

Sexual orientation, gender identity & intersex status discrimination

INFORMATION SHEET (JULY 2013)

Overview

This information sheet gives an overview of the new protections against discrimination on the grounds of sexual orientation, gender identity and intersex status in the *Sex Discrimination Act 1984* (Cth) (SDA).

The Australian Human Rights Commission will be able to accept complaints of discrimination on these grounds about things that have happened on or after the commencement date. The commencement date will be fixed by royal proclamation. These new protections are expected to commence shortly.

What is changing?

From the commencement date it will be unlawful under federal law to discriminate against a person on the grounds of their:

- sexual orientation
- gender identity
- intersex status

Same-sex couples are now also protected from discrimination under the new definition of 'marital or relationship status' (this was previously 'marital status').

On 28 June 2013 the [Sex Discrimination Amendment \(Sexual Orientation, Gender Identity and Intersex Status\) Act 2013 \(Cth\)](#) (SDA Amendment Act) received Royal Assent. The SDA Amendment Act inserts the new grounds into the [Sex Discrimination Act 1984 \(Cth\)](#) (SDA).

Most states and territories have some form of protection against discrimination on the basis of sexual orientation and gender identity. However, the SDA Amendment Act introduces more inclusive definitions and addresses gaps such as a lack of coverage for acts or practices of the federal government. It also qualifies the exemptions for religious organisations to the effect that it does not apply to conduct connected with the provision of Commonwealth-funded aged care services. It also includes the new ground of intersex status which is not covered by any other law.

It also significantly expands the protections against discrimination on the basis of sexual orientation in federal law as previously the Commission could only accept complaints of discrimination on the basis of 'sexual preference' in the area of employment or occupation.

When do the new protections start?

The new protections are expected to commence shortly. The Commission will be able to accept complaints of discrimination on the new grounds that occurred on or after the commencement date. The commencement date will be fixed by royal proclamation.

Who does the SDA apply to?

It will be unlawful to discriminate against a person on the basis of the attributes listed above. This will particularly apply to lesbian, gay, bisexual, intersex, trans and gender diverse people.

The entities with obligations under the SDA include the Commonwealth Government, state governments and local governments (except in relation to employees of state instrumentalities), private companies, small businesses, incorporated and unincorporated bodies, educational authorities, partnerships, recruitment and employment agencies to name a few. Subject to some limited exceptions, these obligations exist regardless of the size of the entity.

When does the SDA apply?

Discrimination may be unlawful when it occurs in protected areas of public life, including:

- employment
- education
- provision of goods, services and facilities
- providing land, housing or accommodation
- membership and activities of licensed clubs
- the administration of Commonwealth laws and programs.

What is discrimination?

Direct discrimination is treating another person less favourably on the basis of their sexual orientation, gender identity or intersex status, than someone without that attribute would be treated in the same or similar circumstances.

Indirect discrimination is imposing, or proposing to impose, a requirement, condition or practice that has, or is likely to have the effect of disadvantaging people with a particular sexual orientation, gender identity or intersex status, and which is not reasonable in the circumstances.

Some examples are provided below.

What is discrimination on the basis of sexual orientation, gender identity and intersex status?

Sexual orientation means a person's sexual orientation towards:

- a) persons of the same sex or
- b) persons of a different sex or
- c) persons of the same sex and persons of a different sex (s 4(1)).

Some terms used to describe a person's sexual orientation include gay, lesbian, homosexual, bisexual, straight and heterosexual. The new definition does not use labels, as these may be offensive or inaccurate; however, it is intended to cover these orientations.

Direct discrimination may occur on the basis of sexual orientation if an employer refuses a promotion to an employee after he discloses he is bisexual.

Indirect - An employer's benefits policy which provides spousal benefits to an employee's husband or wife, such as discounted travel or gym membership, may indirectly discriminate against a lesbian employee who has a same-sex partner.

Gender identity means the gender-related identity, appearance or mannerisms or other gender-related characteristics of a person (s 4(1)). This includes the way people express or present their gender and recognises that a person's gender identity may be an identity other than male or female.

Some terms used to describe a person's gender identity include trans, transgender and gender diverse. The SDA does not use these labels however it is intended to cover these identities and more.

The SDA provides protection from discrimination for people who identify as men, women and neither male nor female. It does not matter what sex the person was assigned at birth, or whether the person has undergone any medical intervention.

Direct discrimination could occur if a shop-assistant refused to serve a person who identifies and presents as a woman but has a deep masculine sounding voice because she felt uncomfortable about that person's gender identity.

