

GUIDELINES FOR LOCAL CLUBS ON BEST PRACTICE FOR INCLUSION OF TRANSGENDER AND INTERSEX PARTICIPANTS



This information is intended as a guide only. It is not a substitute for legal advice.

CONTENTS

ABOUT THIS PUBLICATION: WHO, WHY AND WHERE?	2
Who is this publication for?	2
Why is the ACT Human Rights Commission providing this information?	2
A note about terminology	2
Attributions	3
Where can I find more advice or information?	3
PART A: UNDERSTANDING THE ISSUES	4
What do we mean by 'intersex' and 'transgender'?	4
Before we begin	4
A little bit about sex and gender	4
What does 'intersex' mean?	4
What does 'transgender' mean?	5
Legal recognition of intersex and transgender people	5
Why is this important in the context of sport?	6
Legal context: Discrimination protection	6
PART B: WORKING TOWARDS BEST PRACTICE	9
Background	9
Eliminating discrimination before it occurs	12
Building a best practice policy framework	13
Embedding best practice within your organisation	17
PART C: UNDERSTANDING ACT DISCRIMINATION LAW IN MORE DETAIL	23
Who is protected by discrimination law?	23
What areas of my activities are covered by the ACT Discrimination Act?	24
Are there any relevant exceptions or exemptions provided for in the ACT Discrimination Act?	25
OTHER POTENTIALLY RELEVANT ISSUES	28
Other forms of discrimination	28
Sexual harassment	28
Vilification	28
Victimisation	28
Privacy issues	29
Other employment law	29
Drug testing and anti-doping laws	29
APPENDIX: QUICK OVERVIEW – ACT DISCRIMINATION ACT	30

About this publication:

WHO, WHY and WHERE?

WHO IS THIS PUBLICATION FOR?

This publication is aimed at local, state/territory and national sporting organisations and clubs involved in non-elite sporting activities. It can also help individuals and players to understand their rights within a non-elite sporting context.

WHY IS THE ACT HUMAN RIGHTS COMMISSION PROVIDING THIS INFORMATION?

The Commission has produced this publication with the aim of offering practical information about intersex and transgender issues within a non-elite sporting context where the focus is on facilitating participation of all people.

This document has been developed through a collaborative consultation process with sporting bodies as well as organisational and individual representatives of both the intersex and transgender communities.

Part B provides practical guidance for sporting clubs and organisations in promoting an inclusive environment, being proactive in preventing discrimination and responding appropriately if it occurs.

Part C of this publication outlines the relevant legal obligations of sporting bodies under the *ACT Discrimination Act 1991*. Some references are also made to the Commonwealth *Sex Discrimination Act 1984*, but these provisions are not explored in detail.

Obligations in the Discrimination Act apply to many activities undertaken by sporting bodies including player participation, engagement of volunteers and officials, club membership provisions, as well as accessibility of other services or facilities and employment. Information is also included in this section on the exceptions in the Discrimination Act which may allow discrimination in some circumstances.

A NOTE ABOUT TERMINOLOGY

The Commission acknowledges the complexities and limitations of language, particularly when discussing issues that are integral to many people's personal identity.

We note that there are a rapidly growing number of ways that people are expressing their gendered identities and experiences. We also recognise that language used to describe intersex variations and gendered identities shifts over time and often differs across cultures and generations. Sometimes legal definitions don't match community expectations about the language that best respects and reflects their experience.

The terminology we have used in this publication was chosen to help enable a broad based discussion of the relevant legal issues. We recognise that there are many other ways that individuals may refer to their intersex variations and/or gendered identities. The information provided in this publication will also apply to individuals who identify using other terminology.

It's important to remember that, in your dealings with an individual, **it is always best to ask, and then use, the terms that are preferred by that person.**

ATTRIBUTIONS

Part of this document is reproduced with permission from the Victorian Equal Opportunity and Human Rights Commission; *Guideline: Transgender people and sport > Complying with the Equal Opportunity Act 2010* available at

www.humanrightscommission.vic.gov.au

The Commission acknowledges the significant contributions made by Peter Hyndal (Director, Transformative) and Peter Downs (Manager, *Play by the Rules*) to the drafting and consultation process.

This work was also informed by the 'Inclusive Sport Survey', which was conducted by ACT Government Sport and Recreation Services as part of the Inclusive Sport Project (which addresses harassment, bullying and discrimination in sport). The 2013 survey was designed to address an identified lack of research and policy work done to improve sport opportunities for LGBTI people. This was the first sports-specific study of its type conducted in the ACT and provides findings on the sport experiences of local LGBTI people. Over 300 people participated in the survey, and a report with recommendations was published.

You can find more information about the survey and the Inclusive Sport Project at www.sport.act.gov.au

WHERE CAN I FIND MORE ADVICE OR INFORMATION?



If you have questions about these guidelines, or if you need more information to help you implement them, you can contact the Commission and we will try to assist you, or suggest other places you might find the advice you need.

The Commission also conducts in-house and on-site training to help service providers, employers and sporting organisations understand their rights and responsibilities. These services are generally on a fee-for-service basis.

For more information, contact the Commission on 6205 222 or at www.hrc.act.gov.au

Part A:

UNDERSTANDING THE ISSUES

WHAT DO WE MEAN BY 'INTERSEX' AND 'TRANSGENDER'?

BEFORE WE BEGIN

Before we begin a discussion about intersex and transgender participation in sport it is important to be clear about what we mean by 'intersex' and 'transgender'. Although there is now much more public discussion about intersex and transgender issues, there is also still a lot of confusion.

A LITTLE BIT ABOUT SEX AND GENDER

The terms 'sex' and 'gender' are often used interchangeably to mean different things at different times. For the purposes of this discussion it is important to think about these terms more clearly as separate categories.

Biological sex refers to a variety of biological and physical characteristics including sex chromosomes, sex hormones, internal reproductive organs and external genitalia.



Legal sex refers to the way a person's sex is legally recognised. This is noted as a distinction because there are a range of reasons why a person's legal sex might not be the same as their biological sex. These issues will be discussed in more detail throughout this publication.

Gender identity refers to the way a person identifies and expresses their inner sense of 'who they are' in gendered terms. A person's gender identity is not pre-determined by their biological sex.

However we identify our gender, we all make choices about how we communicate our gendered sense of ourselves to other people – through our choice of clothes, hairstyle, mannerisms and other behaviours.

WHAT DOES 'INTERSEX' MEAN?

Many people assume that sex is binary – that it is only possible, in biological terms, to be either male or female. This is not, and never has been, an accurate reflection of human biology.

Intersex refers to those people who are born with biological characteristics that do not fit neatly within ideas of what is 'male' and 'female'. This may be because a person has some, *but not all*, characteristics that are usually associated with being either male or female. It can also be because a person has some characteristics that are usually associated with being male, *as well as* some characteristics that are usually associated with being female.

Rather than thinking about biological sex characteristics as two distinct boxes of male and female, it is more accurate, and also more useful, to think about biological sex as a continuum where a person's biological sex can exist at any point.

Different ways of thinking about biological sex

A binary model that doesn't recognise that people are born intersex:



A more accurate continuum based model might look like this:



It is important to remember that being intersex is simply a way of describing a normal variation in biological sex characteristics.

Being intersex says nothing about the way a person identifies their gender, and many intersex people identify very clearly as either men or as women.

People with intersex variations may or may not:

- identify as male or female
- identify as both, all, between, or neither gender/s
- appear visibly or audibly different from gender norms
- connect with an LGBT or LGBTI community
- have experienced medical intervention.

Although some intersex people have characteristics that mean they are identified as being intersex at birth, there are many documented cases where this information has been withheld from children. Many intersex people also have characteristics that mean they only discover their intersex status later in life – sometimes ‘by accident’. These two things mean that there are people who are intersex who may not yet know, or who may never discover, that this is the case.

People with intersex variations also have no duty to discuss or disclose their personal experiences.

WHAT DOES ‘TRANSGENDER’ MEAN?

Although many people assume that biological sex is intrinsically linked to gender, this is not always the case.

Transgender is used as an ‘umbrella term’ to describe those people whose biological sex at birth is either male or female, but who identify and/or express their gender in a different way.

As well as thinking about biological sex as a continuum, it is useful to also think about gender as a quite separate continuum where a person’s biological sex and gender can exist, independently of one another, at any point on each line.

Separate and independent continuums for biological sex and gender identity

Biological sex:



Gender identity:



Some transgender people will identify their gender at one or other end of the ‘man’/‘woman’ continuum, but a growing number of people are identifying their gender identity and/or expression, in more fluid ways.

Some (but by no means all) transgender people may choose to undertake hormonal or surgical interventions that may either temporarily, or permanently, alter some of their biological sex characteristics, but there are other biological characteristics (such as chromosomes) that can never be altered.

LEGAL RECOGNITION OF INTERSEX AND TRANSGENDER PEOPLE

There is growing legal recognition of both people with intersex variations and transgender people, and more reform is likely over the coming years.

