

Discrimination Law

WHAT IS DISCRIMINATION?

Discrimination is treating, or proposing to treat, someone less favourably because of a personal characteristic. This may involve bullying, excluding, or victimising a person. But not all unfair treatment is discrimination that is against the law.

WHEN IS DISCRIMINATION UNLAWFUL?

In New South Wales, anti-discrimination laws are covered by both State (NSW) and Federal (Australian) laws. These anti-discrimination laws cover certain types of treatment (called "grounds") in certain circumstances (called "areas").

To make a discrimination complaint, you need both a "ground" of discrimination, and an "area" of public life where the conduct occurred.

GROUNDS OF DISCRIMINATION

A combination of Commonwealth and State laws protect people from unlawful discrimination in NSW. Some of the legislation you might have heard of includes:

- *Racial Discrimination Act 1975* (Cth)
- *Sex Discrimination Act 1984* (Cth)
- *Disability Discrimination Act 1992* (Cth)
- *Age Discrimination Act 2004* (Cth)
- *Australian Human Rights Commission Act 1986* (Cth)
- *Anti-Discrimination Act 1977* (NSW)

In NSW, the *Anti-Discrimination Act* covers all of these grounds, and one or two more. "Grounds" are also known as "protected characteristics".

"Grounds" that may give rise to unlawful discrimination include:

- Race, including colour
- Nationality
- Descent and ethnic, ethno-religious, or national origin

- Sex or gender, including pregnancy and breastfeeding
- Disability
- Age
- Marital or domestic status
- Pregnancy
- Sexual orientation
- Sexual harassment
- Vilification on the basis of race, homosexuality, transgender status, or HIV/AIDS status
- Gender identity
- Intersex status
- Carers or family responsibilities.

The law may also extend protection to someone who is “associated” with a person who has one of the above characteristics. The law may also extend protection to someone who is considered to have a protected characteristic, even if they do not in fact have that characteristic – for example, if someone is considered to be gay by their workmates, but is not actually gay.

AREAS OF DISCRIMINATION

As mentioned above, you need an “area of life” covered by anti-discrimination law in order to make a complaint of unlawful discrimination.

Discrimination is only unlawful when it happens in an area of “public life”. If you are unfairly treated in private, for instance, by family members, friends, or flatmates, this won’t be unlawful discrimination.

“Areas” of life that are covered by discrimination law include:

- Employment
- Education
- Obtaining goods and services
- Accessing public places and facilities
- Accommodation
- Clubs and associations.

IS IT “DIRECT” OR “INDIRECT” DISCRIMINATION?

Direct

Direct discrimination refers to treatment that is clearly discriminatory. The treatment will be obvious that a

person is being discriminated because of one of the “grounds” or “protected characteristics”. For example, if a real estate agent refuses an application from an Aboriginal man to rent a house because the landlord prefers non-Aboriginal people, the real estate agent has discriminated against the Aboriginal man based on his race.

Indirect

Other times, the discriminatory treatment may not be so obvious. It may occur in instances when a rule or policy might look fair because it applies to everyone, but in practice it has an unfair and unreasonable effect on a particular group of people. For example, if a person in a wheelchair wants to go to a particular cinema, but stairs are the only entrance to that cinema, that person is being discriminated against based on their disability. Everyone has to go up the stairs, but the person in a wheelchair will not be able to do so.

WHAT IS VILIFICATION?

Vilification in Australia is against the law. It refers to when someone says or does something in public that could make other people ridicule or hate a particular group of people.

Under the *Anti-Discrimination Act 1977* (NSW), the following types of vilification are against the law:

- Vilification of people with HIV/AIDS (section 49XB)
- Vilification of people who are homosexual (section 49ZT)
- Vilification of people who are transgender (section 38S)
- Vilification of racial groups (section 20C).

I WANT TO MAKE A DISCRIMINATION COMPLAINT. WHERE DO I GO?

To make a complaint, you cannot go directly to a court or tribunal. You have the option to make a complaint to either Anti-Discrimination NSW or to the Australian Human Rights Commission (AHRC). You cannot make a complaint to both organisations about the same problem.

If you are unsure of which organisation to make the complaint to, it is best to seek legal advice.

HOW LONG DO I HAVE TO MAKE A COMPLAINT?

If you decide to make a complaint to Anti-Discrimination NSW, you have **12 months** from the date the discrimination occurred to submit your complaint. If you decide to make a complaint to the AHRC, you have **6 months** from the date the discrimination occurred. The President of the AHRC can now terminate a complaint to the AHRC if the complaint was lodged more than 6 months from the date the discrimination occurred.

The complaint must be made **in writing**. Anti-Discrimination NSW and the AHRC are required to assist you in formulating a complaint.

MAKING A COMPLAINT TO ANTI-DISCRIMINATION NSW

Section 87A of the *Anti-Discrimination Act 1977* (NSW) allows a person in NSW to make a complaint alleging unlawful discrimination to Anti-Discrimination NSW (formerly known as the Anti-Discrimination

Board (ADB) until a name change in 2019).

Once a complaint is made to Anti-Discrimination NSW the complaint handler will investigate the complaint by gathering information from the Applicant and the Respondent.

The complaint handler will then try to resolve the complaint through conciliation conferences. The conferences will provide an opportunity to consider possible resolutions.

Your "settlement proposal" may include resolutions such as:

- Verbal or written apology
- Compensation (usually a relatively nominal amount)
- Anti-discrimination/harassment training for the persons who treated you badly
- Introduction of policies, procedures, and training for preventing and dealing with discrimination.

If the complaint is not resolved, the complaint may be referred to the NSW Civil and Administrative Tribunal (NCAT).

MAKING A COMPLAINT TO THE AUSTRALIAN HUMAN RIGHTS COMMISSION

The Australian Human Rights Commission (AHRC) is a federal organisation that deals with discrimination matters across all of Australia.

Section 46P of the *Australian Human Rights Commission Act 1986* (Cth) says a person may lodge a complaint with the AHRC alleging unlawful discrimination.

Like the Anti-Discrimination NSW, once the Commission receives your complaint, the Commission will give the respondent a copy of the complaint and the respondent will be required to provide a response to the complaint.

The Commission will let the complainant know what the respondent has said in reply to your complaint, and then invite both parties to attend conciliation.

If the President of the Commission is satisfied that a complaint cannot be resolved, the complaint will be terminated, and you may apply to the Federal Circuit and Family Court of Australia (FCFCA) or the Federal Court of Australia (FCA).

This information is current to 8 September 2021 and reflects the law in New South Wales. It is general information and is no substitute for legal advice tailored to your particular circumstances. For assistance, contact the ICLC at 9332 1966.