

Australian Federal & State Law on Sex and Gender



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The Sex Discrimination Act 1984 was amended in 2013 to introduce protection against discrimination on the grounds of sexual orientation, gender identity, and intersex status. It is complemented by Australian Government Guidelines on the Recognition of Sex and Gender, commenced in 2013 and updated in 2015. There's more information on relevant parts of each below. Section I is the Sex Discrimination Act, Section II the Guidelines, and Section III the various federal and state-level laws for changing sex on official documentation (in Australia, passports are federal, and birth certificates by state).

I. Sex Discrimination Act 1984 (including amendments up to 2014), which means this overlaps with Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013

This act lists both 'sex' and 'gender identity' as protected categories (Part I, 5 & 5B). It does not define sex or gender. It defines 'gender identity' as 'the gender-related identity, appearance or mannerisms or other gender-related characteristics of a person (whether by way of medical intervention or not), with or without regard to the person's designated sex at birth'. (Yes, it's unhelpfully circular...).

For interest, the 1984 Act — before the 2013 amendments and now superseded — defined both 'man' and 'woman':

– > “‘Woman’ means a member of the female sex irrespective of age”

– > “‘Man’ means a member of the male sex irrespective of age”

Reference: <https://www.legislation.gov.au/Details/C2004C06708>

The most relevant parts of the act are Section 5 (Sex Discrimination), Exemptions, Section 5B (Discrimination on the grounds of gender identity), and the various qualifications that relate to these. I've copied these below.

Section 5: Sex discrimination

“(1) For the purposes of this Act, a person (in this subsection referred to as the discriminator) discriminates against another person (in this subsection referred to as the aggrieved person) on the ground of the sex of the aggrieved person if, by reason of:

- (a) the sex of the aggrieved person;
- (b) a characteristic that appertains generally to persons of the sex of the aggrieved person; or
- (c) a characteristic that is generally imputed to persons of the sex of the aggrieved person;

the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person of a different sex.

(2) For the purposes of this Act, a person (the discriminator) discriminates against another person (the aggrieved person) on the ground of the sex of the aggrieved person if the discriminator imposes, or proposes to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging persons of the same sex as the aggrieved person.

(3) This section has effect subject to sections 7B and 7D.”

Section 7 is about pregnancy and potential pregnancy, 7B is about indirect discrimination, and 7D is about special measures taken to achieve equality, which include both sex and gender identity: something doesn't count as sex discrimination if it's done in the service of achieving equality for some other listed group (the full list of groups mentioned are men and women, sexual orientation, gender identity, intersex status, marital status, pregnancy, family responsibilities, and then two further categories that I'm really not sure how to understand, namely “women who are pregnant and people who are not pregnant” 7D(1)(c), and “women who are potentially pregnant and people who are not potentially pregnant” 7D(1)(d).

Exemptions: ‘Certain discrimination on ground of sex not unlawful’ (Division 4, 30).

“(1) Nothing in paragraph 14(1)(a) or (b), 15(1)(a) or (b) or 16(b) renders it unlawful for a person to discriminate against another person, on the ground of the other person's sex, in connection with a position as an employee, commission agent or contract worker, being a position in relation to which it is a genuine occupational qualification to be a person of a different sex from the sex of the other person.

(2) Without limiting the generality of subsection (1), it is a genuine occupational qualification, in relation to a particular position, to be a person of a particular sex (in this subsection referred to as the relevant sex) if:

- (a) the duties of the position can be performed only by a person having particular physical attributes (other than attributes of strength or stamina) that are not possessed by persons of a different sex from the relevant sex;
- (b) the duties of the position involve performing in a dramatic performance or other entertainment in a role that, for reasons of authenticity, aesthetics or tradition, is required to be performed by a person of the relevant sex;
- (c) the duties of the position need to be performed by a person of the relevant sex to preserve decency or privacy because they involve the fitting of clothing for persons of that sex;

(d) the duties of the position include the conduct of searches of the clothing or bodies of persons of the relevant sex;

(e) the occupant of the position is required to enter a lavatory ordinarily used by persons of the relevant sex while the lavatory is in use by persons of that sex;

(f) the occupant of the position is required to live on premises provided by the employer or principal of the occupant of the position and:

– (i) the premises are not equipped with separate sleeping accommodation and sanitary facilities for persons of each sex;

– (ii) the premises are already occupied by a person or persons of the relevant sex and are not occupied by any person of a different sex from the relevant sex; and

– (iii) it is not reasonable to expect the employer or principal to provide separate sleeping accommodation and sanitary facilities for persons of each sex;

(g) the occupant of the position is required to enter areas ordinarily used only by persons of the relevant sex while those persons are in a state of undress; or

(h) the position is declared, by regulations made for the purposes of this paragraph, to be a position in relation to which it is a genuine occupational qualification to be a person of a particular sex.”

