporting organisations, and any organisation that is involved in the management or operation of sport.

Transgender

'Transgender' (commonly abbreviated to 'trans') is a general term used to describe a person whose gender identity is different from the sex they were assigned at birth. Being transgender is about how an individual describes their own gender. It is not necessarily about their biological characteristics.

A person whose birth certificate originally described them as female, who now identifies as a man, may use the labels 'trans', 'trans man' or 'man'. Similarly, a person originally described on their birth certificate as male, who now identifies as a woman, may use the label 'trans', 'trans woman' or 'woman'.¹⁵

Transition

'Transition' or affirmation refers to the social, medical or legal steps that a transgender person takes to affirm their gender identity.

A transition or affirmation may or may not involve medical treatment, including surgeries or hormone therapy. People can transition as children or as adults. Each transition is different.

Social transition is the process by which a person changes their gender expression to better match their gender identity. This may include changing their name, pronouns, and appearance.

Medical transition is the process by which a person changes their physical sex characteristics to align with their gender identity. This may include hormone therapy, surgery or both.

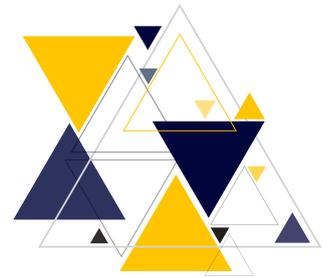
Legal transition is the process by which a person changes their identity documents, name, or both, to reflect their gender identity. This may include changing their gender marker on a passport or birth certificate, or changing their name on a driver's licence or bank card.

'Transition isn't a process from one destination to the other; there is time involved.'



'I played in team sports from age 8 until I transitioned, when I made a conscious decision to not continue playing sport. I didn't want to go through the indignity of having to disclose or prove my gender identity.'

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

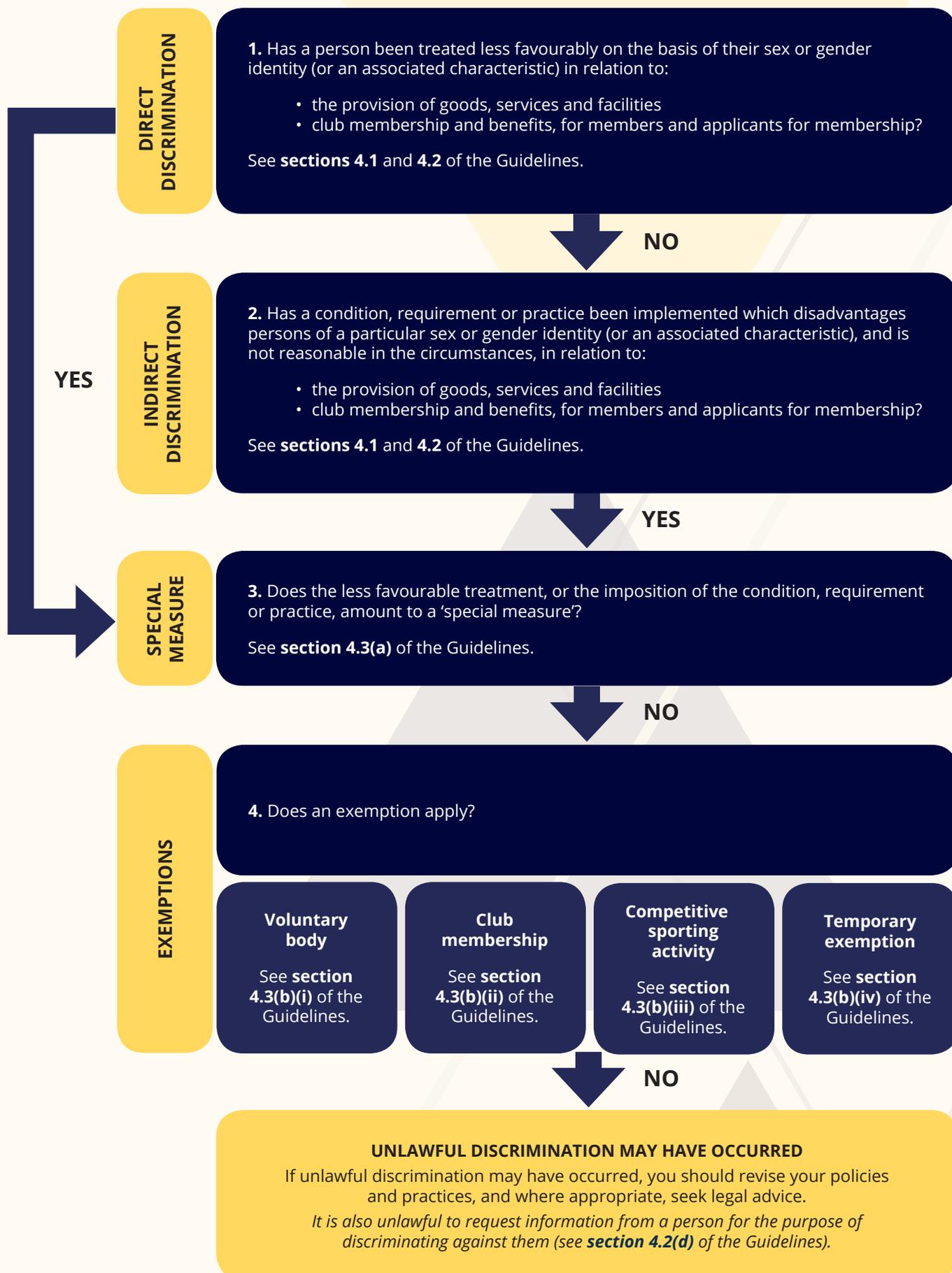
A sporting organisation may apply to the Commission for a temporary exemption. Given the permanent exemptions that already exist in the Act, the Commission grants temporary exemptions sparingly. The Commission has published **guidelines** about how it assesses applications for temporary exemptions under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

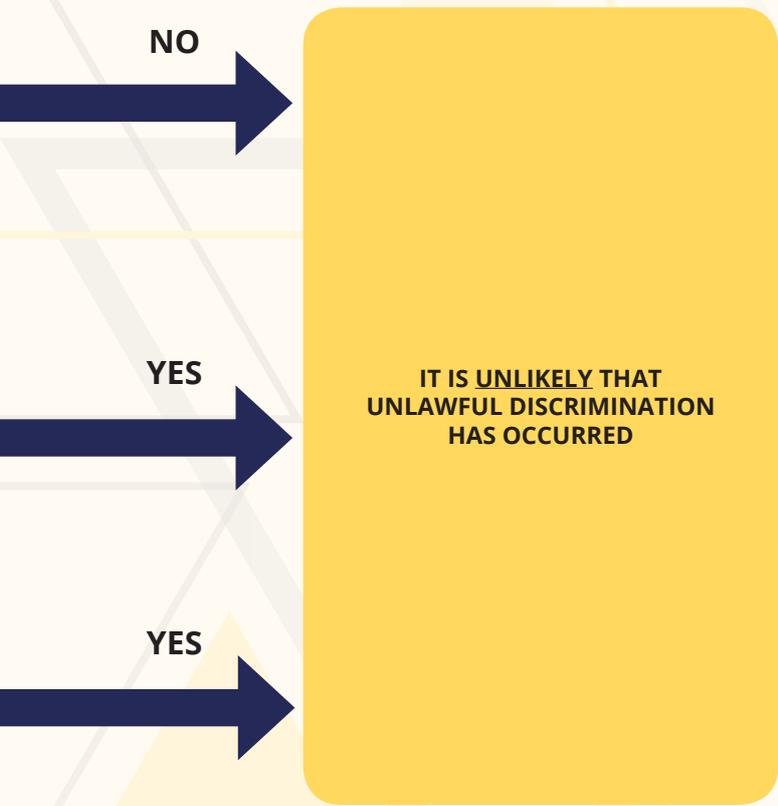
Temporary exemptions can be granted:

- 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?

