

# Transgender Discrimination

## Guidelines for Employers and Service Providers

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Revised November 2007 Reviewed July 1<sup>st</sup> 2008

### Is transgender discrimination against the law?

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Yes. It is generally against the law to discriminate against or harass people because:

- they are transgender, or
- you think they are transgender, or
- they have a relative or associate who is (or you think is) transgender.

In the same way as with other types of unlawful discrimination, (race discrimination, sex discrimination, and so on), transgender discrimination and harassment are only against the law in relation to employment, service delivery, government education, registered club membership and the provision of any type of rental or holiday accommodation.

It is also against the law to publicly vilify people for being transgender. For more information about transgender vilification please visit the New South Wales (N.S.W.) Anti-Discrimination Board website.

### What does transgender mean?

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Transgender means anyone who lives, has lived, or wants to live as a member of the opposite gender (sex) to their birth gender.

In the past, the common term for transgender has been transsexual. However, in general, people who are transgender prefer to use the term transgender as this is a more accurate reflection of their identity or behaviour – that is, that they want to live and behave as a member of the opposite gender to their birth gender, not the opposite sexuality, sexual preference or sexual orientation. A transgender, just like anyone else, may be heterosexual, homosexual or bisexual.

### What does this law mean for employers and service providers?

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It means that you must treat all transgenders fairly. It does not matter whether they have or haven't had "sex change" or other surgery. It does not matter whether they are or aren't taking hormones. It does not matter why they are transgender. It does not matter what gender they were at birth, or what gender they prefer to be. It does not matter whether they already live as their preferred gender, or whether they are in the process of "changing over" to their preferred gender ("transitioning"). If they fit the definition of transgender given above you must treat them fairly.

The general rule is that you should treat transgenders in the same way as you would treat anyone else. In most cases, this means that you should treat transgenders in the way they wish to be treated. In other words, if they want you to treat them as the opposite gender to their birth gender that is what you should do.



There is more information about the exact legal rights of transgenders – including who is counted legally as being their preferred gender and who isn't, in the N.S.W. Anti-Discrimination Board fact sheet "Transgender Discrimination: Your Rights".

The rest of these guidelines answer the most common questions employers and service providers ask us about transgender discrimination. If your question isn't answered either here or in the "transgender discrimination" fact sheet please contact the Anti-Discrimination Board for advice. You don't have to give us your or your organisation's name when you contact us.

## **Must I treat someone who is transgender as the gender (sex) of their choice?**

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If your employee, or customer or client is transgender, or decides to "change over" into their preferred gender while working for or doing business with you, it is best to ask them how they wish to be treated and then abide by their wishes. For example, a transgender may still wish to be addressed as their original gender, or they may wish to be known as their preferred gender. They may wish to set an official date from which they will always be known as their preferred gender. It depends on the individual.

It's important to check with the particular person first and not make assumptions. If they are in the process of "transitioning" ("changing over" to their preferred gender), it is important to ask them how they wish to handle this with their colleagues or your staff. Some may wish to talk with their colleagues/your staff themselves, or they may want you to do this for them. Some may want to have a period of leave before coming back as their preferred gender. You can get more information on how best to handle transitioning from the Gender Centre or the N.S.W. Anti-Discrimination Board.

If you have a dress code, it must apply to men and women fairly. In general, someone who is transgender should be allowed to wear the clothing or uniform of their preferred gender.

## **Do I need to change my records to reflect a transgender's preferred gender?**

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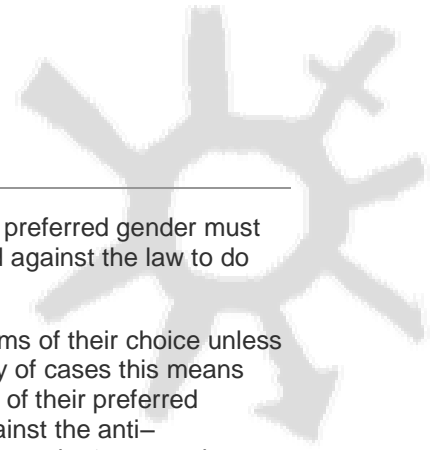
Anyone (including a transgender) can change their name by deed poll or statutory declaration. If a transgender has changed their name, you should change your records to reflect this. You can ask for an official document to confirm the name change, although you don't have to do this.

