

# MARKET AND SOCIAL RESEARCH AND ANTI-DISCRIMINATION LAW

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## Background

The Commonwealth and each Australian state and territory has anti-discrimination legislation in place. This legislation protects people from being unlawfully discriminated against in certain circumstances, including in employment and in relation to the provision of goods and services, on the basis of having, or being presumed to have, certain 'protected' attributes.

Any form of market and social research – quantitative or qualitative – may require the selection of certain participants, dependent upon the type of questions to be asked and the client specifications. These specifications can relate to gender, age groups, purchasing or other preferences, certain personal habits, beliefs, characteristics or behaviours – depending on the type of research questions the client wishes to ask.

For example, participants for a survey on children's eating habits may be defined as parents of children of certain ages, the client for a survey on attitudes to superannuation may want to talk to people of a certain age (for example nearing the age of retirement) or with a certain level of superannuation or assets.

Recruitment or sampling may require an exclusionary approach to selection (i.e. non-solicitation of people who don't meet project specifications).

Researchers need to be mindful of their obligations under anti-discrimination legislation when undertaking their sampling or recruiting to avoid claims being made against them on grounds of unlawful discrimination.

## Unlawful Discrimination

Unlawful discrimination is treating someone with specific protected attributes in a different manner from other people.

Some of the protected attributes are:

- age;
- disability and impairment;
- industrial or union activity;
- political belief or activity;
- marital status, parental status or status as a carer;
- physical features;
- pregnancy;
- race, religious belief or activity;
- sex, lawful sexual activity, sexual orientation or gender identity;
- personal association (whether as a relative or otherwise) with a person who is identified by reference to any of the above attributes.

There are two types of discrimination:

### Direct Discrimination

Treating someone with a protected attribute less favourably than you would have treated someone without that attribute, in the same or similar circumstances.

### Indirect Discrimination

Unreasonably requiring a person in a protected category to comply with a condition, requirement or practice which the person cannot comply with because of the protected attribute.

Motive and intention are irrelevant for both types of discrimination. Therefore, it is not sufficient to claim that one is conducting market and social research and that this justifies the act of discrimination.

Note, however, that the legislation would not usually apply where the protected attribute means the person cannot reasonably meet the requirements of the research being undertaken (e.g. severe visual impairment in the context of researching responses to pack graphics).

## Legislation

The following legislation covers anti-discrimination in the various Australian jurisdictions. Researchers must comply with both Federal and applicable State or Territory legislation.

### State and Territory laws

- Australian Capital Territory Discrimination Act 1991 (ACT)
- New South Wales Anti-Discrimination Act 1977 (NSW)
- Northern Territory Anti-Discrimination Act 1996 (NT)
- Queensland Anti-Discrimination Act 1991 (QLD)
- South Australia Equal Opportunity Act 1984 (SA)
- Tasmania Anti-Discrimination Act 1998 (TAS)
- Victoria Equal Opportunity Act 2010 (VIC)
- Western Australia Equal Opportunity Act 1984 (WA)

### Federal laws

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

Due to minor differences in the wording of the various statutes listed above, and the way in which they cover discrimination in the provision of goods and services, the application of the statutes to market and social research is open to dispute in some jurisdictions.

The recommended best practice for researchers, however, is to always act as if covered by all the anti-discrimination legislation in Australia.

## Market and social research and discrimination claims

There are no specific exceptions for commercial market or social research practices in the relevant legislation operating in any state or territory.

Therefore, it is important for researchers to keep the following in mind when recruiting potential research participants:

- Wherever possible, design the research project to be as inclusive as possible. That is, allow the inclusion of as wide a range of people as is consistent with the objectives of the project, including those with a protected attribute. Do not exclude people needlessly. You may be committing an act of discrimination and you may be missing the views of an important group within the community.
- Consistent with good research practice, ensure that the selection criteria used during the screening process are not readily apparent to potential participants. If people do not know the basis for their exclusion, they may be initially less inclined to complain. However, if lack of transparency is the basis of their complaint, then one would need to be open and candid.
- Ensure that anyone administering the questionnaire – interviewer, recruiter or researcher – understands how to respond to questions about the screening criteria. Train and brief them on the reasons for selection of certain people and how to reply to queries about the selection process.
- For example, explain to a woman contacted after the female quota for a survey is full that she is not being discriminated against as a woman, rather it is a result of her being contacted at that time, when the quota has already been filled.
- Use diplomacy; wherever possible; if someone wishes to be involved, allow them to express their views or participate, even though that data may not be used in the survey. Show that you value the person's opinion and you will reduce their motivation to complain.

In summary, prevention is better than the cure when it comes to discrimination. Always follow the guidelines above and ensure that everyone involved in the research process, including the client, understands the need to consider these issues when undertaking any market and social research.