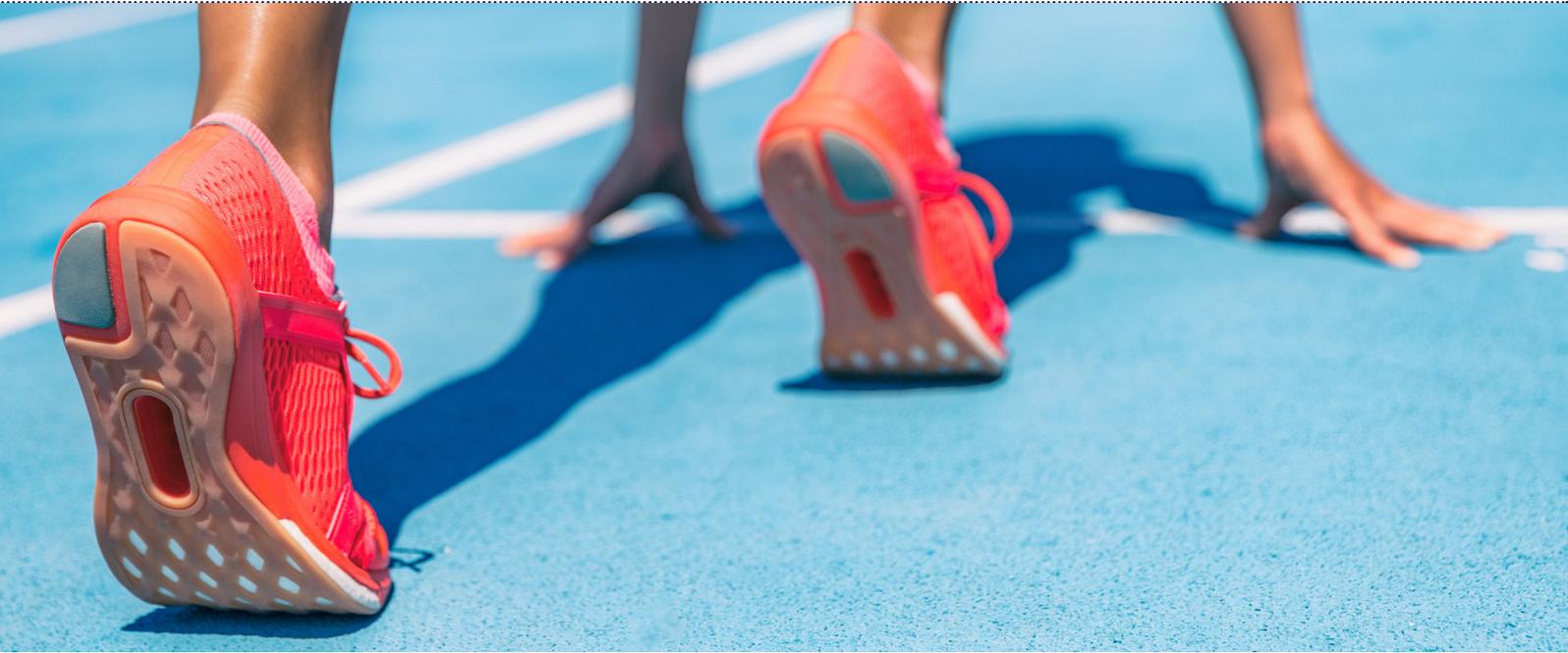
In addition to the provisions of the Act, as the federal anti-discrimination law, sporting organisations also have legal obligations under state and territory anti-discrimination legislation. These Guidelines do not cover the obligations that sporting organisations have under state and territory legislation.

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.

