



EEO Amendments and Your Responsibilities

The Equal Opportunity Act (1984) Western Australia has been changed to include gender history and sexual orientation. These changes have implications for employers, educational institutions, employees and those providing goods and services.

The purpose of this newsletter is to raise awareness to what those changes mean.

Whether you are an employer or employee, it is important that you know your legal obligations and what is expected of you.

This newsletter summarises recent changes to the Act as they relate to employment. The material raises awareness to common issues, experiences and misunderstandings related to gender and sexuality.

Discrimination on the grounds of gender history and sexual orientation are no longer just unfair ... they are illegal.

It's important to be mindful of EEO obligations and Code of Conduct responsibilities as you go about your dealings with employees, contractors, students, clients and members of the public.

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What is Gender History About?

Our society makes it difficult for those who don't look or act male or female. For those who don't conform to male and female roles, have distinctive male and female genitals, or those who choose non-heterosexual relationships, then discrimination based on misinformation and prejudice is a common experience.

Transsexuals are transgendered people who have undergone sex-reassignment.

Until recent changes transsexuals were required to identify their birth sex for the purposes of gaining a passport, completing official forms and job applications.

Since the amendments, a transsexual can legally identify as their reassigned gender. So a male to female transsexual can legally identify as female, and a female to male transsexual can legally identify as male.

Changes also mean that discrimination experienced by a gender-reassigned person on the basis of their gender history is unlawful.

Very few transgendered people actually go through sex reassignment surgery. Most do not want to change their anatomical sex and many cannot afford the costs involved.

No protection for discrimination is yet available under the Act for intersex and transgender people. However, employers need to be aware that protections exist for all employees under a range of laws including:

- *contract of employment;*
- *occupational safety and health,*
- *industrial relations laws covering unfair dismissal*

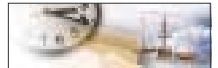
Specific Code of Conducts and legislation in the public service ensure that all employees, no matter what their background, are treated with dignity, fairness and justice.

Amendments on Gender History Grounds

So, what are the amendments to the Equal Opportunity Act?

It is unlawful to discriminate against a gender reassigned person on the ground of that person's gender history, in certain areas of public life.

Obviously everybody has a gender history, but for people with less common gender histories, those differences can be the source of prejudice and discrimination.



Gender History – FAQ's

What does transgender mean?

Someone whose gender identity or expression differs from what our society usually expects of masculine or feminine. Their internal sense of identity differs from their physical sex. Transgender includes male-to-female (MTF) and female-to-male (FTM) transsexuals, male and female cross dressers, and others with unconventional gender expressions.

Isn't being transgendered just a lifestyle choice?

No. Some transgendered people are born with gender identities that don't match their physical sex. For other transgendered people this description of what it means to be transgendered is simplistic and does not accurately reflect their situation.

Being transgendered is neither a choice nor a lifestyle.

In our society, being transgendered can be confusing, isolating and dangerous. Lack of understanding and stigmatisation suffered over the course of a lifetime can lead to poor health, wellbeing and employment outcomes.

Don't transgendered people have high sex drives?

Transgendered people are no more sex driven than anyone else. There is a big difference between gender identity and sex drive.

Who do transgendered people choose for partners?

Most transgendered people consider themselves to be heterosexual, that is, a male-to-female (MTF) will prefer a male partner and a female-to-male (FTM) will prefer a female partner.

Some are gay, lesbian or bisexual. Transgendered people are often perceived as gay.

Aren't transgender and intersex the same?

No. The dictionary defines intersexual as '*existing between the sexes*' and '*an individual that is intermediate between male and female*'.

The term describes someone born with physical characteristics that are not exclusively male or exclusively female.

The public perception is that births with a clear distinction between the sexes is high and that intersex is unbelievably rare. This is not the case. It is estimated that one in 1,000 births are intersex.

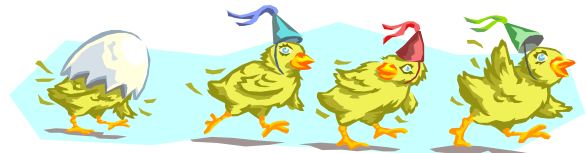
While discrimination against transgender and intersex people is not yet unlawful in this state, the Public Service Act 1984, Code of Conduct requires that you treat people with equity, dignity and respect for persons.

