

8 AGE DISCRIMINATION

8.1 Introduction

Age discrimination or 'ageism' occurs when a person is treated less favourably or is disadvantaged or harassed because of their age. Age discrimination also occurs when a person is treated less favourably or is disadvantaged or harassed because of the age of a member of their family, friend or work colleague.

Of course, some differential treatment on the basis of age is sensible, and properly takes account of the needs and circumstances of a certain age group. For instance, it is lawful that the law does not allow people under 16 to drive. Discrimination may be permitted when it meets a special need of a particular age group or if it protects a particular age group. This is why concessions and discounts offered to older people are not unlawful.



However, you may find that negative stereotypes about older people make it difficult for you to participate in the work force and the community, or to access certain amenities, goods and services as you get older. This is a significant problem that many older people encounter. Direct age discrimination happens when a person is treated less favourably because of their age than a person of another age group would be treated in the same or similar circumstances. For example, an older person may be refused employment because it is assumed that older people do not have adequate computer skills.

As with all types of discrimination, age discrimination can also be indirect, and it is not always easy to identify when it is happening. This is particularly so if you are in a position where you are confronting other types of discrimination as well, such as disability discrimination, or discrimination on the basis of race or sex. Indirect discrimination happens when there is a requirement, condition or practice that is the same for everyone but has an unfair effect on a person of particular age. For example, it could be indirect discrimination if an employer requires an older person to meet a physical fitness test which younger people can meet more easily, if the fitness standard is not reasonable for the job in question. This is because though everyone is subject to the same requirement, it is indirectly discriminatory because it has the practical effect of favouring younger applicants over older ones.

8.2 What does the law say?

Every state and territory in Australia has passed legislation prohibiting age discrimination in the areas of employment, education, the provision of goods and services, accommodation and registered clubs. In addition, the Commonwealth Government has recently passed the *Aged Discrimination Act 2004* which addresses discrimination in those same areas as well as in the administration of Commonwealth laws and programs. As can be expected, there is some overlap between the prohibitions contained in the Commonwealth and state laws, so that in some matters, you will be able to choose whether to bring complaints under the Commonwealth or state laws.

8.3 Anti-Discrimination laws

In NSW, once you are 18 years of age or over, the *Anti-Discrimination Act 1977* gives you the right not to be discriminated against on the basis of your age in the areas of employment, access to rental accommodation, state education, most goods and services and registered clubs. In addition, a variety of Commonwealth and State laws deal with some issues that can relate to age discrimination. These include:

- *Disability Services Act 1993 (NSW)*;
- *Privacy and Personal Information Protection Act 1998 (NSW)*;

- *Workplace Relations Act 1996 (Cth)*;
- *Human Rights and Equal Opportunity Commission Act 1986 (Cth)*; and
- *Disability Discrimination Act 1992 (Cth)*.

The following are some of the areas that are covered in both the Commonwealth and State laws:

8.4 Discrimination in employment

Employment includes recruitment, training, promotion, transfer, benefits, dismissal, redundancy and retirement.

The law states that you have the right to be fairly considered for most jobs and traineeships, and to be trained, promoted and receive work benefits regardless of your age. It is unlawful to force an employee to retire because of their age, threaten to retire a person because of their age, or to do anything that may result in the employee retiring because of their age. However, it is not unlawful to offer voluntary retirement or severance schemes. The law against compulsory retirement in NSW overrides State industrial awards and agreements and any other NSW Act or Regulation that stipulates compulsory retirement.

However, studies in age discrimination show that systemic problems exist in the area of employment. Employers are often reluctant to hire older people, or terminate them first when business slows or a restructure occurs because “they are likely to retire anyway”. This, coupled with the desire to “bow out gracefully”, means that few complaints are ever made and such practices continue unquestioned.

8.5 Rental accommodation

You have the right to rent houses, units or flats, hotel or motel rooms, caravans and commercial premises, and on the same terms as people of other ages. Generally, you may only be denied accommodation if it is not large enough for the number of people who are intending to live there, if you cannot afford it, or if your references are unfavourable.

If you are refused rental accommodation or treated differently when you are renting because of your age this may be discriminatory. However, retirement villages and hostels that are designed especially for older people, and comply with local government planning requirements, are not unlawful as they meet a special need.

8.6 State education

It is discriminatory for any State educational authority which administrates a school, college, TAFE, or university to refuse to enrol you or to limit your access to educational resources and benefits because of your age. It is lawful for the institution to establish mature age admission schemes, or to provide benefits or concessions that are intended to meet the needs of people in specific age groups.

These age discrimination laws do not apply to independent educational institutions.

8.7 Purchase of goods and services

People providing goods and services must not discriminate on the basis of age in their provision of those goods and services. The main exception to this is that insurance, superannuation and credit providers can discriminate on the basis of age if there is statistical or actuarial evidence to support this, or if another law says that they must.

8.8 Registered clubs

Generally, a registered club may not refuse a membership application on the basis of age (once you are over eighteen years of age or over). Registered clubs are entitled to offer concessions to members because of their age. The main exception to this is when a registered club has as its principal object the provision of benefits for persons who are of a particular age or age group.

8.9 If you are experiencing age discrimination

If you believe that you are being discriminated against, try and resolve it directly by talking with the other party. If it is a work problem, and you belong to a union, the union may be able to assist.

If the direct approach is unsuccessful, you can contact the Anti-Discrimination Board (ADB) or the Human Rights and Equal Opportunity Commission (HREOC). The ADB handles matters under NSW law and HREOC looks after matters under Federal law.

Initially, you can make a general inquiry to see if the law covers your discrimination matter. The ADB and HREOC operate telephone and drop-in inquiry services that give advice on the law and how to make a complaint.

In some circumstances, you may be covered by both federal and state legislation and you will have to decide which jurisdiction you wish to proceed under as you cannot lodge a claim with both. You should enquire with both agencies as to what the differences are and how it may affect your claim.

If you wish to make a formal complaint then you must write to the ADB or HREOC. You should be aware that complaints made to the ADB must be made within 12 months of the discriminatory behaviour, though there is a discretion to investigate complaints made after 12 months from the conduct complained of.

Your letter of complaint should explain what type of discrimination you have suffered and request that the matter be investigated. If the matter is investigated, and warrants further action, an officer from ADB or HREOC will organise a meeting with the parties to the complaint and try to resolve it informally. This is called conciliation and the aim is to get the parties to reach a private settlement. This may be, for instance, an apology, the implementation of non-discriminatory policies and procedures, financial compensation or re-employment.

Most complaints are resolved successfully at conciliation, but if not then:

- in cases handled by the ADB, the President of the ADB can refer it to the Administrative Decisions Tribunal for hearing. The ADT will hear your complaint and can make a range of orders, including an order of compensation up to \$40,000.00; or
- for complaints handled by HREOC, you can take the complaint to the Federal Court or Federal Magistrates Court for hearing. You should be aware that this must be done within 28 days from the date of the complaint termination notice issued by HREOC.

If you choose to make a complaint under the NSW legislation, you can contact the Anti-Discrimination Board, contact details of which are set out in Chapter 14.

8.10 Threats and victimisation

Both federal and state laws make it illegal to victimise or threaten someone who makes or intends to make, or has helped someone else make a complaint of discrimination, harassment or vilification. This includes people who have agreed to be witnesses in relation to your complaint.

This means that you must not be punished or receive further unfair treatment for complaining about treatment that you believe is discriminatory. If anyone tries to make trouble for you because you made a complaint or because they think you might make one, you should talk immediately to the ADB or HREOC.