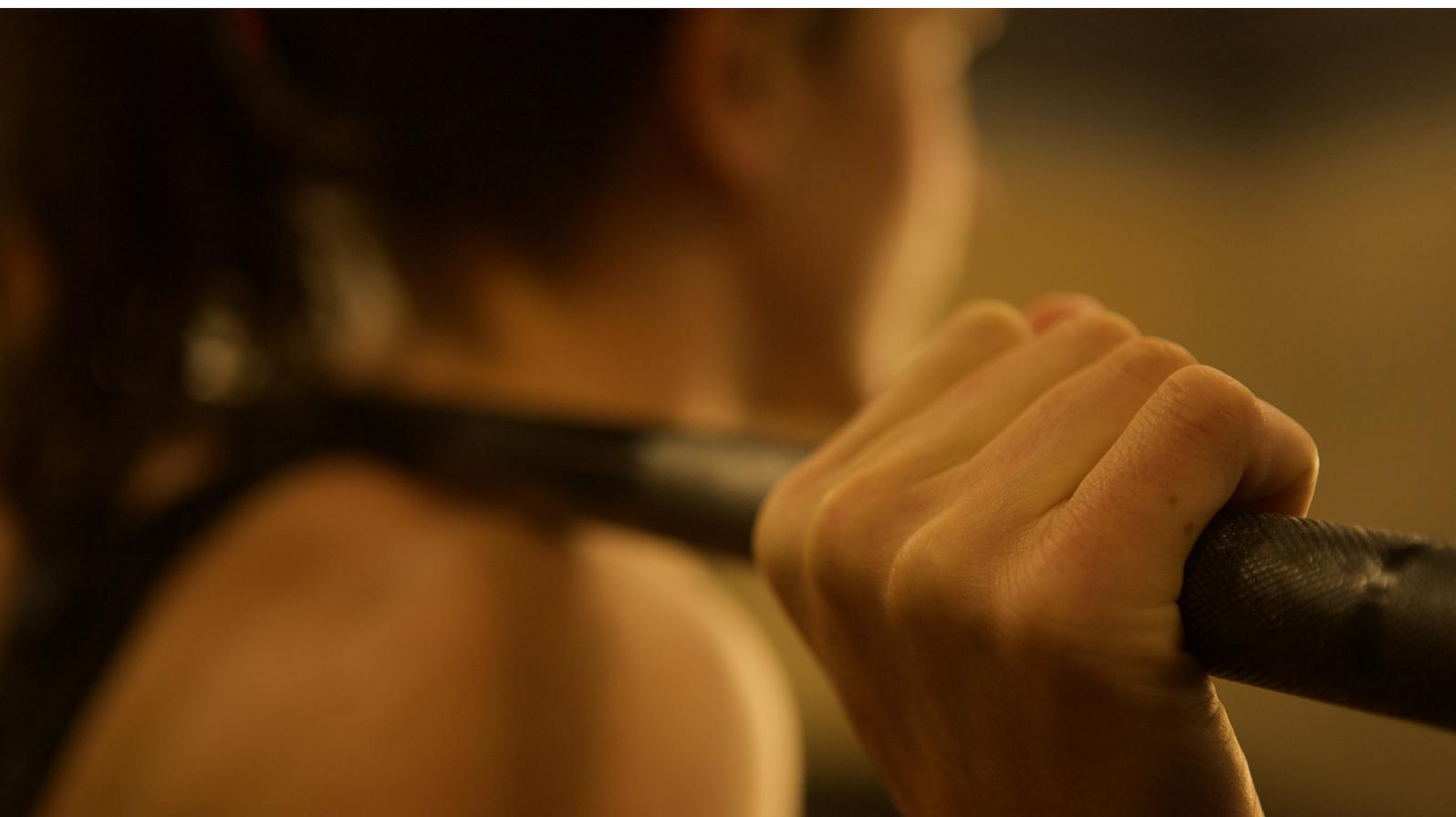
(c) Anti-doping laws

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.

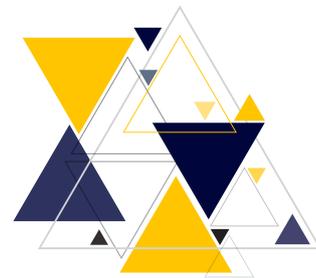
When developing policies and procedures in relation to drug testing and anti-doping laws, organisations will need to consider the *Australian Sports Anti-Doping Authority Act 2006* (Cth), the *Australian Sports Anti-Doping Regulations 2006* (Cth), and the associated National Anti-Doping Scheme.⁶⁹

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.



How can my sporting organisation be inclusive?



This section outlines practical guidance for promoting the inclusion of transgender and gender diverse people in sport.

A number of key human rights principles underpin this practical guidance. These are the rights to:

- equality⁷⁰
- participation in sport⁷¹
- freedom from discrimination and harassment⁷²
- privacy.⁷³

Sporting organisations play an important role in promoting and protecting these rights through their approach to:

- leadership
- inclusion policies
- codes of conduct
- uniforms
- facilities
- information collection processes.

5.1 Leadership

Transgender and gender diverse individuals are often excluded from participating in sport because their affirmed gender—which may be different from their legally assigned sex—is not recognised within the policies, structures and organisation of sport.

To ensure that sports are inclusive of transgender and gender diverse people, it is essential that those who lead sporting organisations (the Board, Management Committee, and executive):

- are committed to the inclusion of transgender and gender diverse people (for example, have made a written commitment through their governance processes)
- take active steps to educate players, coaches, staff, volunteers and members about this commitment (for example, by providing training, and including this information in induction packs).

Sporting organisations should also consider enlisting support from prominent players, parents and coaches in the form of ‘champions’. A champion for transgender and gender diverse inclusion could be a strong ally or someone with lived experience.

‘To offer support, sporting organisations need to show leadership and put practical things in place.’

Examples of exclusion from sport experienced by transgender and gender diverse people

- A trans man being told that he cannot register to play for a men's club.
- A non-binary child being excluded from a match in a single-sex competition because of an objection raised by the opposing team.
- A trans man in the early stages of affirming his gender being told he can no longer play on any women's team at his club.
- A trans girl being counted by an umpire as a male player for the purpose of allocating gendered positions in a mixed gender competition.
- A trans woman being told she cannot coach a women's team because only women coaches are allowed.
- A trans woman who has begun socially transitioning being told she cannot play on the men's team of her sport.
- A trans woman not being able to order a tennis skirt in an appropriate size.
- A non-binary person not being able to access the women's changeroom, where they feel more comfortable, because the facilities owner will only unlock the men's changeroom for training.
- A trans boy being denied membership to a club.



5.2 Inclusion policies

To maximise inclusion, sporting organisations should have a policy that specifically promotes the inclusion of transgender and gender diverse people. This could be a stand-alone policy or included within an existing policy.

Inclusion policies, particularly when publicly available, can:

- help a transgender or gender diverse person identify a sporting organisation that will welcome them
- encourage a transgender or gender diverse player to remain engaged in sport throughout their transition or affirmation
- provide guidance to staff and volunteers at a sporting organisation on how to include transgender and gender diverse participants and respond appropriately to any issues that may arise.

Case study

How policies and people create inclusion

Sara is a young trans woman who is very talented at volleyball. She is looking for a new club to join. She is early on in her transition and has not had any medical interventions. Sara is eager to join a club that accepts her as a woman and allows her to play in the women's competition.

She goes online to try and find the inclusion policies of some volleyball clubs in her area. She finds a club whose policy specifically mentions that transgender players are welcome and encouraged to play for the club in the gender category they identify with. She also reads that the club has an inclusion officer she can speak to if she has any questions about joining the club.

Sara calls the inclusion officer to ask about the culture of the club. The inclusion officer is very approachable and tells Sara that in their experience the club is very welcoming. Sara is relieved and registers to play.

Case study

Including non-binary people in mixed sports

Jay's workplace has recently entered a lunchtime, mixed AFL 9s competition. Under the competition rules, each ball-up involves two opposing players of the same gender. Jay is non-binary and does not identify as a man or a woman.

The captain of Jay's team privately asked Jay if they would prefer to be counted as a man or a woman for the purpose of the ball-up. Jay said that they did not really mind.

The captain had a quick word to the umpire and it was agreed that Jay could participate in the ball-up against both men and women.

Elements of an inclusion policy

Sporting organisations should consider incorporating the following elements into their inclusion policies:

- a statement that promotes the inclusion of transgender and gender diverse people
- a statement that participation in sport should be based on a person's affirmed gender identity and not the sex they were assigned at birth⁷⁴ to the fullest extent possible
- a commitment to creating a safe and welcoming space for all players
- if applicable, confirmation that players will not be asked to undergo a medical examination for the purposes of gender verification
- confirmation that personal information will only be collected from participants if absolutely necessary, and that any information that is collected will be only be disclosed if necessary and in accordance with the law⁷⁵
- an inclusion officer as a point of contact and support for transgender and gender diverse players, and a clear outline of other roles and responsibilities in relation to the policy⁷⁶
- information and guidance about the organisation's complaints process.⁷⁷ A complaints process should:
 - » outline how a player can make a complaint regarding any discrimination or harassment they may experience on the basis of their sex or gender identity
 - » outline how the sporting organisation will respond to complaints
 - » be fair, effective and confidential (as far as possible), with an option for anonymous complaints
 - » be accessible to children and child-focused.⁷⁸
- recognition that a sporting organisation should be led by the individual player regarding their particular needs, and in relation to any transition or affirmation (in other words, each experience of transition or affirmation is unique and personal)
- a statement that the organisation encourages correct pronoun use (for example, by asking players what pronouns they use when they sign up, and using these pronouns consistently across verbal and written communication)
- a 'common questions' section to answer queries that may be raised (see 'Common questions' on [page 37](#) for some examples of information that could be included in this section).

These elements can be incorporated into existing policies, such as an organisation's Member Protection Policy (MPP), or can form the basis of a stand-alone policy.