In the past, legal recognition has often required medically unnecessary surgical interventions. But over the last ten years, a growing number of international jurisdictions (including some parts of Australian law) have become more human rights compliant, for example by removing the requirement for transgender people to undergo any hormonal or surgical interventions.

In an Australian context, this legal recognition has also extended to recognition that some people (either because of their biological characteristics or because of their gender) may choose to be legally recognised as neither male nor female.

Since 2011, Australian passport policy has allowed for a person’s sex/gender to be recorded as either M, F or X. In 2013 the *Australian Government Guidelines on the Recognition of Sex and Gender* were adopted. These guidelines encourage all Commonwealth agencies to provide for the recognition of sex/gender as either M, F or X.

In the ACT, the *Births Deaths and Marriages Registration Act 1997* allows for people’s legal sex to be shown or amended on their birth certificates to accord with their gender identity (as either M, F or X), without any requirement to undergo surgery or hormone treatment. People born outside the ACT can also have a ‘recognised details certificate’ issued to have their sex officially recognised.

WHY IS THIS IMPORTANT IN THE CONTEXT OF SPORT?

Sport operates in a largely sex-segregated way. Even in 'mixed' sporting activities, there are usually certain quotas that must be met for the numbers of men and women participating in each team.

In the past, when the existence of people with intersex variations was ignored and when transgender people were not recognised, classifying people into the categories of 'male' and 'female' for the purposes of participation in sport may have appeared to have been a straightforward task.

But the reality is that we now exist in a social context where increasing numbers of people are discovering, identifying, presenting and also being legally recognised as either:

- not fitting into assumptions about the biological binary of either male or female; or
- as being a sex which is different from that allocated to them at birth.

This reality poses some challenges in an environment where there are often sound reasons for running separate men's and women's competitions and events.

One issue is how sports that operate sex-segregated events can include those people whose legal sex is now 'X'. Noting that ACT Birth certificates are issued and amended based on a person's birth in the ACT and not where the person currently lives, this is an issue that will increasingly need to be addressed by sporting organisations in other jurisdictions as well.

The second issue is how to include those people whose legal sex may be either F or M, but whose biological characteristics or gender identity don't fit neatly into 'completely male' or 'completely female'.

To date, there has been no guidance from international bodies to define what 'a woman' or 'a man' is for the purposes of sporting competition. This lack of guidance doesn't change the fact that local and national sporting bodies have legal obligations they must meet under the ACT Discrimination Act and also the Commonwealth Sex Discrimination Act. Increasingly, sporting organisations will be required to respond to these issues.

The answers are not always going to be straightforward or easy to work out, but anecdotal evidence shows that more and more sporting bodies are already being asked to respond to these issues. The reality is that these issues need to be addressed within the context of sex-segregated sports, and the sooner we start the conversations the better the outcome will be for all of us.

Legal context:

DISCRIMINATION PROTECTION



WHAT IS DISCRIMINATION?

Discrimination is treating someone unfavourably on the basis of one or more attributes (personal characteristics) that are protected by legislation.

Direct discrimination is when you treat, or propose to treat, a person with a protected attribute unfavourably because of that attribute.

Indirect discrimination is when you impose, or propose to impose, an unreasonable requirement, condition or practice – which may appear to treat people equally – that has or is likely to have the effect of disadvantaging a person with a protected attribute.



In determining whether a person has discriminated against someone else, the person's motive is irrelevant. This means that if your club or one of the individuals associated with the club is acting in a discriminatory way, it may be unlawful even if it is unintentional.

WHAT DISCRIMINATION LAW APPLIES WITHIN THE ACT?

Discrimination protections for intersex and transgender people exist both at a territory level (under the Discrimination Act) and also at the Commonwealth level (under the Sex Discrimination Act).

The requirements of both of these pieces of legislation apply to sporting clubs and organisations operating within the ACT.

WHAT ARE MY OBLIGATIONS UNDER DISCRIMINATION LEGISLATION?

Discrimination law is complex and discussed in more detail in Part C of this publication. The information included here is intended to provide a brief overview of some of the issues you need to be aware of.

- Under both the ACT Discrimination Act and the Commonwealth Sex Discrimination Act, it is unlawful to discriminate against intersex or transgender people in sport. Discrimination protection covers areas including participation in sport (as players or officials), membership of certain clubs, access to services (such as coaching), and employment including selection processes.
- Discrimination law covers more than just issues about player participation – it also covers areas such as engagement of volunteers and officials, club membership provisions, accessibility of other services or facilities and employment.
- The way that discrimination protection operates with respect to participation, club membership and employment, is different in each of these pieces of legislation.
- There are exceptions in both the ACT Discrimination Act, and also the Commonwealth Sex Discrimination Act, which mean you can lawfully discriminate in some circumstances, but the particular circumstances when this is the case are different within each piece of legislation.

- Many of the exceptions are open to legal interpretation and there is often not enough case law to provide clarity on exactly how they might be interpreted in any particular case. For these reasons, you need to carefully consider a number of factors, and may potentially require specific legal advice, before seeking to rely on any exceptions.

WHO IS LIABLE FOR BREACHES OF DISCRIMINATION LEGISLATION?

Discrimination law applies to organisations and also to individuals.

- If a person or organisation discriminates against another person, they may be directly liable for their actions.
- An individual or organisation can also be liable if they requested, instructed, induced, encouraged, authorised or assisted unlawful conduct of another person.
- Organisations are generally liable for the discriminatory actions of employees, contractors, volunteers and other people who are working for, or on behalf of the organisation.

An organisation will not be liable for the unlawful conduct of its employees or agents if they can show they have taken reasonable precautions to prevent unlawful conduct.

WHAT HAPPENS IF SOMEONE MAKES A DISCRIMINATION COMPLAINT?

You may be required to respond in writing to the details of the complaint.

There may be follow-up information, clarification or questions that you also need to respond to in writing.

If the complaint progresses, you may be invited to attend one or more conciliation sessions to discuss the issues in more detail to try to reach an outcome that is satisfactory to both parties.

If agreement is not reached you may be required to attend a court or tribunal. To settle the matter, you may agree to do things such as make a formal apology, alter a decision or policy or pay damages and/or legal costs to the person who complained.

EXAMPLE: INDIVIDUAL AND VICARIOUS LIABILITY



A netball club employs a coach, Pam.

A transgender woman, Jackie, complains to the general manager of the club saying that Pam has verbally harassed her during matches saying she will be off the team if she wants to 'play rough' or 'play like a man'.

When Jackie complained about being singled out like this, Pam responded by saying 'If you don't like it then go and join the local footy team. This is a game for real women'.

Pam could be liable for discrimination by treating Jackie unfavourably in the area of service delivery (providing coaching services).

Pam's employer could also be vicariously liable for discrimination if it cannot show that it took reasonable steps (such as having appropriate policies and disciplinary procedures in place, and providing training for coaches and staff) to prevent discrimination against transgender players.

HOW CAN I MINIMISE THE RISKS FOR MY ORGANISATION?

One way of minimising the risks to your organisation is to focus only on strict compliance with legal obligations. However, the different definitions, coverage and exclusions that exist in ACT and Commonwealth legislation, combined with the uncertainty of interpretation and a lack of solid case law, may make this a potentially onerous task that still isn't able to provide certainty.

Instead of focussing on compliance, sporting clubs and organisations can also minimise risk by focussing their energy on developing, adopting and reviewing best practice models which aim to increase intersex and transgender participation in inclusive and responsive ways.

ADOPTING 'BEST PRACTICE' MODELS TO INCREASE PARTICIPATION AND MANAGE RISK

There are many benefits for sporting clubs and organisations in adopting a 'best practice' approach rather than focussing on how to avoid legal liability for discrimination.

Being more inclusive means that more people will feel comfortable participating in your sport. This not only increases the numbers of people participating, but also increases the diversity of those people and improves the quality of the social connections that are so important within non-elite sport.

Working to promote best practice inclusion (rather than focussing on the minimum you are legally required to do) is potentially cheaper and simpler than working on a model that is driven only by complying with legal obligations.

Sporting organisations and clubs that can demonstrate that they have taken positive steps to discourage and prevent discrimination are more likely to be able to avoid liability for discriminatory actions of their employees, contractors or volunteers.

Sporting organisations and clubs that are working towards best practice models find themselves better equipped to respond to specific circumstances as they arise. They both avoid the risk of negative publicity and, increasingly, receive positive attention for their work.

Developing and maintaining best practice models is often the most effective way of managing and reducing risk to the organisation, and can also provide other benefits – not only for intersex and transgender people but also for other participants and the sport as a whole.

Part B: **WORKING TOWARDS BEST PRACTICE**

BACKGROUND

Sport is an important part of life for many people.

It can help us to engage, pursue and develop our talents, and has significant health benefits. However, discrimination adversely affects many intersex and transgender people's enjoyment of sport and prevents them from participating.

Confusion about legal obligations and a lack of awareness about intersex and transgender people – both by those who are responsible for team selection and administration in sport and by other players – can lead to unnecessary discrimination, bullying and exclusion.