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

Intersex status 'means the status of having physical, hormonal or genetic features that are:

- a) neither wholly female nor wholly male or
- b) a combination of female and male or
- c) neither female nor male.' (s 4(1))

Being intersex is about biological variations, not about a person's gender identity. An intersex person may have the biological attributes of both sexes, or lack some of the biological attributes considered necessary to be defined as one or other sex. Intersex people typically also have a gender identity and sexual orientation.

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

Indirect - A policy which deems that certain medical treatment, such as for ovarian cancer, is only appropriate for women, might disadvantage an intersex man who has both male and female sex characteristics.

The amendments also extend the definition of marital status to ‘**marital or relationship status**’ which includes de facto same-sex couples.

Discrimination on the new grounds is unlawful in the same circumstances as for other grounds already covered by the SDA.

What about the existing protections under the SDA?

The changes do not affect the existing grounds (sex, pregnancy, potential pregnancy, breastfeeding and family responsibilities) which will continue to operate unchanged. Information about [sex discrimination](#) is available on the Commission’s website.

Protections for [sexual harassment](#) will continue with one change. The sexual harassment provisions will now include that a person’s ‘sexual orientation, gender identity, intersex status, marital or relationship status’ are now part of the circumstances that can be taken into account when considering whether or not a reasonable person ‘would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated’.

Are there exceptions/exemptions to unlawful discrimination?

Yes. The SDA includes provisions that provide that in certain circumstances the discrimination will not be unlawful. These are called either ‘exceptions’ or ‘exemptions’. Some of the existing provisions in the SDA will now also apply to the new grounds.

- It will now be possible to also take **special measures** to achieve substantive equality between people of different sexual orientations, between people of different gender identities, between people who are of intersex status and those who are not, and between people of different marital or relationship statuses.
- **Specific exceptions and exemptions** in the SDA will limit the protection on the new grounds. These include; for certain accommodation providers, charities, religious bodies (except for intersex status in religious educational institutions), voluntary bodies, sport (except for sexual orientation) and certain acts done under statutory authority. Whether these exceptions and exemptions apply will depend on the particular circumstances. It also qualifies the exemptions for religious organisations to the effect that it does not apply to conduct connected with the provision of Commonwealth-funded aged care services.
- The Australian Human Rights Commission is also able to grant [temporary exemptions](#) from some parts of the SDA.

There are also some new exemptions introduced specifically for discrimination on the basis of sexual orientation, gender identity and intersex status:

- Anything done by a person in **direct compliance with the *Marriage Act 1961 (Cth)*** – this could apply to persons such as Commonwealth-registered marriage celebrants and statutory bodies such as registers of births, deaths and marriages (this exemption also applies to discrimination on the basis of marital or relationship status).
- Anything done by a person in **direct compliance with prescribed Commonwealth, State or Territory laws**. These laws must be prescribed by regulation.
- **Requests for information and record keeping** in relation to sex and/or gender that

do not allow for identification as being neither male nor female.

What do the new protections mean for me?

It means that discrimination on the basis of sexual orientation, gender identity and intersex status is unlawful. If you experience discrimination on these grounds you may want to deal with the situation yourself by raising it directly with the person or people involved. If this does not resolve the situation, or you do not feel comfortable doing this, you can [make a complaint](#) to the Australian Human Rights Commission. Details on how to make a complaint are below.

If you are an employer, service provider, private or government organisation or otherwise covered by the SDA, the new protections mean that you may have some new obligations under the SDA. Organisations should become familiar with the changes to the SDA and review their policies, processes and training to ensure that they do not discriminate against persons on the basis of their sexual orientation, gender identity, intersex status or their relationship status. You may already have much of this in place in order to comply with state and territory anti-discrimination laws.

Where can I get more information?

The Australian Human Rights Commission's contact details are:

Telephone

Complaint Info line: 1300 656 419

TTY: 1800 620 241

Fax: (02) 9284 9611

If you need an interpreter you can call the Translating and Interpreting Service (TIS) on **131 450** and ask to be connected to the Australian Human Rights Commission.

If you are deaf or have a hearing impairment you can contact us by TTY on **1800 620 241**. If you are deaf or have a hearing or speech impairment you can also contact us through the National Relay Service (NRS) on **133 677**. If you need an Auslan interpreter, the Commission can arrange this for you.

If you are blind or have a vision impairment, the Commission can provide information in alternative formats on request.

Post

Australian Human Rights Commission
GPO Box 5218
SYDNEY NSW 2001

Online

Email: complaintsinfo@humanrights.gov.au

Website: www.humanrights.gov.au

You can make a complaint online by going to <http://www.humanrights.gov.au/complaints/lodging-your-complaint>

If you are thinking about making a complaint or are responding to a complaint, you might also want to consider getting legal advice, contacting your industrial organisation or other organisation that represents you.

Disclaimer: The information on this fact sheet is only intended as a guide. It is not a substitute for legal advice.