Relying on the 'competitive sporting activity' exemption

There may be times when a sporting organisation considers that participation on the basis of affirmed gender identity alone is not possible. For example, this may occur in a sport where an individual's strength directly affects their ability, and the ability of others, to 'effectively compete'.⁷⁹ In these circumstances a sporting organisation may seek to rely on the 'competitive sporting activity' exemption in the Act.⁸⁰

When seeking to rely on the 'competitive sporting activity' exemption, the following factors should be considered:

• Importance of inclusion to your sport

Sports are often structured around particular core values and beliefs. These include respect, fairness, community, integrity, professionalism, and inclusion.

• Limits of 'competitive sporting activity'

The exemption only applies to competitive sporting activity in which the competitors are aged 12 years and over.

The exemption only applies to competitors. It does not apply to coaches, umpires or referees, or administrators.

Not all sports or physical activities will constitute a 'competitive sporting activity' for the purpose of the exemption. For example, as the term is not defined in the Act, it is uncertain whether an activity, where the sole purpose is social participation, would constitute a 'competitive sporting activity'.

• Relevance of strength, stamina and physique

Sports are diverse. Different sports require different skills and physical input from participants. If strength, stamina and physique are relevant, the assessment should be based on these factors and not on gender identity.

The exemption only applies to sports where the strength, stamina or physique of a competitor is relevant. These characteristics might not be relevant if your sport is skill rather than strength-based. If these characteristics are not relevant to 'effective competition' within your sport, then the exemption may not apply.

• A fair and robust decision-making process

If a sporting organisation seeks to specifically exclude an individual from a 'competitive sporting activity' by relying on the exemption, then it is advisable for it to consider:

- consulting with the relevant national or state sporting organisation
- consulting with the relevant player association
- ensuring that it has an established, clear, written and publicly available policy (prior to seeking to rely on the exemption) which states:
 - » how it will assess the application of the exemption
 - » who will make the assessment
 - » what evidence will be used for this assessment, as well as the other factors on which the assessment will be based
- ensuring that any assessment is undertaken in a timely manner so that the individual is not unnecessarily disadvantaged
- providing the individual with an opportunity to respond to any proposal to exclude them based on the exemption
- providing the individual with written reasons for any decision to exclude them
- providing the individual with an opportunity to seek a review of a decision to exclude them.



Common questions

1. What about testosterone?

There is limited research examining the impact of testosterone on the sporting performance of trans women.⁸¹

Testosterone is a hormone produced by the human body. Males generally produce much higher levels of testosterone than females.⁸²

Higher testosterone levels are generally associated with greater strength, muscle mass and endurance.⁸³ While testosterone levels affect these physical characteristics, many factors can have an impact on a person's sporting ability.⁸⁴

2. Do people transition to gain a competitive advantage?

Transitioning can be a complex, difficult, long-term and expensive process, which has impacts on a person's identity and wellbeing. It is a personal decision that can involve many stages of social, medical and legal transition.

There is no evidence of a person transitioning in order to gain a competitive advantage. For transgender athletes, as for all athletes, sport is about the physical, social and mental health benefits of participation.

3. How do I make my sport more inclusive of non-binary people?

Non-binary is a term used to describe a person who does not identify exclusively as either a man/boy or a woman/girl.

It might seem difficult to include non-binary people in sport, as sport is often organised based on male and female categories. However, there are simple ways to promote the inclusion of non-binary people in sport.

Some strategies include:

- creating gender-neutral teams
- allowing participants to elect which team they wish to join based on their gender identity
- allocating a number of gender non-specific positions in mixed competitions (for example, 40% women: 40% men: 20% non-specific) instead of a designated men/boys to women/girls ratio
- considering ways that the rules of a particular sport can be universally re-designed to accommodate non-binary players.

5.3 Codes of conduct

Everyone has the right to live free from violence and harassment.⁸⁵ This includes the right to enjoy sport in a harassment-free environment.

Some transgender and gender diverse individuals experience harassment when they participate in sport.⁸⁶

Sporting organisations need to pay close attention to the needs of transgender and gender diverse children in order to ensure that they are not subjected to violence and harassment.⁸⁷

Exclusion and harassment

Examples of exclusion or harassment experienced by transgender and gender diverse people include:

- being told they are in the wrong bathroom and asked to leave
- being asked invasive questions about physical characteristics
- having team members or players from other teams refusing to play with them
- having their privacy breached (for example, walked in on while in the shower)
- being intentionally addressed by incorrect pronouns (for example, calling a trans woman or girl 'he').

Sporting organisations can address this by:

- implementing codes of conduct which stipulate a zero-tolerance policy for harassment and the consequences of any breach
- raising awareness through education and training programs for their staff, players, officials, volunteers and spectators
- reviewing existing codes of conduct to ensure that the harassment of transgender and gender diverse individuals is specifically addressed.

Codes of conduct should apply to:

- coaches
- umpires and other officials
- staff and administrators
- spectators
- players
- volunteers.

A code of conduct should include a commitment to creating a harassment-free environment and an inclusive culture within the sport. It should also outline how the organisation will allocate roles and responsibilities to support this.

A spectator code of conduct should be developed and displayed at venues where training and competition take place. It should clearly communicate to spectators that the sport has a zero-tolerance policy for harassment and outline how harassment by spectators will be dealt with.

Case study

How adhering to a code of conduct can promote a safe and inclusive environment

Rami plays cricket for the state women's team. At the beginning of each season the players sign a code of conduct. A spectator version of the code is displayed at the entrance to venues, and compliance is a condition of entry.

Rami identifies as non-binary transgender. Rami has body and facial hair and prefers to play in a looser uniform.

A spectator for the opposing team sledges Rami by referring to Rami as 'it' and making derogatory comments about Rami's appearance. Rami's teammates notify the umpire about the harassment and the umpire pauses the game to speak to the ground controller.

The ground controller asks the spectator to leave, based on the zero-tolerance policy for harassment outlined in the code of conduct.



'The difficulty is how to open up inclusion and ensure people are feeling consistently welcomed and supported, and not rely on a lottery style impact depending on who is there on the day.'

Education and training programs should support organisations to:

- raise awareness about harassment
- provide tools to recognise harassment
- develop skills to address harassment.

5.4 Uniforms

All players should be able to play in a uniform in which they feel comfortable.

While a uniform is an important part of sport, particularly team sports, players should be provided with an appropriate range of uniform styles and sizes. Schools are beginning to take this approach in relation to school uniforms.⁸⁸

Sporting organisations can make their uniforms more inclusive by considering whether different men's and women's uniforms are necessary for their sport.

If gendered uniforms are necessary, then sporting organisations should:

- allow players to choose which uniform they would prefer to wear
- ensure that appropriate sizes are available
- design options that are suitable for different body types and shapes.

Case study

How non-gendered uniforms can enhance inclusion

Alfie is a trans man who is a member of a running club. The singlet that most of the men compete in does not fit properly over his hips, but he would feel embarrassed requesting the 'women's' singlet. Fortunately his club has a few different styles with slightly different cuts, to fit the range of body shapes of its members. The club colours and logo are the same across all variations of the uniform. Participants can mix and match styles and cuts to find a uniform that fits their body best and enables them to run comfortably. The design of the uniform options ensures that all participants still present as a team.