While the Discrimination Act prohibits discrimination against intersex and transgender people, it also provides exceptions regarding competitive sporting activities and single-sex competitions including where strength, stamina or physique is relevant to participation. These protections and the exceptions are aimed at ensuring fairness by protecting players from discrimination while also ensuring particular individuals do not have an unfair competitive advantage or disadvantage.

THE DISTINCTION BETWEEN ELITE AND NON-ELITE SPORTING ACTIVITIES

The Commission is aware that currently many sporting clubs and organisations rely heavily on international policies and regulations regarding participation in sports.

International and elite-level policies and regulations, among other things, require many intersex and transgender people to undergo medically unnecessary surgical interventions in order to participate in the competition aligned with their gender identity. This requirement is not in accordance with current human rights laws and principles, nor with the legal protections and recognition processes that apply in the ACT.

Although elite-level policies and regulations may offer some guidance in specific circumstances for some elite level competitions, they are not necessarily easy or appropriate to apply at the community sporting level. We may need to take a different approach to address the realities of people's experiences and the needs of local club and recreational level sport.

The existence of an International Olympic Committee (IOC) policy that applies at an elite level does not remove the legal obligation on sporting clubs and organisations operating within the ACT to comply with relevant ACT and Commonwealth anti-discrimination laws.

The Commission is aware that many sporting organisations are unsure about their obligations regarding discrimination against intersex and transgender people and how to manage the related issues.

This section of the publication attempts to address gaps in understanding and provide user-friendly guidance for sporting organisations on the specific issue of ensuring the non-discriminatory participation of intersex and transgender people in non-elite sport.

MYTHS AND STEREOTYPES

Myths and stereotypes about biological sex differences, particularly within a sporting context, often inappropriately guide our responses to these issues.

Some of the false assumptions that may lead to discrimination and exclusion of intersex and transgender people in sport include:



MYTH:

Men are biologically bigger, stronger and faster than women

It is true that when you map sex-based differences in height, weight, strength and speed that the highest performing men outperform the highest-performing women.

It is also true however, that there is significant overlap between men and women in each of these areas – meaning that many women are as tall, as strong and as fast, as many men.

To whatever extent size, strength and speed affects sporting ability in a particular sport, then it may be true that men will perform better than women *in these particular sports at elite levels*.

The data does not support an argument that *all* men will perform better than *all* women at these sports. This is of major significance in the context of participation based non-elite sporting activities.



MYTH:

Men are better at sport than women

Assumptions about the inherent characteristics of male and female bodies, including that males are better at sport than females, don't take into account the reality of variations that exist in physique and capacity.

Different sports require different skills. Sometimes these may be things that we generally associate with men rather than women – for example greater size, strength or speed. But some sports either don't rely on these attributes, or also rely on other attributes.

There are also other biologically influenced factors that contribute to a person's ability at particular sports. This may include agility, flexibility, ability to work co-operatively in a team, or to think more strategically while a game is in play. These attributes, which as a general rule women are more likely to exhibit, clearly also have a role to play in making a person 'better at sport'.



MYTH:

Exposure to testosterone makes a person better at sport

Although it may be true that testosterone generally increases a person's strength and other potentially relevant factors, it does not necessarily follow that this makes a person better at sport. Size, strength and speed may provide a competitive advantage in some sports – but in others, such as shooting for example, it is hard to see how this would be the case.

The strongest statement the IOC makes in its *Regulations on Female Hyperandrogenism* is that testosterone '*may* provide a competitive advantage in sports' (italics added). It does not elaborate on when, or how much, competitive advantage may be obtained, nor on which sports may or may not be affected.

At the same time, an article published in *The Journal of Clinical Endocrinology and Metabolism* in August 2014 states that 'there is no clear scientific evidence proving that a high level of testosterone is a significant determinant of performance in female sports'. Studies undertaken on elite male athletes also show no evidence of a correlation between increased testosterone levels and increased athletic ability. Studies also suggest that testosterone levels are dynamic depending on a number of factors.

Even if testosterone does increase performance in some sports, there are many other factors that also affect sporting ability including fitness, training, age and experience.

It is important to note, in the context of this discussion, that many of the effects of testosterone are reversed if levels are reduced, and not all of the effects are generated if testosterone is administered only after puberty.

Some people with intersex variations are insensitive to testosterone, which means that although testosterone can be measured, it may have little or no affect on their functioning. These are factors that may need to be considered in relation to some intersex people, and also to transgender people who are taking cross-sex hormones.

Given the available evidence, it would be difficult for clubs and organisations at the non-elite level to argue that testosterone levels are a relevant measure of a competitor's eligibility for a particular competition.



MYTH:

If a person has higher testosterone levels than 'the normal range' for that sex then they should be excluded on the basis that they will have an unfair advantage

As discussed above, there is growing evidence that increased testosterone is not an accurate measure of increased sporting performance.

For example, the International Court of Arbitration for Sport recently suspended the operation of an international athletics policy that required female athletes to have testosterone levels below a certain threshold. The Court found there was no evidence demonstrating that testosterone levels had anything to do with fair competition.

Now, all women, regardless of their natural hormone levels, can compete. Despite a historical focus on testing the functional testosterone levels of women, there has been no similar testing of these levels in male competitors. Nor is there any notion that a male competitor who happened to have functional testosterone levels significantly higher than what is considered to be 'the normal range' for men should be excluded from competing because they have an 'unfair advantage' in the men's competition.

If it is considered reasonable that the level of functional testosterone in male competitors should be ignored as a variable in determining their eligibility, then on what basis is it reasonable that this criteria be applied to female competitors? Again, at the non-elite level, it is unclear why competitors' levels of testosterone should be measured for any purpose.



MYTH:

If we allow people with intersex variations and transgender people to compete in the competition that aligns to their gender identity, then some men will 'pretend' to change their gender in order to reap rewards in women's sport

In the long history of 'sex verification' procedures in international sports competitions, there is no evidence to support a claim that men will 'pretend' to be women in order to reap rewards.

At a non-elite level it is even less likely that this might occur. Male sports competitions and sports-people still receive more media coverage, public acknowledgement, sponsorship dollars and other funding in this country.

We also still exist in a cultural context where women are assumed to be 'not as good' as men, and where men and boys are chastised by being told they 'throw like a girl' or 'run like a girl'. For these reasons alone, pretending to be a woman in order to win a women's competition is unlikely to be an attractive option for a man to elect by choice.

Further, in many sports, peer-pressure and stigma from other competitors may dissuade a male from entering a female competition with the (potentially erroneous) belief they will perform better relative to the other competitors. Such issues may also be addressed by rethinking whether non-elite competitions need to be described in terms of sex. For example, the 'ladies tee' in a golf tournament could instead be labelled the 'short tee'.

ELIMINATING DISCRIMINATION BEFORE IT OCCURS

The following sections provide general and specific information on how clubs and organisations can develop policies, practices and procedures to prevent discrimination against intersex and transgender people in sport. These are issues that should be considered by all sporting organisations, regardless of whether there are currently people with intersex variations or transgender people participating, or seeking to participate.

This information focuses on eliminating the causes of discrimination, not just responding to complaints that arise, and can help clubs ensure that they won't be liable for discrimination.

This guide seeks to discuss issues for both people with intersex variations and transgender people, because the issues faced by these groups at times overlap. However, the issues faced by these two distinct groups of people can also be very different.

Working towards best practice means that you need to have policies, practices and procedures in place that deal with discrimination against people with intersex variations and transgender people. This may be part of your broader equal opportunity policy (this could form part of your Member Protection Policy or Code of Conduct).

You also need to make sure your members, staff and players know about these policies and that they understand that they need to comply with them. You can provide this information in induction materials – and then through regular updates or refresher training.

You should also have a process for responding to complaints, including instigating disciplinary action, if discrimination, bullying or harassment does occur.

Some examples of how sporting organisations could start to improve their practice in these areas are discussed in more detail in the following sections and include:

- developing or updating policies on diversity and equal opportunity, discrimination provisions, player participation, complaints and disciplinary processes
- reviewing and improving procedures to provide a planned approach to discrimination prevention, provision of training and support, respectful engagements and inappropriate behaviours
- having a process for regularly reviewing and improving compliance that includes consulting with those who have personal or professional expertise

HYPOTHETICAL CASE STUDY: TAKING A PROACTIVE APPROACH

A basketball club decides to review its policies and practices to increase the participation of people with intersex variations and transgender people at the club.

The club establishes a working group to develop an action plan. The working group is made up of senior staff, interested players, a representative from a local intersex group and a transgender person who has expressed interest in joining the club.

The group develops a written policy clearly stating that discrimination against both people with intersex variations and transgender people is against the law. The policy includes statements about diversity and welcoming people from a range of backgrounds as part of the club's core values.

The group also develops a participation policy. This states that where an intersex person or transgender person is seeking to participate in a non-elite single-sex competition, the organisation will facilitate participation in the competition that aligns with the way the individual identifies, regardless of any medical intervention or legal recognition.