Section 5B: Discrimination on the ground of gender identity

“(1) For the purposes of this Act, a person (the discriminator) discriminates against another person (the aggrieved person) on the ground of the aggrieved person’s gender identity if, by reason of:

(a) the aggrieved person’s gender identity; or

(b) a characteristic that appertains generally to persons who have the same gender identity as the aggrieved person; or

(c) a characteristic that is generally imputed to persons who have the same gender identity as the aggrieved person;

the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person who has a different gender identity.

(2) For the purposes of this Act, a person (the discriminator) discriminates against another person (the aggrieved person) on the ground of the aggrieved person’s gender identity if the discriminator imposes, or proposes to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging persons who have the same gender identity as the aggrieved person.

(3) This section has effect subject to sections 7B and 7D.”

(7B & 7D are as described above for sex discrimination).

This seems to protect *both* differential treatment between people of one biological sex and transgender people who identify as that sex (e.g. between female people and transwomen) *and* differential treatment between people of one biological sex who are and are not transgender. (a) protects the former, for

example if a transwoman was excluded from a female-only club she might be able to bring a discrimination complaint on the grounds of her gender identity. (Being treated differently from female people). (b) & (c) protect the latter, because the comparison class here is people with a 'different' gender identity. For example, a transwoman who (in virtue of taking hormones) has breasts, has a characteristic that women generally have, and so can be subject to discrimination on that basis. (Non-trans) male people, who don't have breasts, would not be subject to that treatment.

Qualifications

Section 43A: Requests for information and keeping of records

“(1) The making of a request for information is not unlawful under Division 1 or 2 merely because the request does not allow for a person to identify as being neither male nor female.

(2) Nothing in Division 1 or 2 makes it unlawful to make or keep records in a way that does not provide for a person to be identified as being neither male nor female.”

Summary: Australian Federal Law prohibits discrimination on the grounds of sex, but allows exemptions where sex is relevant to the occupation. It also prohibits discrimination on the grounds of gender identity, and seems to protect transgender people both in comparison to people of their biological sex and in comparison to people not of their biological sex.

(The Australian Human Rights Commission have the following interpretation of the SDA: “The Sex Discrimination Act makes it unlawful to treat a person less favourably than another person in a similar situation because of the gender-related identity, appearance, mannerisms or other gender-related characteristics of the person. Example: A shop assistant refused to serve a person who identifies and presents as a woman because that person has a deep and masculine-sounding voice”. Under ‘Gender Identity’ they give the example “An organisation’s human resources policy does not permit changes to an employee’s records. The policy may require a transgender woman to continually disclose information about her gender identity in order to explain discrepancies in personal details”).

II. Australian Government Guidelines on the Recognition of Sex and Gender 2013

These guidelines say that government records should track gender (‘a person’s identity and social footprint’) not sex (‘information regarding a person’s sex would not ordinarily be required’) (p. 3). They define sex and gender classification, present standard of evidence for sex and / or gender change on personal records, and recommend data collection be consistent across government agencies. Again, the relevant bits are copied below:

“For the purpose of these Guidelines, sex refers to the chromosomal, gonadal and anatomical characteristics associated with biological sex” (p. 4).

“Gender is part of a person’s personal and social identity. It refers to the way a person feels, presents and is recognised within the community. A person’s gender may be reflected in outward social markers, including their name, outward appearance, mannerisms and dress” (p. 4).

“Although sex and gender are conceptually distinct, these terms are commonly used interchangeably, including in legislation” (p. 4).

“...Sex can also be legally changed in Australian identity documents, including birth certificates” (p. 4).

The government recommends having three options, M (male), F (female), or X (indeterminate/intersex/unspecified) for instances where sex and / or gender information is collected (p. 4).

X is for nonbinary people (p. 5).

Change of sex or gender in government records:

“...where it is necessary to verify a person’s sex and/or gender to confirm identity or determine eligibility for a service or entitlement, departments and agencies will recognize any one of the following as sufficient evidence of their sex and/or gender:

- a) a statement from a Registered Medical Practitioner or Registered Psychologist which specifies their gender
- b) a valid Australian Government travel document, such as a valid passport, which specifies their gender, or
- c) a state or territory birth certificate, which specifies their gender. A document from a state or territory Registrar of Births Deaths and Marriages recognizing a change of sex and/or gender will also be seen as sufficient evidence” (p. 5).

