

What is Disability Discrimination and when is it against the law?

In Queensland, disability discrimination is covered by two separate laws: the Queensland Anti-Discrimination Act (ADA) and the Commonwealth Disability Discrimination Act (DDA).

This fact sheet will help you understand what disability discrimination is.

What is a Disability?

Disability is defined in the widest possible terms in both Acts.

- Both Acts include any temporary or permanent intellectual, physical, psychiatric, sensory or neurological conditions
- The Commonwealth DDA also includes behaviours linked with a disability, for example, aggressive behaviour resulting from an acquired brain injury
- Under the ADA, discrimination based on behaviour is lawful even if the behaviour is a result of a disability
- In the ADA, disability is referred to as "impairment"
- The condition doesn't have to exist right now. It could have existed in the past - Under DDA a future condition can be considered; e.g. if you are refused a job because a compulsory medical states you have a high chance of developing a degenerative condition based on your family history
- In fact the condition may not even exist but you were discriminated against because somebody mistakenly believed you had impairment.

Impairment or disability can involve:

- Total or partial loss of bodily or mental functions, such as diabetes and some acquired brain injuries

- Total or partial loss of a part of the body
- Presence of organisms causing disease such as HIV AIDS or hepatitis
- Presence in the body of organisms capable of causing disease: for example HIV which has not developed into AIDS
- Malformation, malfunction or disfigurement. Cerebral palsy is an example of malformation, epilepsy an example of malfunction, a disfigurement may be caused by a burn
- A condition causing a person to learn differently such as attention deficit disorder or dyslexia
- A disorder, illness or disease affecting a person's thought processes, perception of reality, emotions or judgment. This impairment includes all forms of psychiatric illness.

What is Discrimination?

Discrimination in this context is when an individual or a group of people are treated less favourably on the basis of a characteristic or class, rather than on individual merit.

What is Disability Discrimination?

Disability Discrimination is negative treatment that results from a person or group having a disability

- Under the Commonwealth DDA if there are two or more reasons that the discrimination occurred (e.g. sex and disability) it is enough that impairment is one of the reasons. It does not need to be the main reason
- Under Qld's ADA, if there are two or more reasons for less favourable treatment you must show the main reason was your impairment

- Discrimination can also occur by association. For example, you may be with someone with a disability and you are treated less favourably as a result. You can lodge a discrimination complaint in these circumstances
- It is important to be aware that in order for a person or organisation to discriminate against you on the basis of a disability, they must be aware that you have an impairment
- Why you have been discriminated against (their motive) is not relevant
- For example, your employer may alter your job so that you are working at a desk more because you are pregnant without your consent or against your wishes. They may do this to be considerate (their motive) however this is still discriminatory.

When is Disability Discrimination against the law?

In Queensland, discrimination against people with disabilities is unlawful under both the Queensland Anti-Discrimination Act and Commonwealth Disability Discrimination Act.

To prove unlawful discrimination you must show the following four things have occurred:

1. That you have an impairment/disability and the person or organisation that you believe discriminated against was aware of this impairment
2. There has been direct or indirect discrimination because of the impairment or disability.

Direct Discrimination

Direct discrimination is against you personally.

Example: Katriona, who has a cervical spine injury and applied for a promotion. Nathan, who doesn't have a cervical spine injury, got the promotion. Katriona's employer says her injuries prevented her getting the job. This is direct discrimination. Katriona has been treated less favourably.

Indirect Discrimination

Indirect discrimination occurs when there is a practice or condition in place for all people which negatively impacts on a particular group. The two Discrimination Acts have differing ways of working out if there has been indirect discrimination.

Under Queensland's ADA, there are four requirements to make a claim of indirect discrimination:

1. A condition or requirement is imposed, and
2. The person cannot meet this condition because of their disability, and
3. A higher proportion of people without the disability can meet this condition, and
4. It is not reasonable to impose this condition.

Example: Kevin Cocks v State of Queensland is a real example. Kevin said he was indirectly discriminated against because the front entrance to the Brisbane Convention and Exhibition Centre only had steps. Kevin had to satisfy four requirements of indirect discrimination:

1. In order to enter the building at the front people were required to use the steps
2. Kevin was unable to meet this because he uses a wheelchair
3. A higher proportion of people without Kevin's disability could meet the condition because they don't use a wheelchair and can use the steps
4. It was shown as an unreasonable requirement imposed by the Government. Both Acts make the discriminator prove that the term is reasonable.