The club then invites representatives from local intersex and transgender organisations to hold an information session for players and officials. The club also arranges to attend some meetings held by local intersex and transgender organisations in order to publicise their new inclusive policy with the aim of increasing participation.



What is reasonable for one sporting organisation may not be achievable in another and depends on circumstances including the nature, size and resources of your organisation as well as the practicality and cost of the measures being considered.

It is also important to view this work as an ongoing project. Any steps you make that improve your practice are worth taking, even if there are other areas where more work may need to be done.

In an area that is evolving so quickly, and where there is still a lack of experience in responding to the issues, it's also important to be realistic about the fact that perfect policy solutions may not be achievable the first time round. As more and more sports start to improve their practices, we will build collective knowledge about the kinds of policy and practices that work best, and we will be able to refine and improve our policy framework over time.

BUILDING A BEST PRACTICE POLICY FRAMEWORK

GENERAL POLICY FRAMEWORK

An important component of developing best practice models is ensuring there is a transparent and inclusive policy framework.

In developing this policy framework, bear in mind that you may well already have both intersex participants and transgender participants who have chosen not to disclose this information – because it is irrelevant, or because they are concerned they may be excluded from participating if they do disclose.

A best practice policy framework would include developing or reviewing:

- existing policies and procedures to ensure that they comply with ACT and Commonwealth discrimination laws and also promote equal opportunity for all people, including those with intersex variations and transgender people.
- complaints and disciplinary processes to ensure they are accessible, transparent and effective in responding appropriately if allegations of discrimination occur.
- policies regarding the collection and confidentiality of personal information that may be held by the organisation. This should also include a review of forms and other documents to ensure you are requesting only relevant information in respectful and sensitive ways.
- an equal opportunity policy which includes information about sex, intersex and gender identity discrimination.
- any information that you must hold about a person's transgender or intersex status should be assumed to be highly sensitive, and should be kept as secure and confidential as possible.

You might also consider developing or reviewing separate policies: one specifically related to the inclusion of participants with intersex variations; and another separate policy regarding transgender participants in your sport.

For example, it will rarely, if ever, be relevant to know if a participant has intersex variations. Many intersex people will have lived (and likely competed) their whole lives as a particular sex.

Intersex people should not find themselves having to undergo medical testing or interventions in order to compete in non-elite sport. Therefore, an Intersex Variations Policy may simply make clear that questions and information about intersex variations should rarely, if ever, be sought. If this information is offered, then the general rule should be that if participation is based on gender, a participant is free to play in the competition consistent with their gender.

An example of something that might be specifically outlined in a policy for transgender participation might be clarity regarding the use of toilet or change room facilities and appropriate uniforms (see below for more information).

POLICIES RELATED TO ENSURING EQUAL OPPORTUNITY

Does your sporting organisation or club have policies about discrimination and diversity? If you do not have an equal opportunity policy (or address equal opportunity in another policy such as a Member Protection Policy or Code of Conduct), you should develop one for your organisation.

The policy should:

- include a clear opening statement that discrimination, sexual harassment and victimisation on the basis of personal attributes, including sex, intersex status and gender identity, is against the law under discrimination law
- include a statement about diversity and welcoming people from a range of backgrounds as part of the organisation's core values
- address rights and responsibilities in all areas that are relevant to your organisation including sport, employment, administration, club membership and service delivery
- provide details about how to get more information or raise any complaints or concerns under the policy. It may be useful to consider having a nominated person in your organisation as a contact officer for these issues. This could be someone like an existing diversity or inclusion officer or your Member Protection Information Officer.

POLICIES RELATED TO THE INCLUSION OF PARTICIPANTS WITH INTERSEX VARIATIONS AND TRANSGENDER PARTICIPANTS

For reasons discussed earlier in this publication, it is best not to rely on IOC policies and regulations in relation to your non-elite competitions, nor to rely on existing member protection policies that reflect IOC guidelines on inclusion of transgender and intersex participants.

Instead, sporting organisations are encouraged to develop their own best practice policies for inclusion of participants with intersex variations and transgender participants.

In developing such policies, you could consider issues including:

- Would having a person with intersex variation or transgender person involved in the competition give them an unfair advantage? On what basis and in what way?
- Is there an evidence base to show that this unfair advantage is a direct result of some attribute directly related to their sex? What is the particular biological attribute/s that might lead to an unfair advantage in this particular sport?

- Even if there are particular biological attributes that can be shown to provide an unfair advantage, a person's individual circumstances, skill level, experience and ability may mean they don't really have a competitive advantage at all. How will these factors be considered?
- If a player is excluded from this competition, what other competitions are available to them? Would they be able to compete without an unfair disadvantage in those competitions? If your organisation only runs competitions for one sex, it would be beneficial to work in collaboration with the relevant sporting body that runs competitions for other sexes to ensure that players are dealt with consistently by both organisations (see case study below).
- Think about different scenarios and how you would decide on including people in either a men's or a women's competition. Some examples to think about might include:
 - A woman with intersex variation with XY chromosomes but a complete insensitivity to androgens who has always identified as female.
 - A transgender man who has not had any surgical intervention but who has been on testosterone for the last five years.
 - Someone born male who identifies as 'genderqueer'. They now use a female name, have changed the sex on their birth certificate to "X" and have had no surgical or hormonal intervention.

It is always best to have a policy framework to guide and inform any specific questions you might ask people about their personal information, otherwise there is a risk that your request itself could be discriminatory.

If 'strength, stamina or physique' is determined to be an issue of relevance in your sport, your policies should provide a clear explanation as to why. It should also outline the factors that you will use to determine particular requests for participation, and how these will be considered.

This will help you to have a more respectful and transparent way of dealing with requests than if you have no policy framework, and simply request personal information without being clear about why you need it or how you are going to use it.

TAKING A POLICY APPROACH THAT CONSIDERS PARTICIPATION OPTIONS IN BOTH THE men's and women's COMPETITIONS



Work on your policy framework with other relevant sporting bodies to ensure there is a fair and equitable treatment of participants with intersex variations and transgender participants. This will avoid situations where people may find themselves effectively excluded from participating in any competition.

For example, a transgender man might be excluded from participating in a women's competition on the basis that he identifies as a man. In certain circumstances he may also find himself excluded from the men's competition on the basis that his 'strength, stamina or physique' is not equivalent to that of other men and it would place his team at an unfair disadvantage.

By considering the implications for both the men's and the women's competitions and working together, it should be possible to develop a policy that allows all people with intersex variations or transgender people to participate in your sport.

POLICIES RELATED TO THE INCLUSION OF PEOPLE WITH INTERSEX VARIATIONS AND TRANSGENDER PEOPLE IN OTHER ROLES

In developing your policy framework, you should also consider situations where people with intersex variations or transgender people may be involved in your organisation in ways other than as a participant in your sporting competitions. This could include as a volunteer, coach, official, administrator or employee.

In these roles, the 'strength, stamina or physique' consideration will not be relevant, so different policy considerations will need to be taken into account.

- keeping complaints confidential
- communicating about the progress of complaints
- ensuring that the person who has made a complaint or their friends or relatives are not victimised or threatened with any detriment because they made a complaint.

Organisations should also have policies that deal with disciplining players, officials, volunteers, employees and also potentially spectators who behave in ways that may constitute discrimination, harassment or bullying. Most sporting organisations will already have a disciplinary policy and procedures and mechanisms that could be used to incorporate these issues.

POLICIES RELATED TO COMPLAINTS AND/OR DISCIPLINARY PROCEDURES

An effective complaints process helps you to deal with complaints of discrimination, sexual harassment and victimisation quickly, fairly, impartially and transparently.

Discrimination law does not prescribe what a complaints process should include, however, an internal complaints process can be strengthened by:

- including information about the complaints process in any equal opportunity policy
- dealing with complaints in a way that is fair, prompt, transparent and confidential
- listening to the complainant in an open and impartial way

POLICIES RELATED TO THE COLLECTION OF INFORMATION AND RELATED PRIVACY ISSUES

Discriminatory requests for information can form the basis for a complaint under discrimination law. When seeking information from people – whether they are job applicants or new and existing players and members – you need to be able to show that you need the information you have requested for a legitimate and lawful purpose.

Your organisation may also be subject to privacy legislation and have to comply with relevant privacy principles. Privacy legislation, including the *ACT Health Records (Privacy and Access) Act 1997* regulates the way organisations collect, use, disclose and manage personal information and health information. You should separately seek advice on

your privacy obligations as this publication provides general principles only.

In certain circumstances, you may need to request information from players about health, injuries or other personal medical information. For example if you are a sport where 'strength, stamina or physique' provides a competitive advantage, there may be occasions when you need some medical information about a person's intersex status and/or hormonal status. If this is the case, you need to be careful about how you request and manage this information once you have collected it.