“Sex reassignment surgery and/or hormone therapy are not pre-requisites for the recognition of a change of gender in Australian Government records” (p. 5).

Caveats:

“Collecting and maintaining sex and gender-disaggregated data is crucial to the ongoing monitoring of equality between men and women. These Guidelines are not designed to restrict departments or agencies from collecting sex and gender information where this data is necessary for the performance of their specific function, is used to inform the development of policy or delivery of services, or contributes to sex and gender disaggregated data”.

Because these Guidelines mention ways of ‘verifying’ sex and/or gender, we need to also look at what it takes to change gender on an Australian Passport, Birth Certificate, and Registrar of Births Deaths and Marriages. (See next section).

III. Change of sex and gender on Australian documents

Change of name: requires a certificate from the Australian Registry of Births, Deaths and Marriages.

Change of sex on the birth register: has different requirements depending on the state, as below.

ACT: at least 18; birth registered in ACT; and “the person has received appropriate clinical treatment for the alteration, or is an intersex person”.

NSW: at least 18; “you have undergone a sex affirmation procedure”; your birth is registered in NSW, or outside Australia and you’re an Australian citizen or permanent resident who has lived in NSW for at least a year.

NT: over 18; born in NT; and either intersex, or “have received appropriate clinical treatment related to your sex or gender such as surgery, hormone therapy, counselling”.

QLD: requires sexual reassignment surgery & the birth or adoption to be registered in QLD. Documentation required is statutory declaration of surgery from two doctors.

SA: “clinical treatment provided by an Australian medical practitioner or psychologist”. (Not clear whether this is surgical or only medical. The application form too just says “you have undergone a clinical treatment”. The sample text for the letter from the clinician requires details of the treatment, and gives the example of counselling, or medical treatment other than counselling).

TAS: Sex is optional on birth certificates. People over 16 years old can change their registered sex by making a statutory declaration.

VIC: at least 18 years old; “have undergone sex affirmation surgery, as defined by the Births, Deaths and Marriages Registration Act 1996” [which says: “sex affirmation surgery’ is a ‘surgical procedure involving the alteration of a person’s reproductive organs carried out for the purpose of assisting the person to be considered to be a member of the opposite sex’”].*

WA: certificate from the Gender Reassignment Board (see below), which requires: documentation that you have had either a surgical or a medical procedure (sex reassignment surgery or hormone therapy); documentation that you have had counselling; and documentation that persons in your immediate community recognize you as the sex you are applying to be recognized as.*

*Note: VIC is currently considering [a bill](#) that would make legal sex a matter of statutory declaration of a belief that one is of the nominated sex. The bill was moved to second reading on June 19th 2019, and scheduled for the Upper House on 27th August 2019.

*Note: There was a successful High Court challenge in 2011 which meant that sex reassignment surgery (on genitals) was not required for sex change in WA. The High Court found that two transsexual men who had both undergone double mastectomies, testosterone treatment, and counselling, and are considered infertile, could be recognized as men, despite still having female reproductive systems and not having undergone phalloplasty. The High Court judges said that the medical or surgical procedure needed to alter gender characteristics, but didn’t need to remove all vestiges of the original sex. This seems to have been interpreted to mean that hormone therapy is sufficient to change of sex in WA (see [this document](#), updated 5th April 2019).

Summary: 3/8 states of Australia require sex reassignment surgery: VIC, NSW, & QLD. WA requires hormone therapy and acceptance by the person’s immediate community. The ACT, SA, & NT only require ‘clinical treatment’ which can be as little as counselling. TAS has made sex on birth certificates entirely optional. (Another way to put this is that VIC, NSW, & QLD have strong gatekeeping requirements, WA has moderate gatekeeping requirements, the ACT, SA, & NT, have weak gatekeeping requirements, and TAS has no gatekeeping requirements.)

A certificate from the Gender Reassignment Board: (this is only in WA – see notes above).

Change of sex on a passport: (if different from previous passport or from birth certificate) requires an application form. It says that “you can provide” (not clear whether required) one of the following as documentation: “a gender recognition certificate issued by the Gender Reassignment Board”; a revised birth certificate issued by the Registry of Births Deaths and Marriages (RBDM) (see above); a recognised details certificate from the RBDM; or “a statement from a registered medical practitioner or psychologist that you have had or are receiving appropriate clinical treatment for gender transition”. Clinical treatment is a lot weaker than the other documentation, so assuming that it is generally accepted, it looks like it will be relatively easy for non-transsexual transgender people to change their sex on their passports (compared to changing their birth certificates).

References

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