Examples of Unlawful Discrimination

Examples of unlawful discrimination on the ground of gender history would include:

- *Terminating the employment of a person because they have had undergone gender reassignment.*
- *Demoting or failing to promote a person because of their gender history, the way they look or the way they speak.*
- *Refusing permission for a gender reassigned person to use the appropriate toilet.*
- *Refusing to employ a gender reassigned person in a customer service job because "our customers wouldn't take us seriously if they were served by a tranny".*
- *Failing to include a gender reassigned person in work projects, work meetings or activities associated with the course of work because of personal prejudice or discomfort.*

The correct term to describe a gender reassigned person is transsexual. Whilst use of the term transsexual is not generally considered derogatory, it can be offensive if it is used in ignorance or as an insult.



'We might all look like chickens to you but we're not the same!'

Be mindful not to confuse a gender reassigned (transsexual) person with a transvestite, a drag queen, a cross-dresser or a gay person.

The Gender Reassignment Act (WA) 2000 amended the Equal Opportunity Act (WA) 1984 by including Gender History as a ground of unlawful discrimination.

Gender history in this instance means a person who identifies as a member of the opposite sex by living, or seeking to live, as a member of the opposite sex.

A *gender-reassigned* person is defined to mean a person who has been issued with either a recognition certificate or an equivalent certificate*.

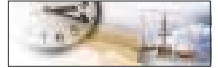
Gender reassignment procedure means a medical or surgical procedure (or both) to alter the gender characteristics (*genitals & other physical sex characteristics*) so that a person will be identified as a person of the opposite sex to that on their birth certificate.

Opposite sex means a sex of which the person was not a member at birth.

Unlawful discrimination on gender history grounds includes reference to something done because of characteristics that pertain or are imputed to persons because of their gender history.

*Gender reassignment is a requirement for a recognition certificate or equivalent.





Amendments on Sexual Orientation

It is unlawful to discriminate against a person on the ground of that person's:

- actual sexual orientation
- a characteristic that appertains generally to persons of the same sexual orientation as that person
- a characteristic that is generally imputed to persons of the same sexual orientation as that person.

Discrimination on the ground of sexual orientation is unlawful in the following areas of public life :

- employment, including contract for service, casual, commission agents, contract workers, partnerships of six or more persons, membership of employee or employer organisations, qualifying bodies, and employment agencies
- provision of goods, services, or facilities
- access to places and vehicles
- education (*discrimination by an educational authority*)
- accommodation (*discrimination by a principal or agent*)
- disposal of land
- membership of a club
- application forms (*requiring information about a particular sexual orientation*)

Religious bodies, including religious schools are exempt.

Unlawful Discrimination

Direct discrimination occurs where a person is treated less favourably than someone with a different sexual orientation in the same or materially similar circumstances.

Indirect discrimination occurs when a condition is imposed which is not reasonable in the circumstances. with which the person is required to comply. The condition is such that a substantially higher proportion of people of a different sexual orientation are able to comply.

Discrimination against a person who is a **relative** or **associate** of a person with a particular sexual orientation is also unlawful.

Victimisation

Equal Opportunity legislation provides protection against victimisation.

A person is unlawfully victimised if they are threatened or disadvantaged because they have made, or are thinking of making a complaint. Those involved in a complaint are also protected.

A fine of up to \$40,000 can be imposed by the Equal Opportunity Tribunal (WA) for unlawful victimisation.

Match each of the following examples with the definitions of discrimination provided.

Examples of Unlawful Discrimination

- *Derogatory remarks about sexual practices or lifestyle.*
- *'Outing' someone at work - disclosing their sexual preference without their permission or making insinuations about their sexual preference to others.*
- *Warning a person not to bring their same sex partner to a business or workplace function.*
- *Bullying of students, employees or contractors because others perceive them as gay.*
- *Using unacceptable terms including: poofter; fag; homo; dyke; lezzo, etc.*
- *Refusing to employ a straight person because the business has a lot of gay customers and they prefer to deal with gay staff.*
- *Ordering a gay person whose partner works with them to transfer out of the work area, when heterosexual couples who work together are not required to do so.*
- *Paying out or paying back someone who has been involved in assisting a person, or group of people, to assert their right not to be discriminated against.*

Measures To Achieve Equality

Equality is said to exist when there is an absence of discrimination.

The Equal Opportunity Act of WA 1984 has long provided recognition of the special needs of particular groups and communities through measures intended to achieve equality. Provided it can be demonstrated that a special measure is necessary, then it is not unlawful to provide it.

In the areas of education, employment, training or welfare it is not unlawful to limit access to facilities, services or opportunities to meet the special needs of people with a particular sexual orientation.