As a general rule, you should:

- review your forms, documentation and processes to ensure they do not ask for discriminatory information, are accessible and do not unnecessarily exclude people. For example, you should review categories in any forms to determine whether information about a person's sex or gender is relevant before asking for it.
- only collect the information you absolutely need, with consent, and after you have explained why you need it and how you will use it
- restrict access to the information to the people who "need to know" (for example, the managers who are responsible for making a decision in the particular circumstances)
- store the information securely to protect it from misuse, loss or unauthorised disclosure (such as in a locked filing cabinet or a secure electronic file)
- make sure that any communication about the information is private (for example, make sure that no one can overhear you if you are having a conversation that relates to the information)
- be sensitive to the fact that participants may not wish to disclose their intersex variations or transgender status
- destroy the information when it is no longer required.

When seeking information from people, including any identity documents, you should be aware that some people may have inconsistent information appearing on their records due to barriers imposed by government policies, practices and legislation.

Note that, in the ACT, it is unlawful to discriminate against someone because the record of their sex has been altered under the *Births, Deaths and Marriages Registration Act 1997* (or equivalent legislation in another jurisdiction).

In addition, people born in the ACT may have a birth certificate that shows their legal sex as X. This is not a reasonable or lawful basis to exclude that person from participating in either a men's or a women's competition.

OTHER SPECIFIC POLICY ISSUES YOU MAY NEED TO CONSIDER

Use of toilets, change rooms and similar facilities

When people are only beginning to understand transgender issues, they often express concerns about toilet and change room usage. These concerns can be effectively dealt with in a number of ways. One of the most important things you can do is to be pro-active on this issue by including clear information in your policies about the use of toilets, change rooms and similar facilities.

People should be able to use toilets, change rooms and facilities that are appropriate to their gender (that is, the facilities of their choice).

If you encounter resistance from others about the use of toilets and facilities:

- meet with them to explain the basis of your policy position
- discuss and respond to their concerns
- remind them that you both have legal obligations to prevent discrimination and that this includes allowing people to use the appropriate facilities.

If this does not resolve the issue, you could explore alternative solutions such as allowing concerned individuals to use other facilities (for example a private 'family' or 'accessible' toilet or change room).

When you are building or upgrading toilets and change room facilities – you could also consider creating an environment that includes private spaces for everyone to use rather than large open areas.

Uniforms

You should include clear information in your policies about uniforms if this is relevant to your sport.

Players (and employees) should be given the choice to wear the uniform that they feel most comfortable in.

EMBEDDING BEST PRACTICE WITHIN YOUR ORGANISATION

BEST PRACTICE FRAMEWORK

Developing a transparent and inclusive policy framework is only effective to the extent that it is embedded within your organisation's practice and procedures.

There are many ways to work towards this.

Some ideas include:



- developing a **plan** for how you will respond to intersex or transgender issues as they emerge – either in relation to new or existing participants in your organisation
- ensuring staff are **trained** and aware about discrimination, particularly on the basis of sex, intersex status and gender identity
- **modelling and encouraging** respectful communication at all levels of your organisation, including spectator behaviours
- **monitoring** trends and inviting feedback in relation to the operation of your complaints mechanisms
- **consulting** with people who have personal or professional experience to help improve your organisation's response.

There are a variety of scenarios where intersex or transgender issues may emerge in relation to existing players or employees. Some examples include:

- An existing player in your women's competition privately undergoes a routine medical procedure and as part of that process discovers that she has an intersex variation.
- An existing male referee advises that they have been exploring gender issues for some time and have now decided to start a female transition process.
- An existing player discloses the fact that they are intersex or transgender after many years of being an active participant because the inclusive policy work that your organisation has been undertaking has made them feel more confident that they will be treated respectfully.

It is always best to have a clear policy framework in place before issues like these emerge. Without clear policies, even organisations and individuals that are genuinely trying their best can often struggle to respond appropriately.

Developing a clear policy framework in advance means that you have time to properly understand and consider the issues. This allows you to explore the broader policy implications instead of simply responding to the specific circumstances of a particular situation. It also allows you to outline clear and transparent processes for how you will respond to these situations so that everybody knows what to expect.

These are all important factors not only in reducing the likelihood of discrimination occurring, but also in setting clear and realistic expectations for everyone involved in your organisation.

Developing a planned approach

It will be useful for your organisation to develop a template plan that includes issues to be considered in these circumstances. You could then invite the individual concerned to meet with you (with a support person present if they would prefer this) to discuss and agree on the most appropriate ways for the plan to be implemented. This would include discussion about who, how and when each task would be undertaken.

PREVENTING DISCRIMINATION AGAINST EXISTING PLAYERS OR EMPLOYEES

Often when sporting bodies consider the issue of intersex or transgender participation in their sport, they assume that it will always take place in a scenario where someone who is known to be intersex or transgender is seeking to participate in the sport.

The assumption that you *'will always be able to tell'* if someone is intersex or transgender is simply not true.

It is highly likely that you already have participants with intersex variations and transgender participants in your single-sex sport even if you are not aware of this.

The degree to which a particular individual wants to be involved in these processes will vary – but even if they choose to be very involved, this does not remove your organisational responsibility to remain active and publicly supportive throughout the process.

Although a particular individual may choose to discuss their own situation with others, it is your responsibility to ensure that other players and staff know about anti-discrimination obligations, intersex and transgender issues more generally.

Your template plan could include issues such as:



- What (if anything) do the organisation, other players, officials or employees need to know about this situation?
- How, when and by whom will these people be informed?
- Are there any particular dates of relevance (for example if someone is changing their name or pronouns, when would they like this to commence?)
- Are there any documentation changes that need to be made and if so when will these be undertaken? For example, if someone is changing their name this will need to be reflected on personnel files, player registration details, team rosters and/or newsletters as applicable
- Are there any specific issues regarding uniforms or usage of toilet or change room facilities? How will this be managed and communicated to other people?
- Is there any information of a personal or confidential nature about the individual that is now held by the organisation? If so, how will this be managed to ensure their privacy?
- What pieces of information, or topics of conversation, are inappropriate to the current situation? How will this be communicated to others, and how will any inappropriate behaviour be responded to?

What strategies should be adopted to assist and support other employees, officials or players?

- How will the organisation ensure that people are aware of their legal obligations not to discriminate and of any relevant organisational policies?
- Would it be helpful for the organisation to provide a general information or training session to increase people's understanding of discrimination law, and/or intersex and transgender issues more broadly?
- If other people have questions or issues they are unsure of, who in the organisation can they be directed to?

What strategies should be adopted to assist and support the individual?

- Be realistic in your communication with the individual.
 - If you already have an inclusive policy framework that values diversity and aims to facilitate the participation of intersex or transgender people, reassure the individual of this.
 - If however, this is the first time you are dealing with these issues it would be good to acknowledge this, be clear that you will respond to the best of your capacity, and be realistic about the fact that you may make mistakes along the way. Encouraging ongoing and open communication between the individual and the organisation can be beneficial in these circumstances
- Ensure the individual is provided with copies of, and understands, any relevant organisational policies
- If the individual experiences any discrimination, harassment or inappropriate comments or questions what should they do? How will the organisation respond to these occurrences? Do you have contact officers in place in case the person would like to discuss their concerns, and evaluate their options confidentially?

The points raised here are important issues for you to consider – but not all of them will be applicable to every situation your organisation may encounter. You will need to use this template plan flexibly to appropriately meet the needs of individuals.

CASE STUDY: USING YOUR TEMPLATE PLAN TO RESPOND FLEXIBLY TO THE SPECIFIC NEEDS OF EACH SITUATION



Shelley is 16 and has been playing netball in the girls' competition since she was ten.

She has recently discovered that she has an intersex variation called 'complete androgen insensitivity' (CAIS). Shelley is not sure if her club would expect her to disclose this information, even though it won't have an impact on the way she plays the game. She is worried about how her team mates might respond, and she is also concerned that the club might say she can no longer play in her team because, as she has just discovered, she has XY chromosomes.

Shelley and her parents have looked on the association's website, but have not been able to locate any information to clarify this issue. They rang the association office to seek clarification and arranged a meeting with Leo who is the association's diversity officer.

At the meeting, Leo provides Shelley and her parents with a written copy of their policy which includes a clear policy position on including girls/women who are intersex within their non-elite girls and women's competitions.

In line with their policy, Leo confirms that Shelley is able to continue playing in the girls' competition and after that the women's competition.

Leo provides a copy of the template developed by the association as a guide to inform discussion at the meeting, noting that many of the issues raised in the template will not necessarily be relevant to Shelley's circumstances.

Leo states clearly that from the association's point of view, there is no need for anybody to be informed of Shelley's intersex status, but that if or when Shelley does decide she wants to tell people, then the association would be supportive.

Shelley does not wish to disclose her personal information. Shelley's parents ask for some formal confirmation that Shelley is able to continue participating.

Leo offers to provide a follow up email after the meeting formally confirming that Shelley is able to continue participating in all competitions that are run by their association. Leo also notes that he is aware some elite international competitions include women with CAIS in female competitions.

Leo acknowledges the confidential nature of the information that Shelley and her parents have provided and undertakes to keep a copy of all related correspondence in a secure section of the office computer system that only he has access to.

Leo advises that he will need to inform the Executive Officer about their inquiry and the provision of his written advice, but that he would not need to identify Shelley as part of that process. Leo also undertakes to remind the administration officer who took their initial call about the need for confidentiality.