## **Do I have the right to ask transgenders their gender, or to see their identification**

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This would depend on the circumstances and the reasonableness of the request. In general, you can only ask to see someone's identification in a situation where everyone else would be asked to show their identification. In most situations, it wouldn't be appropriate to ask questions about someone's gender unless you are asking everyone else too. In general, it's best to treat transgenders in the way they are presenting themselves and not ask inappropriate questions.

In a situation where everyone is asked to show their identification, and a transgender shows you an identification of the opposite gender to the one they present as, you should be extremely sensitive in your approach. All you need to do is establish that they are the same person as their identification. You do not need to ask why they choose to present differently, or to harass or insult them in any way.



## **What is the situation with toilets and change rooms?**

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A transgender who has a birth certificate or recognition certificate in their preferred gender must be treated at all times as their new gender. It would be discrimination and against the law to do anything else.

All other transgenders should be allowed to use the toilets or change rooms of their choice unless this would be "unreasonable in all the circumstances". In the vast majority of cases this means that transgenders should be allowed to use the toilets and change rooms of their preferred gender. It is not necessary, and in most cases would be insulting and against the anti-discrimination law, to either instal a special set of toilets/change rooms or make transgenders use a different set than people who are not transgender.

Once again, don't make assumptions. Some transgenders may wish to use the toilets of their birth gender, while others may wish to use the toilets of their preferred gender.

## **How do I stop other staff from harassing transgender staff?**

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Prevention is better than cure! It is management's legal responsibility to make sure, to the best of their ability, that no-one – including transgenders – is harassed when working for them. If other members of staff refuse to work with, be supervised by, or share toilets with transgenders, or if they harass transgenders, call them names, or refuse to use their preferred name or gender, this would be transgender harassment, and against the law.

This means that you need to set a standard for what is acceptable and professional work behaviour and what isn't. You should implement grievance procedures to deal with all types of harassment, including transgender harassment. Staff must be advised that transgender harassment is not only unacceptable in your workplace, but also against the law, and that disciplinary action will be taken against them if harassment continues.

For more information on how to prevent and deal with harassment ask the Anti-Discrimination Board for their harassment in the workplace guidelines.

## **Do I have to employ a transgender?**

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In general, all job advertisements, jobs, apprenticeships and traineeships must be open to anyone who is transgender, in the same way that they are open to anyone else.

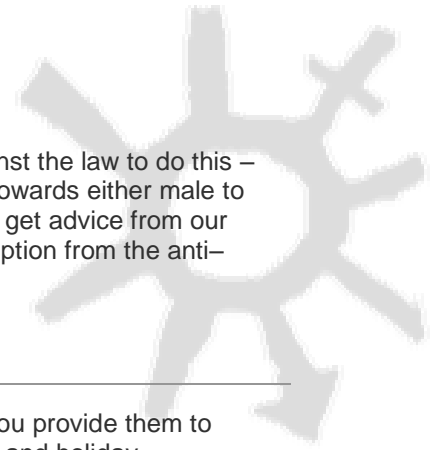
Transgenders must be assessed on their merits against the specific criteria for the particular job in the same way as all other applicants.

You must not dismiss someone for being transgender, or for deciding to "change over" to their preferred gender while working for you – unless the job is legally only open to people of their birth gender, and then you can only dismiss someone once they have a birth certificate or recognition certificate in their new gender. In all other cases, a transgender can only be dismissed for the same reasons that anyone else can be dismissed – for example, for ongoing poor work performance, serious misconduct, medical reasons that mean they're no longer fit enough to do the job, or redundancy.

## **What about jobs that are targeted towards men or women only?**

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Someone who is transgender has the legal right to be considered for a job that is legally targeted towards only one gender, if they have an official birth certificate or recognition certificate issued in that gender. (This could be a certificate in their birth gender, or one in their preferred gender, as some transgenders are legally able to get new certificates in their preferred gender).



