

Discrimination

Clubs have an obligation to ensure that discrimination does not occur at their Club both in the context of the workplace and also in certain areas of public life.

This fact sheet gives a summary of the various forms of discrimination that are illegal in SA and the obligations on Clubs to prevent discrimination from occurring.

Please note that this is not an exhaustive list in regards to discrimination laws in SA.

1. Definition and Legislation

Discrimination can be both direct and indirect.

Direct discrimination occurs where a person, or a group of people, are treated less favourably than another person or group of people due to their background or certain personal characteristics. For example where someone is not hired for a role on the basis of their race.

Indirect discrimination occurs where a particular rule or requirement that applies to everyone will unfairly disadvantage people who possess a specific characteristic. For example this could occur where access to a Club is only via stairs and there is no access provided for those with disabilities who use wheelchairs.

In Australia, there are a number of different pieces of Federal legislation that protect people from discrimination:

- *Age Discrimination Act 2004*
- *Disability Discrimination Act 1992*
- *Racial Discrimination Act 1975*
- *Sex Discrimination Act 1984*

The *Australian Human Rights Commission Act 1986* also deals with discrimination, but more so in the context of giving the Australian Human Rights Commission the ability to hear issues on discrimination.

The *Australian Human Rights Commission Act 1986* covers discrimination in employment or occupation only, but other pieces of legislation also cover this as well as other areas of “public life”, such as the provision of goods, services and facilities to people and membership in Clubs and Associations.

The only Federal legislation that directly covers volunteers is the *Sex Discrimination Act 1984*, but only where the employer is a “person conducting a business or undertaking” (PCBU). This means it applies to volunteers who are at a Club that has at least one employee but not to a “volunteer only” run Club.

As mentioned above however, other pieces of legislation do cover aspects of public life and in this context volunteers, like everyone else will need to be protected from discrimination. Clubs also need to be aware that should they discriminate against volunteers or members of the public or not properly prevent this from occurring then they could be liable under common law negligence.

In SA specifically, the piece of legislation that protects people from discrimination is the *Equal Opportunity Act 1984* (SA). The *Equal Opportunity Act 1984* (SA) covers not only employees, but also all volunteers, **so Clubs that are purely volunteer run will have their volunteers covered by this Act.**

There is also the *Racial Vilification Act 1996* (SA) that specifically prohibits a person inciting hatred, serious contempt or severe ridicule of a person or group of people on the ground of their race by a “public act”.

As well as the above, the *Fair Work Act 2009* (Cth) also prohibits an employer from taking adverse action against an employee or contractor or potential employee or contractor for a discriminatory reason. Adverse action includes such things as terminating an employee or ending a contractor arrangement, not hiring a potential employee or engaging a contractor, or changing their job so it is to their disadvantage etc.

The *Fair Work Act 2009* (Cth) also specifically prohibits sexual harassment in connection with work and in this context the protection is afforded to all workers, which will include volunteers who are at a Club that has at least one employee.

2. Grounds of Discrimination and Areas

In terms of specifically what grounds someone is prohibited from being discriminated on, the pieces of Federal Legislation prohibit discrimination based on:

Age Discrimination Act 2004

- Age

It is prohibited, subject to some exceptions, to discriminate in areas such as employment, education, access to premises, disposal of land etc.

Disability Discrimination Act 1992

- Disability

It is prohibited, subject to some exceptions, to discriminate in areas such as employment, education, access to premises, accommodation, sale of land, membership of clubs and associations etc.

Racial Discrimination Act 1975

- Colour
- Descent
- National or ethnic origin
- Race

It is prohibited, subject to some exceptions to discriminate in areas such as access to places and facilities, employment, provisions of goods and services, membership of unions etc.

Sex Discrimination Act 1984

- Breastfeeding
- Family responsibilities
- Gender identity
- Marital or relationship status
- Pregnancy or potential pregnancy
- Sex discrimination
- Sex orientation

It is prohibited, subject to some exceptions to discriminate in areas such as employment, voluntary work (where the business employs at least one employee) education, goods and services, accommodation, clubs, lands etc.

In SA, the *Equal Opportunity Act 1984* (SA) prohibits discrimination on the basis of:

Grounds:

- Age
- Breastfeeding
- Caring responsibilities
- Chosen gender / gender identity
- Disability
- Identity of spouse or domestic partner
- Marital or domestic partnership status
- Pregnancy
- Race
- Religious appearance or dress (in work or study)
- Sex
- Sexuality

In terms of the areas someone is prohibited from being discriminated in under the *Equal Opportunity Act 1984* (SA), subject to exemptions and the grounds this includes education, employment, voluntary work, accommodation, membership of associations, lands, goods and services etc.