Leo apologises for not having the policy document available on the association's website, thanks Shelley's parents for drawing this issue to his attention, and undertakes to make sure it is added as part of the next website update. Leo also suggests that it might be useful for the association to provide a 'refresher' session at their next clubs' meeting – to make sure that all clubs are aware of the policy, and to provide a brief information session from an intersex advocacy group.

Leo stresses to Shelley and her family that the association is committed to ensuring an inclusive, safe and respectful environment for all players and encourages them to contact him directly if they have any future concerns or questions.

REVIEWING STAFF AND PLAYER KNOWLEDGE AND AWARENESS

You should review any training you provide for staff or players about discrimination. In addition to training about legal rights and responsibilities, you could also consider developing training about intersex and transgender issues more broadly to address any myths or misconceptions. To improve staff and player knowledge and training you should:

- seek information about how much they know about intersex and transgender issues and what they would like to hear about in training
- take positive steps to train staff and players about intersex and transgender issues and equal opportunity law, including the provision of annual refresher training
- shape the content of your training and deliver it in a way that is engaging and easy to understand.

Ideally, all players and staff members, including administrators and team coaches, should read this publication about their responsibilities. You could consider including this publication and other information about discrimination – including your equal opportunity policy – in any induction materials and discuss regularly at meetings. Continue to raise awareness about discrimination and your policy at least once a year and consider providing training on discrimination every two years.

ENSURING RESPECTFUL COMMUNICATION (INCLUDING THE USE OF CORRECT NAMES AND PRONOUNS)

While sports generally pride themselves on principles of fairness and positive team values, sport can also be a hostile environment where teasing or ridicule occurs. This may be particularly pronounced for people with protected attributes (characteristics) under discrimination law, including intersex people and transgender people.

You should examine communications between your staff, officials and volunteers and new or existing players including language between players during matches.

Sporting organisations should also be mindful of their own communication with employees or job applicants, officials, volunteers and current or prospective players.

Sporting organisations and those who may observe or have control over these communications – such as administrators and team coaches – should set clear expectations about respectful communication and the consequences of disrespectful behaviours. This might be something you wish to state explicitly in your equal opportunity policy. Appropriate disciplinary action should also be taken to respond to any abuse or disrespectful behaviour.

The use of appropriate names and pronouns is important to all of us. Failing to recognise a person's identity through the appropriate use of names and pronouns may be unlawful.

You should always respect an individual's choice of preferred name and pronoun and, for people who are making a change in the way they wish to be identified, seek clarification on when they wish to start doing so, and whether they have any preference about how this information should be communicated to other people.

Regardless of whether the individual chooses to communicate this information to other people themselves, you also have an obligation to ensure that other players, officials and administrators are aware of, and understand the importance of using, the appropriate name and pronouns.

Some people may 'slip up' and use the wrong name or pronoun at first. It should not always fall back on the individual to correct these mistakes. As an organisation, you should also play a role in reminding people of the appropriate name and pronouns. Sometimes this may involve formal communication to other players or officials. But it is equally important that representatives of the organisation involved in informal conversation politely correct any inappropriate references that are made.

It is also important that accurate names and pronouns (that is, those provided by the individual concerned) appear in any documentation or computer systems held or produced by your organisation, such as employment documents or team lists and rosters.

CASE STUDY: DEALING WITH INAPPROPRIATE LANGUAGE



Maurice has been going to his local outdoor pool for almost a decade. Maurice knows and has a friendly relationship with the staff at the front counter. However, since Maurice transitioned to affirm his gender their attitude towards him has changed.

On one occasion, two of the staff members tease Maurice referring to him by his previous name 'Marie' and using the pronoun 'she'. Maurice makes a complaint to the manager of the centre, Reg.

Reg apologises to Maurice for the behaviour and meets with the staff members to discuss the situation. When Maurice attends the centre again, Reg and the two staff members issue him with an apology and stress that the same thing will not happen again.

The incident also leads Reg to remind his employees about their equal opportunity policy and the consequences of disrespectful behaviour.

He also provides refresher training for his staff about anti-discrimination law with specific detail on gender identity and respectful, non-discriminatory behaviour in service delivery.

DEALING WITH SPECTATOR BEHAVIOURS

As well as the anti-discrimination law already discussed, the law also specifically protects against 'hate speech' or any public act that incites:

- hatred toward
- revulsion of
- serious contempt for, or
- severe ridicule of

a person or group of people. The law describes this as 'vilification' and in the ACT this protection includes vilifying someone because of their gender identity or intersex status.

Some examples of vilification include distributing pamphlets that incite hatred, wearing clothing with offensive slogans, or yelling abuse. Vilification is a civil matter and dealt with by a complaint to the ACT Human Rights Commission.

However, if vilification involves threats of violence, it is a criminal offence and a matter for the police.

Whether you have obligations for spectator behaviour may depend on the context and the degree of control you have over this behaviour and entry to events.

While dealing with spectator behaviours may be difficult to control and won't necessarily give rise to legal liability, there are steps you can take to prevent players experiencing discrimination in the form of verbal abuse from spectators:

- Provide statements wherever possible – such as in terms and conditions of entry, signs or policies – which outline that discrimination and discriminatory verbal abuse on the basis of protected attributes will not be tolerated at sporting events. Many clubs and sports grounds may already have signage about inappropriate behaviour and language and could include a reference to discrimination and vilification on a list of inappropriate behaviours.
- While it may not be possible to include detailed information about discrimination in terms and conditions or ticketing information, you can simply outline that discrimination and vilification will not be tolerated or go further by naming protected attributes such as gender identity, intersex status, sexual orientation or race. You could include this information in any email attachments to e-tickets.
- Outline the repercussions if this kind of behaviour does occur (via a complaints or disciplinary action policy) and ensure you have staff and established processes to respond appropriately to any incidents.
- Provide avenues for people to report anti-social behaviour from spectators (such as a contact person, complaint phone number or email address, online website form).

RESPONDING TO COMPLAINTS AND FEEDBACK

Look at the trends from your complaints systems. Have you received complaints? What is the nature of the complaints? Have they been responded to? Do they reflect any trends that require action more broadly?

Any feedback about your complaints procedure can be a valuable source of information to improve quality, respond to people's needs and prevent discrimination. You can seek feedback by talking to people and through questionnaires or feedback forms, or sections on your website offering people the opportunity to make suggestions about whether information was helpful. If you want to survey your staff or players about gaps in understanding and training opportunities, you can also ask about their awareness of your complaints procedure and any feedback they have.

Use knowledge you gather from staff, players and officials, to review the effectiveness of your approach and identify any issues that may warrant further attention over time.

CONSULTING WITH AFFECTED GROUPS OR INDIVIDUALS

Consult with affected groups or individuals when developing or reviewing your approach. For example, when developing your policy documents, you could invite comments and input from intersex and transgender organisations to inform your approach.

Individuals who play your sport or who are employed with you may also be able to provide you with their views on your policies, practices and complaints processes so you can identify opportunities for improvement.

SHARING KNOWLEDGE WITH OTHER SPORTING ORGANISATIONS

Your sporting organisation is not the only organisation that is responding to these issues. It could be helpful to see what other sporting bodies either within or outside your particular sport are doing to address the issue of participation for people with intersex variations and transgender people.

Sharing your knowledge and experiences, and working collaboratively on policy and procedural development, will help to build and solidify expertise and increase collective knowledge and confidence in dealing appropriately with these issues.

Part C: **UNDERSTANDING ACT DISCRIMINATION LAW IN MORE DETAIL**

WHO IS PROTECTED BY DISCRIMINATION LAW?

PROTECTED ATTRIBUTES UNDER THE ACT DISCRIMINATION ACT

The ACT *Discrimination Act 1991* includes protection for people on the basis of:

- their gender identity
- their intersex status
- their sex
- their physical features
- the record of their sex having been altered under the *Births, Deaths and Marriages Registration Act 1997* or an equivalent law in another jurisdiction.

‘Gender identity’ is defined as:

...the gender-related identity, appearance or mannerisms or other gender related characteristics of a person, with or without regard to the person's designated sex at birth.

‘Intersex status’ is defined as:

...status as an intersex person.

The Discrimination Act provides no guidance on when a person is recognised as being a particular ‘sex’. The term ‘sex’ is not defined in legislation, and there is no clear guidance on when exactly a person would be considered to be ‘male’ or ‘female’ for these purposes.

It is worth noting that if a person was born in the ACT, they do not need to have had hormonal or surgical treatment to have the sex on their birth certificate changed. People born outside the ACT are also able to have a ‘certificate of recognition’ issued that is evidence of their legal sex.

If a person has had the sex on their birth certificate changed, or has a certificate of recognition, then they are considered for all purposes under ACT law to be that sex. This means that you should let the person participate in the relevant single sex competition or club as appropriate to their legal sex.

Elite-level policies sometimes exclude intersex people from participating in women's competitions, and distinguish between transgender people who have or haven't had hormonal or surgical intervention. As discussed above, these issues are of less significance in relation to non-elite sport.