Sexual Orientation – Legal Concepts

Sexual Orientation is defined by the Equal Opportunity Act (WA) 1984 as meaning "in relation to a person heterosexuality, homosexuality, lesbianism or bisexuality and includes heterosexuality, homosexuality, lesbianism or bisexuality imputed to the person."

This includes perceived sexual orientation (someone thinks someone else is gay, lesbian or bisexual).





Sexual Orientation - FAQ's

When applying for a job, do I have to tell my prospective employer about my sexuality?

It is unlawful to ask or require you to provide information on an application form which could be used for the purposes of discrimination, where other applicants would not be asked to give the same information.

I have just been appointed to a teaching role in a government school and was told not to disclose that I was gay because of the conservative nature of the district. Can they do this?

Imposing discriminatory terms or conditions in employment (ie, not to disclose sexual orientation) is unlawful. It is a condition that would not apply to other employees and is not reasonable under the circumstances.

We have a group at our college who call themselves "Queers on Campus". I tried to go to a meeting and was asked to leave because I was straight. Isn't that discrimination on the ground of heterosexuality?

No. Historically in Australia it has been common for students on campuses form special interest or affinity groups. Common affinity groups include indigenous student's groups, religious groups, men's groups, women's groups, cultural groups, AA groups, etc.

Queer is a broad term that applies to those with sexual orientations, gender identities or physical sex characteristics that are different to the norm. So, if you don't identify as queer, this is not the affinity group for you.

My religious beliefs are deeply offended by homosexuality and I believe it is my right to refuse to have a homosexual in my team.

About one in ten people are gay, lesbian or bisexual so chances are you have studied, worked and socialised with queer folk. Nobody can force you to work with homosexuals, however, if your words or actions at work are discriminatory, then your behaviour is unlawful and you may be dismissed. It is not your employer's responsibility to provide you with a job that suits your beliefs.

It would be unlawful discrimination to change the employment conditions of a homosexual person to suit your views.

What is Homophobia?

Homophobia is a deeply held and irrational fear of people who are homosexual. While some institutions may endorse such sentiment, the law does not excuse discrimination on the basis of homophobia.

Further Resources

If you would like more information about sexual orientation or sex and gender matters, here are some useful resources:
 TransWest - www.geocities.com/transwest_wa/
 International Foundation for Androgynous Studies Inc – www.ifas.org.au
 Gay and Lesbian Community Services of WA Inc – www.glcs.org.au

Serious Harassment of Part-Timer

A 21 y.o. male worked for a video rental company on a part-time basis for 18 months. Within a few weeks the staff started to ask questions about his sexuality and he confirmed to them he was gay.

From then on he was subject to serious harassment that continued for the duration of his employment:

"I copped a lot of what I'd call sexual abuse. I was continually harassed, chastised about my sexuality. There was one occasion when they tried to stick a fire extinguisher up my anus. A lot of the time they thought it would be amusing to squirt water down my pants. There was constant verbal harassment."

He did not tell his supervisor about the harassment, because the supervisor had made anti-gay remarks and he feared he would be dismissed.

But, the employee was terminated shortly thereafter after what the boss said was a 'company restructure'. It was confirmed that his work performance was not a problem.

"The reason I stayed on despite the harassment was because I needed the money. I was at Uni and my parents refused to have me at home because I am gay."

"But I couldn't get Austudy because they wouldn't sign a statutory declaration saying I was not living at home. I haven't found another part time job."

Tasmanian Gay and Lesbian Rights Group (case study)
<http://www.tased.edu.au/tasonline/tasqueer/>

Employee awarded \$60,000 for serious sexual preference discrimination by SA Education Dept

The complainant's homosexuality was found to be the reason why the Director-General of the Education Department of South Australia prevented him from working as an Artist-in-School at the Jamestown Primary School. The complainant was awarded a total of \$60,000 damages for the acts of discrimination.

While controversy had surrounded the complainant's appointment to the position because of his homosexuality and his HIV positive status, the Director-General said that the reason for the termination of the complainant was that he had received additional information about the complainant. This was a newsletter written by the complainant for the Darwin Gay and Lesbian Society (readership 150).

The Tribunal found that the DG was single minded and if he had made enquiries as an intelligent, reasonable man, he would have concluded that it was a legitimate piece of writing in its context. He refrained from seeking out such information so that it would not interfere with his decision to terminate the program. The Tribunal also found that in describing homosexuality as a "condition", the D-G showed a considerable amount of disquiet and discomfort about the issue of homosexuality.
Jobling v Director-General, Education Department of South Australia & Anor.