The Government could not show it was reasonable to only have stairs at the front. They

were required to install a lift because there would be minimal disruption to the project, it would not detract from the building and the cost was not large in relation to the cost of the project or the state's financial status.

Under the Commonwealth DDA there are 3 requirements to make a claim of indirect discrimination. These may be easier to prove than the Qld ADA requirements as you do not need to provide evidence of who can and can't meet the requirement at issue:

1. A condition or requirement is imposed; and
2. The person cannot meet this condition because of their disability; and
3. The condition has disadvantaged the person with a disability (or is likely to).

Indirect discrimination under the DDA also covers situations where you could have met the condition if you had been provided with reasonable adjustments, but the discriminator failed to provide them.

Example: Ben is vision impaired and went to an interview for an office job. Part of the interview was a computer test, Ben needs specialist software to read the computer screen but the potential employer said he could not load this software onto their computer. They made no arrangements to provide him with an accessible computer. Ben could not do the computer test and did not get the job.

3. The discrimination occurred in a 'relevant area'

For discrimination to be unlawful, it must have occurred in one of the specified areas in the Acts which include:

- employment
- education
- the provision of goods and services (e.g. shop or restaurant)
- accommodation
- clubs
- state or local government.

4. You have suffered loss, damage or detriment.

The discrimination you experienced must have caused something negative to happen to you such as you lost money when fired from work and couldn't find another job. Or maybe you felt hurt because you and your guide dog were refused entry to a restaurant. Both of these are examples of loss, damage or detriment.

Are there exceptions to the law?

Not all discrimination against people with disabilities is unlawful. Both acts provide exemptions. If no exemption applies then you may have suffered unlawful discrimination. Some of the most common grounds for exemption are:

Unjustifiable Hardship

- Employers, Venues, Schools etc. are required to provide reasonable adjustments (alterations to environment and procedures etc. that allow people with a disability to enjoy equal access and opportunity) unless these adjustments have a negative impact on the organisation
- These negative impacts may include unreasonable costs and if these adjustments would negatively impact on other staff without a disability. Unjustifiable hardship is hard to define as it is determined on a case-by-case basis.

Inherent Requirements

- Inherent Requirements in employment (also known as Genuine Occupational Requirements) - are the essential activities and tasks that must be carried out in order fulfil a job
- An employer may be exempt from discrimination breaches if they do not employ a person who cannot fulfil the inherent requirements of a position

- An example of this is that a religious organisation requires that its staff are of that religion. Not employing a person who is of another religion in this case is not unlawful. Another example would be that an organisation could fire someone who was not capable of lifting heavy objects when this was a central component of their job.

Workplace Health and Safety

- Exemptions can apply on workplace health and safety grounds when a person's disability may cause risk to others.

Equal Opportunity

- This allows for the promotion of opportunities for a specific group of people who may ordinarily have fewer chances for participation, e.g. scholarships for aboriginal students. These measures only last until the specific group has achieved equal opportunity.

Who can complain?

A complaint under your name must be either made by:

- The person who has suffered the discrimination or
- An agent acting for the person (legal guardian).

The DDA allows anyone to make a complaint on behalf of somebody else even if the person isn't aware of the complaint. A complaint may be rejected if the aggrieved person doesn't want to pursue it.

For more information

BRQ Fact Sheets

How to Write a Disability Discrimination Complaint

Conciliation Conferences

How to Complain Using the Commonwealth Disability Discrimination Act

How to Complain Using the Queensland Anti-Discrimination Act

Websites

The following websites contain useful information about disability discrimination law and complaints.

Basic Rights Queensland www.brq.org.au

Anti-Discrimination Commission Queensland
www.adcq.qld.gov.au

Australian Human Rights Commission
www.hereoc.gov.au

Please Note:

This Fact Sheet contains general information only. It does not constitute legal advice. If you need legal advice please contact Basic Rights Qld on **3421 2510** or if outside of Brisbane on **1800 358 511**.

Basic Rights Qld is a community legal centre, which provides specialist advocacy and legal services in Social Security and Disability Discrimination in employment law, administration and policy.

We are independent of Centrelink and all assistance is free.

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www.brq.org.au