It is against the law to discriminate against someone on the basis of their gender identity, intersex status, sex or physical features unless an exception applies. These issues are discussed in more detail in the following sections.

PROTECTED ATTRIBUTES UNDER THE COMMONWEALTH SEX DISCRIMINATION ACT

This publication focuses on the ACT Discrimination Act and does not deal with the Commonwealth Sex Discrimination Act 1984 in detail, but it is important to know that Commonwealth legislation also applies to sporting organisations operating within the ACT.

As in the ACT, the Commonwealth Sex Discrimination Act provides protection to people with intersex variations and transgender people using separate provisions.

People with intersex variations are protected if they have 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.

Transgender (and potentially also some people with intersex variations) are protected under the Commonwealth Sex Discrimination Act on the basis of their 'gender identity' which is defined in similar terms as in the ACT legislation.

The Commonwealth Sex Discrimination Act also potentially provides protection to people with intersex variations and transgender people on the basis of their 'sex'.

It is against the law to discriminate against someone on the basis of their intersex status or gender identity in sport and other areas of public life covered by the Act unless an exception applies.

WHAT AREAS OF MY ACTIVITIES ARE COVERED BY THE ACT DISCRIMINATION ACT?

WHEN DO I HAVE A LEGAL OBLIGATION NOT TO DISCRIMINATE?

Discrimination is unlawful if it occurs in an area of public life that is covered by the Discrimination Act. This includes:

- sport and related service delivery
- employment
- the membership of certain clubs.

Discrimination is unlawful unless an exception or exemption applies. These issues are discussed in more detail in the next section.

DISCRIMINATION IN SPORT (INCLUDING RELATED SERVICES AND FACILITIES)

Under the Act, it is against the law to discriminate against another person on the basis of 'sex', 'gender identity' or 'intersex status' by:

- refusing to provide goods or services to them
- discriminating in the terms on which goods or services are provided to them
- otherwise treating them unfavourably in the way the goods or services are provided.

These provisions will generally apply to all aspects of sporting organisations' activities including participation as a player, official or administrator and other sports-related services and facilities such as coaching, social activities and providing amenities.

DISCRIMINATION IN EMPLOYMENT

It is against the law to discriminate against job applicants and employees on the basis of 'sex' or 'gender identity' or 'intersex status'. In employment this includes:

- denying training, promotion, or other employment benefits
- not hiring someone or dismissing someone from work
- subjecting an employee to any other detriment.

Some examples of discrimination affecting people with intersex variations and transgender people in employment include:

- being subjected to inappropriate comments or jokes
- being forced to disclose private information
- not being recognised as their affirmed gender, and
- missing out on employment, training or promotion opportunities.

ADDITIONAL PROVISIONS RELATED TO ORGANISATIONS THAT HOLD A CLUB LIQUOR LICENCE

It is unlawful for an organisation that holds a club liquor licence to discriminate against members, or applicants for membership, on the basis of 'sex' or 'gender identity' or 'intersex status'.

Specific examples that are included in the Discrimination Act include:

- refusing or failing to accept an application for membership, or an application for a particular type of membership

- applying different terms or conditions to memberships and/or application processes
- denying or limiting access to any benefit provided by the organisation
- subjecting the person to any other detriment.

An example of 'any other detriment' might be where a club fails to act to prevent discriminatory harassment of members or guests on its premises.

ARE THERE ANY RELEVANT EXCEPTIONS OR EXEMPTIONS PROVIDED FOR IN THE ACT DISCRIMINATION ACT?

Actions are not unlawful if an exception in the Act applies. Exceptions *allow* discrimination by saying that it will not be unlawful if you do something that falls within their scope. They do not *require* you to discriminate and exclude people. In this area, organisations have a choice about whether they discriminate or not.

If you seek to rely on an exception as a reason for lawfully discriminating against someone, you need to be prepared to explain why the exception applies in your circumstances if someone makes a complaint against you.

You will also need to check that there is a comparable exception in the Commonwealth Sex Discrimination Act. If there is not you will need to either obtain a specific exemption, or modify your activities to ensure compliance.

This section considers some of the exceptions that may be relevant to the participation of people with intersex variations and transgender people in sport.

1. EXCEPTION – IN RELATION TO SINGLE SEX COMPETITIONS: STRENGTH, STAMINA OR PHYSIQUE

Sporting clubs may run single-sex competitions where the strength, stamina or physique of the competitors is relevant to the outcome (for example, a male swimmer may have a competitive advantage competing in an exclusively female swimming race, and a female gymnast may have a competitive advantage competing in an exclusively male gymnastics event).

This exception only applies to competitive sporting activities. It does not apply to other areas related to sport such as employment opportunities, appointment as a coach or umpire, or the use of toilets, change rooms and other facilities.

This exception means you may be able to exclude some people with intersex variations or transgender people from single-sex competitions in some circumstances on the basis of their 'sex', but not on the basis of their 'gender identity' or 'intersex status'.

It is important to remember that the purpose of this exception is to ensure players do not have an unfair competitive advantage in single-sex competitions. If you are considering whether to apply this exception, ask yourself:

- What are the key aspects of your sport that make strength, stamina or physique relevant?
- What are the relevant differences between the sexes in strength, stamina or physique? Will these differences give players of one sex a competitive advantage?

Even if you've established that the strength, stamina and physique of players is relevant to your sport, you also need to consider whether it's appropriate to apply the exception.

When deciding on whether to apply an exception, remember that individuals will often have varying levels of strength and stamina regardless of their sex or gender identity. In some cases, whether or not a person is unresponsive to particular hormones, or is taking prescribed hormones may affect their strength, stamina and physique in ways that either create, or remove, a potential competitive advantage. There are also many other factors such as age, experience, fitness and skill level that may also need to be considered. Making a determination about the relevance of strength, stamina or physique will depend on your particular situation and sport.

Part B of this publication provides some guidance on the kinds of issues you may like to consider in making these kinds of assessments, but you should consider seeking legal advice if you are proposing to exclude a player with intersex variations or transgender player on this basis.

2. EXCEPTION – MEASURES INTENDED TO ACHIEVE EQUALITY

There is an exception in the Discrimination Act that means you could lawfully discriminate against a person if you were doing so in a way that was **reasonable** to:

- a. ensure that a particular class of people have equal opportunities with others, or
- b. meet the special needs of a particular class of people.

This exception is a general exception that potentially applies to any area, not just to sporting activities and facilities.

Some examples of activities where this exception could apply include:

- If attracting men to a particular sport has been a problem, it could be possible run a competition that is only open to men in an attempt to increase their participation. To do so, the club would need to show that this is to address a history of disadvantage.
- If attracting female coaches in a particular sport has been an issue, it could be possible to run special coaching clinics that are only open to women.
- If intersex people have a history of not being engaged in a particular sport, it could be possible to provide incentives to clubs for increasing the number of intersex people who are registered.
- If transgender people are under-represented in using a particular facility, such as a swimming pool or a gymnasium, it could be possible to hold special events where the facility is only available to transgender people.

When looking at whether a proposed measure will fall under this exception, you need to ask yourself whether the measure is necessary, genuine and justifiable given the needs of the group who will benefit. Some things to consider are whether the measure:

- Is justified because the members of the group have a particular need for advancement or assistance
- Is undertaken in good faith to help promote or achieve substantive equality for members of the group

- Is reasonably likely to achieve this purpose
- Has disproportionate consequences for people who will be excluded. For example, whether there are other opportunities for excluded people to participate in similar activities in other ways.

You may also need an exemption from the Commonwealth Sex Discrimination Act to run a single-sex competition on this basis, or rely on an exception under the legislation.

3. EXCEPTION – GENUINE OCCUPATIONAL REQUIREMENTS IN EMPLOYMENT

This exception allows employers to limit offers and of employment to people of one sex if it is a 'genuine occupational requirement' that the employees are people of that sex.

The Act includes a number of examples of where it may be a genuine occupational requirement for a person to be a particular sex, including where the employee will be required to enter a toilet or change room ordinarily used by people of that sex while it is in use by people of that sex which could potentially apply cleaners, coaches and other team officials.

If you intend to rely on this exception, you should consider whether it is a genuine requirement to have the whole role as a single-sex designated job, and whether there are reasonable procedural changes that could be made to resolve the issue without discriminating.

For example, many sporting organisations already have effective policies and procedures to deal with situations where the coach of a women's sporting team is male. It could be argued that extending these kinds of measures is a reasonable way to remove any 'genuine occupational requirement'.

If an intersex person or transgender person is employed or seeking employment with your organisation and you think there is a good reason to rely on this exception to exclude them, you will need to consider whether they are a particular 'sex' for the purposes of this exception.

Although this exception may allow a club to discriminate against a person on the basis of their 'sex', it does not allow you to discriminate against them on the basis of their 'gender identity' or 'intersex status'.

EXAMPLE: DISCRIMINATION IN CLUB MEMBERSHIP



Leanne is a transgender woman and has identified this way publicly for 10 years. She was not born in the ACT and hasn't been able to change the sex on her birth certificate, but she does hold an Australian Passport which shows her sex as female.

