

# Gender History Discrimination

It is against the law under the Equal Opportunity Act 1984 (WA) to discriminate against a person because of their gender history.



Under the Act a person has a gender history if the person identifies as a member of the opposite sex by living, or seeking to live, as a member of the opposite sex.

**Direct gender history discrimination** occurs when a person is treated less favourably because of their gender history, compared to another person in the same or similar circumstances. This includes treating that person as being of their former sex.

**Indirect gender history discrimination** is when a requirement or condition that is the same for everyone disadvantages a higher proportion of gender reassigned people compared to the proportion of people without a reassigned gender who are disadvantaged, and the requirement or condition is unreasonable in the circumstances.

The Act provides for complaints about gender history using this definition, gender reassigned person means:

- (a) A person who has been issued with a recognition certificate under the Gender Reassignment Act 2000 or a certificate that was an equivalent certificate for the purposes of that Act; or
- (b) A person –
  - (i) whose sex or gender in the registration of the person's birth under the Births, Deaths and Marriages Registration Act 1998 has been changed under section 36Q of that Act; or
  - (ii) who has been issued a document acknowledging the person's sex or gender under the Births, Deaths and Marriages Registration Act 1998 section 36ZA;

## Where does the protection apply?

Under the Act it is unlawful to discriminate against a person because their gender history in certain areas of public life, including:

- Work
- Education
- Access to places and vehicles
- Provision of goods, services and facilities
- Accommodation
- Disposal of land or estate
- Clubs
- Sport – in some instances
- Application forms
- Superannuation schemes and provident funds.
- Responsibilities

Organisations must ensure they provide a working environment and services that are free from gender history discrimination and they must take all reasonable steps to prevent it from happening or they may be held responsible for their employees' actions.

**The Commissioner for Equal Opportunity provides information about the Act, investigates and conciliates complaints, conducts community education and training and develops programs to promote equal opportunity.**

## **Examples of gender history discrimination**

A gender reassigned person asked a job agency to refer her to a specific vacancy and was told by the job agency that the prospective employer wanted a woman with “no complications”. The comment was a reference to her gender history.

A transgender person with strong work qualifications was advised that her salary would be doubled if she reverted to living and dressing as a man. She refused and while recuperating from sex-reassignment surgery her work was reviewed and she was dismissed. The company was not prepared to manage issues relating to gender history.

For the purposes of the Act, a person who causes, instructs, persuades, aids, or permits another person to engage in unlawful conduct is taken to have engaged in that conduct themselves.

## **Making a complaint**

A person who believes they have been discriminated against because of their gender history can lodge a complaint with the Commissioner. The onus of proof lies with the person making the complaint. The person will need to comply with what is required by the Births, Deaths, and Marriages Registration Amendment Act 2024 regarding registration of sex or gender.

The incident or incidents in the complaint must have occurred within the 12 months previous to the date the complaint is lodged.

In some circumstances the Commissioner may rule there is good reason, or good cause, to include incidents that occurred more than 12 months before the complaint is lodged.

## **Exceptions**

There are some instances where it is not unlawful to discriminate against a gender reassigned person because of their gender history and these exceptions include:

- Employment as a domestic worker in a private household
- Employment by an educational institution established for religious purposes
- Employment by a religious organisation
- Accommodation in private households of less than five people
- Accommodation provided by a religious body
- Partnerships of less than six people
- Orders of a court or the State Administrative Tribunal
- The provision of charitable benefits
- Voluntary bodies – admissions and benefits
- Competitive sport where the gender reassigned person would have a significant advantage.

If an individual or organisation relies upon an exception under the Act when a complaint is made against them, they must justify the use of that exception to the Commissioner for Equal Opportunity.

## **Call**

General enquiries: 08 9216 3900

Training courses: 08 9216 3927

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