If you wish, you can target a job towards transgenders only. It is not against the law to do this – as long as the job is open to all transgenders. If you wish to target a job towards either male to female transgenders or towards female to male transgenders you should get advice from our legal branch first, as you will almost certainly need to get an official exemption from the anti-discrimination law before going ahead.

### **Do I have to provide services for transgenders?**

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You must provide all your services to transgenders in the same way as you provide them to everyone else. Transgenders must be allowed the same access to rental and holiday accommodation, government education, club membership and indeed to the vast majority of other services, as anyone else. Transgenders must not be harassed by you or any of your staff.

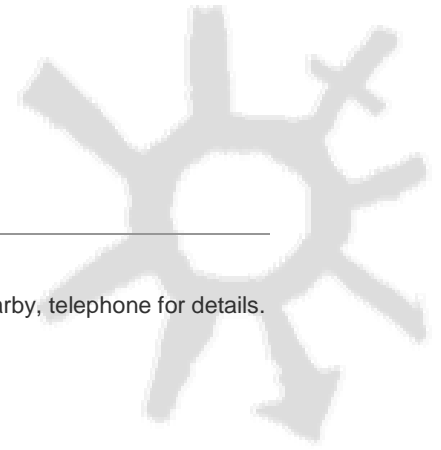
If staff members refuse to serve transgenders, give them lesser or demeaning service, harass them, call them names, or refuse to use their preferred name or gender, this would be transgender discrimination, and you as a service provider could be held legally responsible for this. You should specifically tell your staff that they must treat all customers, including transgenders, fairly and that anyone who disobeys this instruction may be disciplined.

### **What about services, clubs and so on, that are for men or women only?**

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Someone who is transgender has the legal right to use and be admitted to a service, club or educational institution that is legally targeted at only one gender, as long as they have an official birth certificate or recognition certificate issued in that gender. (this could be a certificate in their birth gender, or one in their preferred gender, as some transgenders are legally able to get new certificates in their preferred gender). In addition, if you decide to admit a transgender who does not have the appropriate certificate to a single sex club or educational institution, your club/institution won't lose its single sex status just because you have done this.

If you wish, you can target a service towards transgenders only. It is not against the law to do this – as long as the service is open to all transgenders. If you wish to target a service towards either male to female transgenders or towards female to male transgenders you should get advice from our legal branch first, as you will almost certainly need to get an official exemption from the anti-discrimination law before going ahead.



## **N.S.W. Anti-Discrimination Board Contact Details**

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### **Sydney Office:**

The Sydney Office is wheelchair accessible. Parking for people with disabilities nearby, telephone for details.

Post Office (P.O.) Box A2122 Sydney South N.S.W. 1235

Level 4, 175 Castlereagh Street Sydney N.S.W.

General Office Telephone: (02) 9268 5555

General Enquiry Service and Employers Advisory Service: (02) 9268 5544

Fax: (02) 9268 5500

Telephone Typewriter: (02) 9268 5522

Toll Free: 1800 670 812 (for rural and regional New South Wales only)

Website: <http://www.lawlink.nsw.gov.au/adb>

### **Wollongong Office:**

The Wollongong Office is wheelchair accessible. Telephone if parking is required as this can be arranged.

P.O. Box 67, Wollongong N.S.W. 2520

84 Crown Street Wollongong N.S.W.

Telephone: (02) 4224 9960

Fax: (02) 4224 9961

Telephone Typewriter: (02) 4224 9967

Toll Free: 1800 670 812 (for rural and regional New South Wales only)

### **Newcastle Office:**

The Newcastle Office is wheelchair accessible. Metered parking spaces outside the office can be used free of charge by people with disabled parking permits. The closest designated disabled parking spaces are in Burwood Street (enter from King Street.)

Level 1, 414 Hunter Street Newcastle West N.S.W. 2302

Telephone: (02) 4926 4300

Fax: (02) 4926 1376

Telephone Typewriter: (02) 4929 1489

Toll Free: 1800 670 812 (for rural and regional New South Wales only)

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