She has recently joined her local golf club (which holds a club liquor licence). Every Wednesday, the club has a 'Ladies Day' social event for the female players. Leanne turns up to participate but is refused entry on the basis that it is a 'ladies only event' and she is a transgender person.

The golf club could be liable for discrimination against Leanne on the basis of her gender identity. This is because the club has denied Leanne access to a benefit provided by the club. The club might argue that it discriminated against Leanne on the basis of her sex (as shown on her birth certificate), rather than her gender identity, and seek to rely on the exception.

Noting that the club bears the onus of proving an exception applies, better risk management practice would be to welcome Leanne to the event without the need to refer to her passport or birth certificate. Including Leanne would also make her feel more accepted and likely a more active member of the club.

4. EXCEPTION – CLUBS THAT HOLD A CLUB LIQUOR LICENCE

The Act includes an exception that allows clubs that hold a club liquor licence to limit their membership to a particular sex. If an intersex person or transgender person is seeking to become a member of your single-sex club, think about how you can be inclusive by recognising the person as their preferred gender. A person's legally recorded sex and physical characteristics may not necessarily be relevant to your decisions about club membership.

The Act also allows mixed-sex clubs to limit access to benefits based a person's sex in some circumstances. For example, a club can limit access to its facilities to members of one sex at particular times if the facilities only have a change room that is suitable for use by one sex at a time. However, if a club does restrict access in this way it would need to provide equivalent access to members of other sexes.

Although this exception allows a club to discriminate against a person on the basis of their 'sex', it does not allow you to discriminate against them on the basis of their 'gender identity' or 'intersex status'.

5. EXCEPTION – VOLUNTARY BODY

There is also an exception for bodies that do not operate for profit, in the way they admit members and provide benefits. These do not include clubs that hold liquor licences.

DO I HAVE TO APPLY THESE EXCEPTIONS?

No. While the exceptions may allow you to discriminate against people with intersex variations and transgender people in some circumstances, you don't have to use these exceptions. The guidelines are designed to help you think about ways you can think about how you can encourage participation in your sport by adopting an inclusive approach.

Even if an exception allows you to exclude an intersex or transgender person from one part of your organisation's activities, you could still encourage and support the person to be involved in your organisation in other ways.

EXEMPTIONS

It is also possible to apply for a specific *exemption* from the law for a set period of time. An exemption must be specifically applied for by contacting the ACT Human Rights Commission.

OTHER POTENTIALLY RELEVANT ISSUES

OTHER FORMS OF DISCRIMINATION

There are a range of other discrimination provisions contained within the ACT Discrimination Act as well as a range of different Commonwealth Acts. The right to equality and non-discrimination is also protected by the ACT *Human Rights Act 2004*.

You can find out more by contacting either the ACT Human Rights Commission at www.hrc.act.gov.au (further contact details are at the end of this publication) or the Australian Human Rights Commission website at www.humanrights.gov.au

SEXUAL HARASSMENT

Sporting organisations and clubs also need to know about their legal obligations regarding sexual harassment.

Discrimination law prohibits sexual harassment when it occurs in relation to employment, education, the provision of goods and services, and in clubs.

Sexual harassment is unwelcome sexual behaviour that could be expected to make a person feel offended, humiliated or intimidated. Sexual harassment can be physical, verbal or written and may include comments online or in social media.

Sexual harassment can include a range of behaviours including comments about a person's private life or the way they look, sexually suggestive behaviour, comments or questions. Some examples might include asking a person with intersex variation or transgender person about their sex life, or interrogating them about their physical characteristics. This kind of harassment can also be discrimination.

Sporting organisations and clubs need to have clear policies and procedures in place to prevent and respond to sexual harassment.

VILIFICATION

The ACT Discrimination Act also makes vilification unlawful, if it occurs 'other than in private', and

- incites hatred toward, or
- revulsion of, or
- serious contempt for, or
- severe ridicule of a person or group of people.

This protection covers vilifying someone because of their gender identity or intersex status.

Some examples of the kind of public behaviour that could constitute vilification might include distributing pamphlets that incite hatred, wearing clothing with offensive slogans, or yelling abuse.

Individuals can complain to the ACT Human Rights Commission about acts of vilification. If any acts involve threats of violence, they constitute a criminal offence and can be dealt with by the police.

VICTIMISATION

Victimisation is also unlawful under the Discrimination Act.

Victimisation is when a person subjects another person to a detriment (or threatens to do so) because the person or someone associated with them either made a complaint, talked about making a complaint or helped someone else to make a complaint.

29

Appendix:

QUICK OVERVIEW – ACT DISCRIMINATION ACT

Is your activity covered by the Act?	What does the law say about sex, gender identity or intersex status?	Does an exception apply? Remember – even though an exception may allow you to discriminate, the law does not require that you apply it.
GENERAL SPORTING ACTIVITIES AND FACILITIES		
<i>General sporting activities including playing, coaching, refereeing, administration, social activities and use of amenities</i>	<p>S 20: It is unlawful to discriminate against someone on the basis of their sex, gender identity or intersex status when providing goods, services or facilities.</p> <p>For sporting organisations, this includes:</p>	<p>No. You cannot discriminate against a person on the basis of their sex, gender identity or intersex status by refusing to provide them with services or access to facilities, or by altering the terms on which services or facilities are provided.</p> <p>S 31: There may be an exception in some situations for clubs and organisations that are voluntary bodies.</p>
<i>Single-sex competitions</i>	<p>a. refusing to allow participation in a sporting activity, such as playing, coaching, umpiring, refereeing or administration</p> <p>b. refusing to allow access to other services or facilities</p> <p>c. applying different conditions on a person's participation, access, or use of facilities.</p>	<p>S 41: You can lawfully discriminate against a person on the basis of their sex by excluding them from a single sex competition where the strength, stamina or physique of competitors is relevant.</p> <p>This exception only applies to participants. It does not apply to umpires, referees, administrators or in relation to the provision of coaching or other related services. This exemption also applies only in relation to a person's sex – there is no exemption on the basis of a person's gender identity or intersex status.</p>
<i>Measures intended to achieve equality</i>		<p>S 27: You can lawfully discriminate against a person if you are reasonably doing so in order to:</p> <p>a. ensure that a particular class of people have equal opportunities with others, or</p> <p>b. meet the special needs of a particular class of people.</p> <p>This is a general exception that potentially applies to any area, not just to sporting activities and facilities.</p>

Is your activity covered by the Act?	What does the law say about sex, gender identity or intersex status?	Does an exception apply? Remember – even though an exception may allow you to discriminate, the law does not require that you apply it.
EMPLOYMENT AND RECRUITMENT		
<i>Employment and recruitment (including volunteers)</i>	<p>S 10: It is against the law to discriminate against employees or applicants for employment on the basis of their sex, gender identity or intersex status.</p> <p>This includes discrimination :</p> <ul style="list-style-type: none"> • in employment selection processes (including for unpaid work) • in the terms and conditions of employment, including dismissal • by limiting or denying access to opportunities for promotion, transfer or training or any other employment benefits • by subjecting employees or applicants to any other detriment. 	<p>S 34: You can lawfully discriminate against a job applicant or employee on the basis of their sex if it is a genuine occupational qualification for a person to be a particular sex, including:</p> <ol style="list-style-type: none"> a. where the employee will be required to enter a toilet ordinarily used by people of that sex while it is in use by people of that sex (such as a cleaner) b. where the employee will be required to enter areas ordinarily used only by people of that sex while those people are undressed (such as a coach entering a change room). <p>This exception applies only in relation to a person's sex – there is no exception on the basis of a person's gender identity or intersex status.</p>
MEMBERSHIP OF CLUBS THAT HOLD A CLUB LIQUOR LICENCE		
<i>Mixed clubs (that hold a club liquor licence)</i>	<p>S 22: It is against the law to discriminate against club members or applicants for club membership on the basis of their sex, gender identity or intersex status unless an exception applies.</p>	<p>S 40: In some circumstances, you can lawfully discriminate against a person on the basis of their sex by limiting access to a club benefit (such as facilities) to one sex at particular times.</p> <p>This exception applies only in relation to a person's sex – there is no exception on the basis of a person's gender identity or intersex status.</p>
<i>Single-sex clubs (that hold a club liquor licence)</i>	<p>S 22: In general, it is against the law to discriminate against club members or applicants for club membership on the basis of their sex, gender identity or intersex status unless an exception applies.</p>	<p>S 40: In some circumstances, you can lawfully discriminate against a person on the basis of their sex by limiting membership of a club to a particular sex.</p> <p>This exception applies only in relation to a person's sex – there is no exception on the basis of a person's gender identity or intersex status.</p>

NOTES

This image shows a full page of white paper with horizontal dashed lines, typical of primary school writing paper. The lines are evenly spaced and run across the width of the page. There are no margins, text, or other markings on the paper.



ACT Human Rights Commission

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ACT HUMAN RIGHTS
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Australian Capital Territory