5.5 Facilities

Transgender and gender diverse people may face additional difficulty participating in sport if there are no appropriate facilities.

While many transgender and gender diverse people prefer to use bathrooms, showers and changerooms that align with their affirmed gender, there is also a strong preference for privacy. This is the case for many people, regardless of their sex or gender identity. People who identify as non-binary may prefer to use unisex or gender-neutral facilities.

Transgender and gender diverse people have also reported experiencing harassment or violence while accessing bathrooms.⁸⁹ Such experiences emphasise the need to provide inclusive facilities.

Sporting organisations can make their existing facilities more inclusive by utilising the principles of universal design such as:

- changing the signage on some of the facilities to unisex/gender neutral to provide an option for non-binary people
- modifying changerooms and bathrooms to create private spaces (for example, taller doors, room dividers, shower curtains)

- ensuring that all changerooms have sanitary bins.

These universal design suggestions can make facilities welcoming and inclusive of everyone.

When new facilities are built, or existing facilities are being upgraded, there is an opportunity to make these inclusive by:

- creating private spaces so that people can change, shower and use the toilet safely and comfortably

- providing a gender-neutral space where possible, without co-opting accessible toilets or family rooms.

Sporting organisations that are in the process of, or considering, changing facilities also have an opportunity to seek out facilities that are inclusively designed.

Sporting organisations could also consider working with local schools, local governments and other community-sport infrastructure providers to access facilities which have been designed to be inclusive.⁹⁰

Case study

How innovative solutions can foster inclusion

Kim identifies as non-binary. Kim's pronouns are they/them/their. Kim and a group of Kim's friends have signed up to a mixed, social basketball competition. The basketball court complex that hosts the competition has two bathrooms, one marked 'men' and one 'women'. The men's bathroom has a wall of urinals and one cubicle, which is always out of order. Kim does not feel comfortable using the women's bathrooms because Kim is usually stared at or explicitly told that they should not be there.

For the first few weeks, Kim tried to avoid drinking water before and during the game to avoid needing to use the bathroom. Eventually, one of Kim's teammates realised what was happening and spoke to the manager of the court complex.

The sporting organisation did not have the resources to refurbish the bathrooms, but changed the signage to make them both unisex.

5.6 Collecting and using personal information

Concerns about providing personal information can prevent transgender and gender diverse people from engaging in sport. Personal information should only be collected with a player's consent, and in the case of children, with parental consent.

Sporting organisations can address this by implementing structures and safeguards regarding the collection and use of personal information, particularly where it relates to name and gender (for example, password-protected databases).

See **section 4.9(b)** for an overview of privacy law.

Registering to participate in a sport generally requires an individual to provide personal information. This information might include a birth certificate or driver's licence to verify age, name, or gender.

The collection of personal information by sporting organisations can create additional difficulties for transgender and gender diverse people because of:

- differences between a person's affirmed gender and the sex or gender recorded on their identity documents⁹¹
- differences between a person's preferred name and their name as it appears on their identity documents

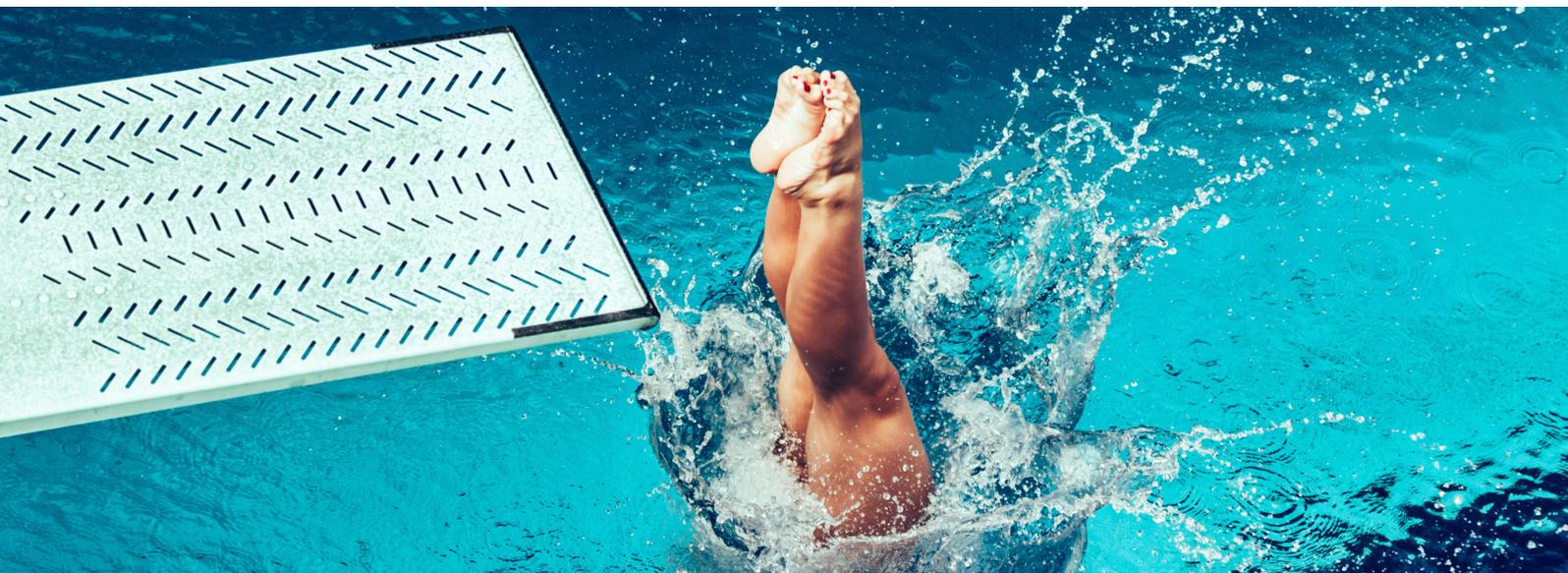
- the structure of registration forms in relation to gender categories and titles (for example, Miss/Ms/Mrs/Mr and M/F).

Sporting organisations can ensure that their processes are inclusive, minimise potential discrimination and protect the privacy of transgender and gender diverse people by:

- only requesting personal information and legal documents when necessary for a legitimate aim of the organisation
- accepting legal declarations to verify name, age and gender (for example, a statutory declaration) in place of identity documents such as a passport or birth certificate that have a sex/gender marker that is inconsistent with a player's gender identity

- providing the option of selecting a non-binary gender identity and a gender non-specific title on registration forms⁹²
- providing 'preferred name' and 'pronoun' options on registration forms
- securely storing personal information, in line with standards prescribed by privacy legislation
- not disclosing the transgender or gender diverse status of a player without their express permission
- ensuring that correct names and pronouns are used in conversations, databases, documents and correspondence.⁹³

As outlined in **section 4.2(d)**, sporting organisations should also be aware that, depending on the circumstances, requesting additional information from transgender and gender diverse people may be unlawful.



'There is a lot of fear and exclusion, trans folk feel that sport is not a space for them.'



