



The South Australian Law Reform Institute (SALRI) is compiling a list of South Australian laws and regulations that discriminate against individuals and families on the grounds of sexual orientation, gender, gender identity, or intersex status (these terms are described in Fact Sheet 1). SALRI would like to hear from you about the current South Australian laws designed to protect against unlawful discrimination on these grounds. We hope this fact sheet helps you get started.

### What does the law in South Australia say about discrimination on the grounds of sex, sexuality or gender identity?

Discrimination - or noting the difference between things - is part of making choices in everyday life. Discrimination is not always wrong but some discrimination is unfair and can be against the law. Under the *Equal Opportunity Act 1984* (SA), it is unlawful to discriminate against a person because of specific personal characteristics or because they belong to a certain group. These personal characteristics include a person's age or race - but also their sex (whether someone is male or female), sexuality (whether someone is gay, lesbian, bisexual or straight), or chosen gender.

Subsection 5(5) of the *Equal Opportunity Act 1984*, defines 'chosen gender' as a circumstance where a person:

*"(a) identifies on a genuine basis as a member of the opposite sex by assuming characteristics of the opposite sex (whether by means of medical intervention, style of dressing or otherwise) or by living, or seeking to live, as a member of the opposite sex; or (b) the person, being of indeterminate sex, identifies on a genuine basis as a member of a particular sex by assuming characteristics of the particular sex (whether by means of medical intervention, style of dressing or otherwise) or by living, or seeking to live, as a member of the particular sex."*

The test for what constitutes discrimination on these grounds is set out in [section 29 of the \*Equal Opportunity Act 1984\*](#).

To be unlawful, the discrimination must be unreasonable and must happen in an area of public life - like a workplace, school or when using a service. It must also cause the person some loss or humiliation.

Discrimination can be direct - like not giving a person a job because of their sex - or indirect - like requiring someone to dress or act according to the sex identified on their birth certificate.

Discrimination that complies with another law or regulation (such as the requirement to indicate your sex as male or female on an official form) is unlikely to be considered unlawful. The onus is on the person making a complaint to show that the discrimination is unlawful.

If someone experiences discrimination that falls within these criteria, they can lodge a complaint with the South Australian Equal Opportunity Commission. The Commission can then help resolve the complaint, by writing to the parties or by holding a conciliation meeting to try and work out an agreement between the parties. If this doesn't work, the person who made the complaint can take their case to the Equal Opportunity Tribunal for a hearing and decision.

### Exceptions to the rules

South Australian equal opportunity law allows for some exceptions to the rules relating to discrimination (these are set out in sections 34-50 of the *Equal Opportunity Act 1984*). Where these exceptions apply, the discrimination is not considered unlawful. For example:

- > in a workplace, an employer can set reasonable dress standards, and it will not be unlawful discrimination on the ground of chosen gender to enforce these dress standards (s.34(4)).
- > in employment at a religious school or university, an employer may discriminate on the ground of chosen gender or sexuality if the discrimination is founded on the precepts of the religion (s.34(3)).
- > in education, if a school has been established wholly or mainly for students of the one sex, it will not be unlawful to exclude students of the opposite sex (s.37(3)).
- > in sport, it will not be unlawful to have single sex competitions, where the sporting activity is one in which the strength, stamina or physique of the competitor is relevant to the outcome of the competition (s48);
- > in insurance, a policy may discriminate on the ground of sex if the discrimination is based on actuarial or statistical data from a source on which it is reasonable to rely; and is reasonable having regard to that data (s49).

Exemptions in the *Equal Opportunity Act* also allow [special measures](#) which mean that organisations can discriminate in favour of a certain group (s47), if it helps address past discrimination. Organisations can also apply to the [Equal Opportunity Tribunal](#) for a [temporary exemption](#) (s92).

### What do you think about these laws as they relate to the LGBTIQ communities?

We would like to know what you think about these current laws. To tell us your thoughts, complete the [online feedback form](#), or visit the [SA Government's YourSAy website](#) for other ways to get in touch.

Attempting to answer the following questions may help with your response:

- > Have you used or sought information about these laws?
- > Do you think these laws are working well to protect people from unlawful discrimination on the grounds of their sex, sexuality, or gender identity, or do they need reform?
- > Do you think the concept of 'chosen gender' is appropriate? Should other terms such as 'gender identity' be considered?
- > Should these laws include specific references to other personal attributes such as intersex status?
- > Are the tests for discrimination fair? Are the exceptions to the rules fair?
- > Is the current approach to burden of proof in the *Equal Opportunity Act* - that places the onus on the person making a complaint to show that the discrimination is unlawful - appropriate?
- > Are there any other issues related to this reference which you would like to bring to the attention of the Institute?

### Where to go for further information

[Equal Opportunity Act 1984 \(SA\)](#) - Part 3 is particularly relevant

[South Australian Equal Opportunity Commission](#)

[Australian Human Rights Commission](#) - particularly its work in relation to sexual orientation and sex and gender identity

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