The *Spent Convictions Act 2009* (SA) also prohibits someone from being discriminated against on the basis of a spent conviction, that being one that can't be disclosed or taken into consideration for any purpose. **Sexual offences and convictions that result in a sentence of more than 12 months imprisonment for an adult, or 24 months for a juvenile are convictions that can never be spent.**

The *Spent Convictions Act 2009* (SA) states that a spent conviction or non-disclosure of one is not a proper ground for refusing a person an appointment, post, status or privilege or revoking any of these.

The *Fair Work Act 2009* (Cth) has a number of attributes that cannot be the basis of adverse action taken against an employee or prospective employee and also in some cases against contractors or volunteers where they are at a Club with at least one employee:

- Race
- Colour
- Sex
- Sexual orientation
- Age
- Physical or mental disability
- Marital status
- Family or carer's responsibilities
- Pregnancy
- Religion
- Political opinion
- National extraction
- Social origin
- Breastfeeding
- Intersex status
- Gender identity
- Being subject to family and domestic violence

As can be seen, under Federal and State legislation there are many areas where people are protected from discrimination.

3. Exemptions

Whilst there are a number of grounds of discrimination, there are some exemptions that will allow certain action to not be unlawful even though it will result in a group of people being treated differently due to a particular attribute they possess.

Under the *Equal Opportunity Act 1984* (SA) there are exemptions such as:

- Genuine requirement of a position e.g. the physical nature of the role precludes people with a certain disability
- A special measure is being taken to try and achieve equal opportunity e.g. looking for female applicants as there are few present in the industry or trying to boost female membership at a sporting club
- The persons attribute would mean they aren't able to perform work without endangering themselves or others or be able to respond to an emergency situation
- It would impose unjustifiable hardship on the organisation

Clubs are advised that certain exemptions may not reasonably apply to certain forms of discrimination e.g. it will be harder to raise an argument on an exemption based on a genuine requirement of the position based on sexuality than disability.

Similar exemptions exist in the *Disability Discrimination Act 1992*, *Sex Discrimination Act 1984* and *Age Discrimination Act 2004*.

Under the *Racial Discrimination Act 1975* there are few exemptions and only where something is said or done in good faith in the performance of artistic work, publishing reports that are in the public interest etc. There are no exemptions on the basis of such things as a genuine requirement of a position, unjustifiable hardship etc.

In the context of sporting competitions, Clubs can run certain events that would result in certain people being treated differently where it is genuinely intended to increase the participation of a particular sex in the sporting activity e.g. have a women's only golf event in order to try and boost female membership.

Clubs are also allowed to have teams and competitions in different age and gender categories.

Associations are also able to be formed specifically for people of particular sexes, religions, sexual orientations, marital statuses etc and applications seeking an exemption to discrimination laws can be made to the Equal Opportunity Commissioner.

4. Duty to Stop Discrimination from Occurring

Clubs need to take reasonable steps to stop discrimination from occurring. What will be considered reasonable will be assessed on a case by case basis and larger Clubs will generally have a higher standard for what will be reasonable than a small Club would.

Other things that could determine what is reasonable are available resources, nature of work undertaken, any past history of discrimination or harassment, number of vulnerable staff etc.

Whilst what is reasonable may be different depending on Club circumstances, all Clubs will have some legal responsibility to prevent discrimination from occurring. Steps to prevent discrimination can include such things as:

- Ensuring there are adequate policies and procedures in place on discrimination with a clear process for someone to raise any issues
- Training of workers on identifying discrimination
- Having things in place to avoid indirect discrimination from occurring e.g. access for those with disabilities
- Remove any items that could be offensive and constitute discrimination
- Check that workers, particularly managers and supervisors are fulfilling their obligations

Should a Club fail to take adequate steps to prevent discrimination then they could be held responsible for the conduct of their workers. This is known as "vicarious liability". A Club risks this where they knew about the discrimination occurring but did not do anything to stop it from happening or from happening again.

Clubs should also notify their workers of their duties to not discriminate against others and where this is not followed, appropriate action needs to be taken.