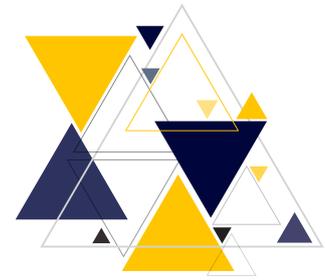
Case study

How inappropriate handling of personal information may exclude transgender and gender diverse people

Cassie was assigned male at birth and given the name Jacob by her parents. Cassie identifies as a woman but has not yet been able to change her legal gender or name because she does not have the money to undergo the gender affirmation surgery required by NSW law,⁹⁴ and finds the name-change paperwork confusing. She has been living as a woman for the last three years and has recently returned to playing hockey, which she played throughout high school.

Cassie was asked to provide a copy of her driver's licence when she signed up. As a result, her name is recorded as 'Jacob' on the official team list. At the end of the game, the manager leaves the team list on a clipboard, face-up on the sideline. Another team player sees the name 'Jacob' and laughs, before saying loudly 'Surely we don't have anyone on our team called Jacob!'.

Cassie is concerned about coming back next week in case there is any discussion about 'Jacob'. She decides to take a break from hockey for a few weeks.



The checklist below is designed to help sporting organisations, their staff and volunteers, to identify practical steps that they can take to promote the inclusion of transgender and gender diverse people in sport. The steps can be considered by sporting organisations in the order which best fits their needs.

Leadership

1. Have you made a commitment to the inclusion of transgender and gender diverse people in your sporting organisation?
2. Do you take active steps to educate your staff, coaches, players, volunteers and members about including transgender and gender diverse people in your sporting organisation?
3. Do you have a champion for transgender and gender diverse inclusion in your sporting organisation?

Inclusion policy

4. Does your sporting organisation have a publicly available inclusion policy in place, which:
 - specifically promotes the inclusion of transgender and gender diverse people
 - clearly articulates that participation in sport should be based on a person's affirmed gender identity and not the sex they were assigned at birth, to the fullest extent possible
 - provides guidance to staff and volunteers on how to include transgender and gender diverse participants and respond appropriately to any issues that may arise?

See [page 35](#) for guidance on what could be included in your inclusion policy.

5. If you plan to rely on the 'competitive sporting activity' exemption, does your sporting organisation have an established, clear, written and publicly available policy that explains how the exemption will be assessed?

See [page 36](#) for guidance on factors to consider when seeking to rely on the 'competitive sporting activity' exemption.

6. Does your sporting organisation ensure that non-binary people can participate in your sport?

See [page 37](#) for simple ways to promote the inclusion of non-binary people in sport.

Code of conduct

7. Does your sporting organisation have a code of conduct that outlines a zero-tolerance policy for the harassment of transgender and gender diverse people?
8. Does your sporting organisation provide appropriate education and training to staff, players and volunteers about identifying, addressing and preventing the harassment of transgender and gender diverse people?

Uniforms

9. Does your sporting organisation provide players with an appropriate range of uniform styles and sizes that cater to different body shapes?

Facilities

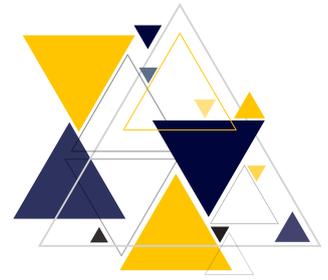
10. Are your sporting organisation's existing facilities inclusive?
11. If your sporting organisation is moving facilities, upgrading existing facilities, or building new facilities, will these facilities be inclusively designed?

Collecting and using personal information

12. Does your sporting organisation have inclusive information collection processes in place?

See [page 42](#) for guidance on inclusive information collection processes.

13. Does your sporting organisation have safeguards in place to ensure the information it collects is kept private and confidential?
-



Australian Human Rights Commission

National Information Service

The Commission's **National Information Service** provides information and referrals for individuals, organisations and employers about a range of human rights and discrimination issues.

Phone 1300 656 419 or (02) 9284 9888 to access this service.

Complaints process

The Commission can also investigate complaints about discrimination and other human rights breaches. The complaints process is simple, free and flexible. For further information on the complaints process please visit the Commission's **website**.

Sport Australia

Sport Australia promotes and supports the development of a cohesive national sport sector that creates opportunities for all Australians to participate and excel in sport and physical activity.

National sporting organisations (NSO) recognised by Sport Australia are required to have a Member Protection Policy or equivalent.

The Sport Australia **Member Protection Policy template** was developed to assist NSOs to write their own sport-specific member protection policy. It is one of several steps to address issues of harassment, discrimination and child protection within an organisation.

Play by the Rules

Play by the Rules is a website that contains information, resources, tools and free online training for sports clubs and participants about discrimination, harassment, child safety, inclusion and integrity issues in sport.

Templates for Member Protection Policies and Codes of Conduct are available on the Play by the Rules website.

Pride in Sport

Pride in Sport is Australia's first and only sporting inclusion program specifically designed to assist national and state sporting organisations and clubs with the inclusion of Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) employees, players, volunteers and spectators through education, training, governance development, resources and membership opportunities.

Proud2Play

Proud2Play is a registered charity which promotes the participation and inclusion of LGBTI+ people in all levels of sport, and provides support to sports organisations with the creation of policies and education programs.

Minus18

Minus18 is Australia's organisation for lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ) youth. Minus18 creates safe events, resources, workshops and volunteer opportunities for LGBTIQ youth.

State and territory human rights commissions

Links to the websites of each of the state and territory human rights commissions or agencies can be found on the Commission's [website](#).

In addition to these Guidelines, the Commission can provide assistance in the form of diversity and inclusion training, workshops and educational resources. For more information please contact us by sending an email to training@humanrights.gov.au.

Endnotes

- 1 United Nations Educational, Scientific and Cultural Organization, *International Charter of Physical Education, Physical Activity and Sport* (21 November 1978) art 1; *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) art 24; International Olympic Committee, *Olympic Charter* (entered into force 9 October 2018) 11.
- 2 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) art 1.
- 3 The members of the Coalition of Major Professional and Participation Sports (COMPPS) are the Australian Football League, Rugby Australia, Cricket Australia, Football Federation Australia, the National Rugby League, Netball Australia, and Tennis Australia.
- 4 Department of Health, 'Sport 2030: Participation, Performance, Integrity, Industry' (2018) 21 <https://www.ausport.gov.au/nationalsportplan/home/second_row_content/have_a_say2/Sport_2030_-_National_Sport_Plan_-_2018.pdf>.
- 5 All of the quotes included in the Guidelines are from consultation participants.
- 6 Caroline Symons et al, 'The Impact of Homophobic Bullying during Sport and Physical Education Participation on Same-Sex-Attracted and Gender-Diverse Young Australians' Depression and Anxiety Levels ("The Equal Play Study")' (March 2014) <<https://www.beyondblue.org.au/docs/default-source/research-project-files/bw0236.pdf?sfvrsn=2>>.
- 7 Australian Human Rights Commission, 'Resilient individuals: Sexual Orientation, Gender Identity & Intersex Rights' (National Consultation Report, 2015) <<https://www.humanrights.gov.au/our-work/sexual-orientation-gender-identity-intersex-status/publications/resilient-individuals>>.
- 8 Australian Human Rights Commission, 'Resilient individuals: Sexual Orientation, Gender Identity & Intersex Rights' (National Consultation Report, 2015) 21 <<https://www.humanrights.gov.au/our-work/sexual-orientation-gender-identity-intersex-status/publications/resilient-individuals>>.
- 9 *Sex Discrimination Act 1984* (Cth) s 48(ga).
- 10 See **section 4.8** for further information about state and territory anti-discrimination legislation.
- 11 *Sex Discrimination Act 1984* (Cth) s 4(1) (definition of 'gender identity').
- 12 The definition used is based on the definition in Queerspace (Drummond Street Services), *Working with Gender Diverse Young People and their Families* (26 April 2017) 5 <<https://aifs.gov.au/cfca/2017/04/26/join-conversation-working-gender-diverse-young-people-and-their-families>>.
- 13 *Sex Discrimination Act 1984* (Cth) s 4(1) (definition of 'intersex status').
- 14 Chris Sidoti and Jack Byrne, 'Promoting and Protecting Human Rights in relation to Sexual Orientation, Gender Identity and Sex Characteristics: A Manual for National Human Rights Institutions' (Report, Asia Pacific Forum, June 2016) 13 <<http://www.asiapacificforum.net/resources/manual-sogi-and-sex-characteristics/>>.
- 15 For further guidance see Victorian Government, *Inclusive Language Guide* (11 August 2016) <<https://www.vic.gov.au/equality/inclusive-language-guide.html>>.
- 16 *Sex Discrimination Act 1984* (Cth) ss 5(1), 5B(1).
- 17 *Sex Discrimination Act 1984* (Cth) ss 5(2), 5B(2), 7B.
- 18 *Sex Discrimination Act 1984* (Cth) s 7B(2).
- 19 *Sex Discrimination Act 1984* (Cth) s 22(1).
- 20 *Sex Discrimination Act 1984* (Cth) s 25.
- 21 *Sex Discrimination Act 1984* (Cth) s 27.
- 22 *Sex Discrimination Act 1984* (Cth) s 4(1) (definition of 'club').
- 23 *Sex Discrimination Act 1984* (Cth) s 22(1)(a).
- 24 *Sex Discrimination Act 1984* (Cth) s 22(1)(b).
- 25 *Sex Discrimination Act 1984* (Cth) s 22(1)(c).
- 26 *Sex Discrimination Act 1984* (Cth) ss 25(1), 25(2).
- 27 *Sex Discrimination Act 1984* (Cth) s 22.
- 28 *Sex Discrimination Act 1984* (Cth) s 25(1).
- 29 *Sex Discrimination Act 1984* (Cth) s 25(2).
- 30 *Sex Discrimination Act 1984* (Cth) s 27(1).
- 31 *Sex Discrimination Act 1984* (Cth) s 27(2).
- 32 *Sex Discrimination Act 1984* (Cth) s 7D(1).
- 33 *Jacomb v Australian Municipal Clerical and Services Union* (2004) FCR 149, 168.
- 34 Australian Human Rights Commission, *Guidelines: Special measures under the Sex Discrimination Act 1984* (Cth) (November 2018) <<https://www.humanrights.gov.au/our-work/sex-discrimination/publications/guidelines-special-measures-under-sex-discrimination-act>>.
- 35 *Sex Discrimination Act 1984* (Cth) s 44. A temporary exemption is not available in relation to the Act's sexual harassment or victimisation provisions.
- 36 *Sex Discrimination Act 1984* (Cth) s 39.
- 37 *Sex Discrimination Act 1984* (Cth) s 4(1) (definition of 'voluntary body').
- 38 *Sex Discrimination Act 1984* (Cth) s 4(1) (definition of 'voluntary body').
- 39 *Sex Discrimination Act 1984* (Cth) s 4(1) (definition of 'registered organisation').

- 40 *Sex Discrimination Act 1984* (Cth) s 25(3).
- 41 The words ‘women’ and ‘men’ are used in the Act. However, in the context of this provision they should be understood in terms of sex.
- 42 *Sex Discrimination Act 1984* (Cth) s 25(4).
- 43 *Sex Discrimination Act 1984* (Cth) s 25(5).
- 44 *Sex Discrimination Act 1984* (Cth) s 42.
- 45 *Sex Discrimination Act 1984* (Cth) s 42(1).
- 46 *Taylor and others v Moorabbin Saints Junior Football League and another* [2004] VCAT 158 (17 February 2004) [19]–[20].
- 47 *Ferneley v Boxing Authority of New South Wales* (2001) 115 FCR 306, 323–324.
- 48 Explanatory Memorandum, Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (Cth) 6.
- 49 Explanatory Memorandum, Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (Cth) 6.
- 50 The Act allows for sporting activities to be prescribed by Parliament as exempt. There are currently no prescribed activities.
- 51 *Sex Discrimination Act 1984* (Cth) s 42(2).
- 52 Australian Human Rights Commission, *Temporary exemptions under the Sex Discrimination Act 1984 (Cth): Commission Guidelines* (2009) <<https://www.humanrights.gov.au/temporary-exemptions-under-sex-discrimination-act-1984-cth>>.
- 53 *Sex Discrimination Act 1984* (Cth) s 44(3).
- 54 *Sex Discrimination Act 1984* (Cth) s 28K.
- 55 *Sex Discrimination Act 1984* (Cth) ss 28G, 28K.
- 56 *Sex Discrimination Act 1984* (Cth) s 28A.
- 57 *Sex Discrimination Act 1984* (Cth) s 28A(1A).
- 58 Victorian Equal Opportunity and Human Rights Commission, *Guideline: Trans and gender diverse inclusion in sport—complying with the Equal Opportunity Act 2010* (May 2017) 14–15 <<https://www.humanrightscommission.vic.gov.au/home/our-resources-and-publications/eoa-practice-guidelines/item/1560-guideline-trans-and-gender-diverse-inclusion-in-sport-complying-with-the-equal-opportunity-act-2010>>.
- 59 *Sex Discrimination Act 1984* (Cth) s 94.
- 60 *Sex Discrimination Act 1984* (Cth) s 94(2).
- 61 *Sex Discrimination Act 1984* (Cth) s 94(2)(g).
- 62 *Sex Discrimination Act 1984* (Cth) s 105.
- 63 *Sex Discrimination Act 1984* (Cth) s 106.
- 64 *Sex Discrimination Act 1984* (Cth) s 106.
- 65 *Sex Discrimination Act 1984* (Cth) s 10(3).
- 66 *Sex Discrimination Act 1984* (Cth) s 10(4).
- 67 Victorian Equal Opportunity and Human Rights Commission, *Guideline: Trans and gender diverse inclusion in sport—complying with the Equal Opportunity Act 2010* (May 2017) <<https://www.humanrightscommission.vic.gov.au/home/our-resources-and-publications/eoa-practice-guidelines/item/1560-guideline-trans-and-gender-diverse-inclusion-in-sport-complying-with-the-equal-opportunity-act-2010>>; and Australian Capital Territory Human Rights Commission, *Everyone Can Play: Guidelines for Local Clubs on Best Practice Inclusion of Transgender and Intersex Participants* (April 2017) <<http://hrc.act.gov.au/everyone-can-play-guidelines-local-clubs-best-practice-inclusion-transgender-intersex-participants/>>.
- 68 International Olympic Committee, ‘IOC Consensus Meeting on Sex Reassignment and Hyperandrogenism’ (Meeting Summary, November 2015) 2.
- 69 *Australian Sports Anti-Doping Authority Regulations 2006* (Cth) sch 1.
- 70 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) art 1.
- 71 United Nations Educational, Scientific and Cultural Organization, *International Charter of Physical Education, Physical Activity and Sport* (21 November 1978) art 1; *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) art 24; International Olympic Committee, International Olympic Committee, *Olympic Charter* (entered into force 9 October 2018) 11.
- 72 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) arts 2 and 3. In a recent resolution the Human Rights Council (UN Doc A/HRC/40/L.10/Rev.1) specifically called for the elimination of discrimination against women and girls in sports. The resolution references rules and practices in place regarding differences of sex development, androgen sensitivity and testosterone levels. As part of the resolution the Council has requested that the United Nations High Commissioner for Human Rights prepare a report on the intersection of race and gender discrimination in sport to be delivered during the Council's 44th session, due to be held in June 2020.
- 73 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) art 12.
- 74 This is the starting point for inclusion, supported by the *Sex Discrimination Act 1984* (Cth) prohibitions on discrimination against people on the basis of sex and gender identity.