5. Legal Action

Australian Human Rights Commission (AHRC)

Where someone believes they are being discriminated against and have suffered some type of harm or loss, they can make a complaint to the AHRC if they wish to claim a breach of one of the Federal pieces of legislation. Claims can be made within 24 months of the date of the incident.

When a complaint is made to the AHRC it has to be in writing and the person making the complaint will be contacted and usually the person who the complaint is made against will as well.

Further information may be sought and if the AHRC decides to continue investigating the complaint then they will seek to resolve the issue via conciliation. A complaint can look to be resolved via such means as an apology, compensation for lost wages, changes and developments of policies etc.

The *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022* has now also increased the AHRC's powers and will allow them to inquire into matters relating to systematic unlawful discrimination (or where this is suspected). This won't come into force until 12 months after the date the Bill was given Royal Assent which occurred on 12 December 2022.

At the same time the above comes in to force the AHRC will also be able to conduct inquiries into businesses compliance with their anti-discrimination duties and can give out compliance notices requiring breaches to be remedied. The AHRC can begin inquiries where they "reasonably suspect" compliance is not occurring and they will be able to apply to the Federal Court to direct compliance with a notice.

Equal Opportunity Commissioner of SA (EOC)

Where someone is claiming they have been discriminated against and suffered harm or loss under a breach of the *Equal Opportunity Act 1984 (SA)* then they can make a complaint to the EOC. Claims can be made within 12 months of the date of the incident.

The first thing that will occur is the complaint will be assessed and if it is considered to be covered by the *Equal Opportunity Act 1984 (Cth)* then the EOC will contact the party being complained against and seek their point of view. If after receiving this the complaint is not closed then it will proceed to conciliation.

During conciliation there will be an attempt to see if an agreement can be reached. If it can't be and the complainant wants it to progress further, then the Commissioner will consider if the case is strong enough to refer to the South Australian Civil and Administrative Tribunal (SACAT). Even if the Commissioner does not refer the matter, an applicant can still decide to take it to SACAT, however, the Commissioner will not assist in this instance and it will be the applicant's responsibility to run the case.

SACAT will initially try to assist both Parties in arriving at a satisfactory agreement via a conference, however if this does not occur then the matter can proceed to a Hearing. Where discrimination has been found to have occurred, SACAT can order such things as compensation, require the respondent to refrain from further contraventions, or make them perform specific acts such as training, apologising etc.

Fair Work Commission (FWC)

When an employee or contractor feels they have had adverse action taken against them due to a discriminatory reason they can make a “general protections” claim at the FWC. In terms of what adverse action means this is a harmful action a person takes or threatens to take. This can include such things as:

- Dismissing an employee
- Ending or refusing to enter into a contract with a contractor
- Not hiring someone
- Injuring an employee in their employment
- Discriminating between employees

Typically these are made by employees who claim that they have had their employment terminated due to a prohibited reason e.g. due to their age, having been away on illness for some time etc. When such a claim is made the presumption is that the action was taken for a prohibited reason meaning the onus is on the respondent to rebut this and show it was not taken for a prohibited reason.

Damages are uncapped meaning that should a respondent be found to have breached the Fair Work Act then this could result in large amounts of costs being owed to the person who brought the claim.

For this reason Clubs must be very cautious when they seek to take adverse action against an employee or contractor and there is a basis to claim it was done for a discriminatory reason.

Where the reason for the claim relates to dismissal it has to be made within 21 days of the dismissal date and for claims not relating to dismissal they can be made within 6 years of the event.

Someone who believes the conduct they have encountered would also constitute sexual harassment can also look to apply to the FWC for a “stop sexual harassment order”. Employees, contractors and volunteers at a business that employs at least one employee can make an application for this order.

The matter will initially go to conciliation and if does not resolve there then it may go to a hearing. Where the FWC holds that sexual harassment occurred they can make orders such as requiring them to stop harassment and apologise, to comply with a policy or to undertake training.

Additionally under changes brought in by the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* on 6 March 2023 the FWC can also look at harassment issues that go beyond making a stop order. The FWC can now conciliate and mediate general complaints of harassment and look to make non-binding recommendations. If someone wants to bring the matter further though then they will have to bring the matter to the Federal Court.

Fair Work Ombudsman (FWO)

It is also possible for someone to approach the FWO to raise a complaint about discriminatory practices by an employer. The FWO may then commence an investigation and where they determine that an employer has (or had) discriminatory practices that are linked to adverse actions for employees or prospective employees they can take enforcement action.