- 75 Particular care should be taken when collecting personal information from children. Parental consent should be obtained for any personal information relating to children.
- 76 These responsibilities could be added to an already established role, such as the Member Protection Information Officer.
- 77 The template Member Protection Policy incorporates a complaints process.
- 78 Further details about how organisations can develop child-focused complaints policies are provided in the National Principles for Child Safe Organisations (Principle 6) <<https://www.humanrights.gov.au/national-principles-child-safe-organisations>>.
- 79 Explanatory Memorandum, Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (Cth) 6.
- 80 *Sex Discrimination Act 1984* (Cth) s 42.
- 81 Bethany Alice Jones et al, 'Sport and Transgender People: A Systematic Review of the Literature Relating to Sport Participation and Competitive Sport Policies' (2017) 47 *Sports Medicine* 701, 713–714; Joanna Harper, 'Race Times for Transgender Athletes' (2015) 6(1) *Journal of Sporting Cultures and Identities* 1, 2.
- 82 David J Handelsman et al, 'Circulating Testosterone as the Hormonal Basis of Sex Differences in Athletic Performance' (2018) 39(5) *Endocrine Reviews* 803, 806.
- 83 David J Handelsman et al, 'Circulating Testosterone as the Hormonal Basis of Sex Differences in Athletic Performance' (2018) 39(5) *Endocrine Reviews* 803, 811–819; Joanna Harper, 'Race Times for Transgender Athletes' (2015) 6(1) *Journal of Sporting Cultures and Identities* 1, 6; *Dutee Chand v Athletics Federation of India (AFI) & The International Association of Athletics Federations (IAAF) (Interim Arbitral Award)* (Court of Arbitration for Sport, Case No 2014/A/3759, 24 July 2015) 53–54 [186], 59 [205].
- 84 These may include factors such as training, genetics, nutrition, 'hardiness', and access to resources. *Dutee Chand v Athletics Federation of India (AFI) & The International Association of Athletics Federations (IAAF) (Interim Arbitral Award)* (Court of Arbitration for Sport, Case No 2014/A/3759, 24 July 2015) 154 [532]; Ross Tucker and Malcolm Collins, 'What makes champions? A review of the relative contribution of genes and training to sporting success' (2012) 46 *British Journal of Sports Medicine* 555, 560; Michael Sheard and Jim Goldby, 'Personality hardiness differentiates elite-level sport performers' (2010) 8(2) *International Journal of Sport and Exercise Psychology* 160, 166.
- 85 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) art 3.
- 86 Australian Human Rights Commission, 'Resilient individuals: Sexual Orientation, Gender Identity & Intersex Rights' (National Consultation Report, 2015) 21 <<https://www.humanrights.gov.au/our-work/sexual-orientation-gender-identity-intersex-status/publications/resilient-individuals>>.
- 87 The Royal Commission into Institutional Responses to Child Sexual Abuse found that transgender and gender diverse children can experience heightened vulnerability in an organisational context. Commonwealth, 'Royal Commission into Institutional Responses to Child Sexual Abuse' (Final Report–Vol 6, 2017) 170 <<https://www.childabuseroyalcommission.gov.au/making-institutions-child-safe>>.
- 88 NSW Department of Education, *School Uniform Policy*, PD/2004/0025/V02 (23 July 2018) <<https://education.nsw.gov.au/policy-library/policies/school-uniform-policy>>.
- 89 Jody 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.
- 90 Department of Health, 'Sport 2030: Participation, Performance, Integrity, Industry' (2018) 26 <https://www.ausport.gov.au/nationalsportplan/home/second_row_content/have_a_say2/Sport_2030_-_National_Sport_Plan_-_2018.pdf>.
- 91 Changing identification documents can be costly, confusing and time-consuming.
- 92 Section 43A(1) of the *Sex Discrimination Act 1984* (Cth) provides that it is not unlawful to request information in a way that does not allow for a person to identify as being neither male nor female. Section 43A(2) of the Act provides that it is not unlawful to make or keep records in a way that does not provide for a person to be identified as being neither male nor female.
- 93 Victorian Equal Opportunity and Human Rights Commission, *Guideline: Trans and gender diverse inclusion in sport—complying with the Equal Opportunity Act 2010* (May 2017) 18 <<https://www.humanrightscommission.vic.gov.au/home/our-resources-and-publications/eoa-practice-guidelines/item/1560-guideline-trans-and-gender-diverse-inclusion-in-sport-complying-with-the-equal-opportunity-act-2010>>.
- 94 *Births, Deaths and Marriages Registration Act 1995* (NSW) s 32B.

Further Information

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Acknowledgements

The Australian Human Rights Commission thanks the following individuals and organisations for their assistance with these Guidelines:

- our partners, Sport Australia and the Coalition of Major Professional and Participation Sports, for their commitment to inclusion
- those who participated in the consultations for sharing their knowledge, expertise and lived experiences
- the Review Group, who provided expert advice on earlier drafts of the Guidelines
- Ashurst Australia, for their support with the consultation process and legal research.

The Sex Discrimination Commissioner thanks the following staff of the Australian Human Rights Commission for their contributions: Afton Fife, Maria Katsabanis, Frankie Sullivan, Sarah Hayes, Natasha de Silva, Darren Dick, Maria Twomey, Julie O'Brien, Rachel Holt, Ella Kucharova, Daniel Nguyen, Diana Lambert, Camilla Gebicki, Lucy Morgan, Hashini Panditharatne, Jodie Ball, Lara Renton, Martine Lappan, Stephanie Abi-Hanna and Stephanie Lum.

The Commission also acknowledges the work of the Victorian Equal Opportunity & Human Rights Commission, the Australian Capital Territory Human Rights Commission and the Canadian Centre for Ethics in Sport in developing earlier guidance to promote the inclusion of transgender and gender diverse people in sport.

