

Using disability discrimination law

► For people who have a disability

This booklet explains some of the important things that you might need to know about disability discrimination law



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Produced by Victoria Legal Aid, Disability Discrimination Legal Service and Villamanta Disability Rights Legal Service Inc.

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Victoria Legal Aid

Our vision

Victoria Legal Aid is a leading and responsible force for community access to the legal system and for social justice.

Our values

Victoria Legal Aid is committed to: serving our clients and community professionally and ethically; acting with integrity, fairness and transparency at all times; respecting and valuing diversity; and pursuing continuous improvement across the organisation.

Our services

We can help you with legal problems about criminal matters, family breakdown, family violence, child support, immigration, social security, mental health, discrimination, guardianship and administration, tenancy, debt and traffic offences.

Our free legal services include:

- information over the phone in English and other languages
- booklets and other materials in English and other languages
- seminars and workshops
- advice at most courts and tribunals, or by appointment.

If you want ongoing help from a lawyer, you can apply for a grant of legal assistance. Getting a grant will depend on your financial situation and your legal problem. You can use a grant to:

- pay a lawyer to help reach agreement or speak for you in court
- go to our family dispute resolution service.

Call us to find out how we can help you on 9269 0120 or 1800 677 402 (country callers).

Disability Discrimination Legal Service

The Disability Discrimination Legal Service is a community legal service specialising in disability discrimination law. The service offers free information, advice and assistance to people experiencing disability discrimination.

Villamanta Disability Rights Legal Service Inc.

Villamanta Disability Rights Legal Service Inc. is a free statewide legal service that works on disability related issues. The service offers free telephone information, advice and referrals to people who have a disability.

About this booklet

This booklet explains some of the important things that you might need to know about disability discrimination law.

Many people with a disability experience discrimination because of their disability. Disability discrimination is unlawful under state and federal laws in Australia. If you experience discrimination, the law may be able to help you.

This booklet will help you understand what the law says about disability discrimination. It explains the differences between Victorian and federal laws and processes. It outlines your options and explains what is involved if you take legal action. Whenever you are dealing with legal issues, it is a good idea to get legal help.

In this booklet are many examples which show how the law has been decided in some actual cases. There are also examples from everyday situations to help you understand the law. We hope that this booklet will give you the information to handle your situation and use the law with confidence.

This booklet is not meant to replace legal advice. Instead, it is a guide that you can use with a lawyer or advocate. If you do not have a lawyer, you will also find the booklet helpful as you prepare and manage your own case.

The law changes all the time. To check for changes you can:

- call the Victoria Legal Aid Legal Information Service on 9269 0120
- read 'New law' on the *Using disability discrimination law* page on the Victoria Legal Aid website at www.legalaid.vic.gov.au/701.htm
- visit a Victoria Legal Aid office or a community legal centre.

Human rights

There are essential rights and freedoms that are recognised throughout the world. These rights are seen as being so important that they have been incorporated into international agreements. They are called 'human rights' and are accepted as central to the wellbeing of people in all countries.

The types of rights covered by such agreements include civil and political rights such as the right to not be discriminated against. Another type is the rights of people with a disability, which are summarised in the United Nations' 1975 Declaration on the Rights of Disabled Persons.

In order for us to receive the benefits of human rights our governments have made them part of Australian law. The state of Victoria passed the Equal Opportunity Act in 1995 and the Commonwealth passed the Disability Discrimination Act in 1992.

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These Acts make disability discrimination unlawful at the Victorian and federal levels and protect you from discrimination on the basis of a disability.

Another way in which human rights are protected is through the *Charter of Human Rights and Responsibilities Act 2006*. The Charter sets out rights, freedoms and responsibilities for people living in Victoria.

These rights and freedoms include:

- the right to protection from cruel, inhuman or degrading treatment
- freedom of expression (how and what you say, write, think, create or receive)
- freedom of association and peaceful assembly (people and groups you communicate or mix with).

The Victorian government and its agencies must consider these rights and freedoms when they make laws and provide services to the public. All new laws will need a 'statement of compatibility' to tell parliament if they meet the standard set by the Charter.

For more information about the Charter, and a full list of the Charter rights and freedoms, go to www.equalopportunitycommission.vic.gov.au or call the Victorian Equal Opportunity and Human Rights Commission advice line on 9281 7111 or 1800 134 142 (toll free).

If you think that your human rights may have been breached, talk to the Victorian Equal Opportunity and Human Rights Commission, Victoria Legal Aid or a community legal centre.



Explaining the law



Defining disability

There are two laws that make disability discrimination unlawful in Victoria.

Federal Law – The *Disability Discrimination Act 1992* is a federal Act, which applies everywhere in Australia. It is administered by the Australian Human Rights Commission.

State Law – The *Equal Opportunity Act 1995* is a state Act and applies only in Victoria. It is administered by the Victorian Equal Opportunity and Human Rights Commission.

Some other states also have their own disability discrimination laws.

At the time of writing, the *Disability Discrimination and other Human Rights Legislation Amendment Bill (2008)* proposes changes to the Disability Discrimination Act, the *Age Discrimination Act 2004* and the Human Rights and Equal Opportunity Act.

If the changes to the Disability Discrimination Act are agreed to, there will be some important changes. These changes will mean that:

- a. if an organisation or an individual says they will not make reasonable adjustments for people with disability, this in itself might be discrimination
- b. the defence of 'unjustifiable hardship' will be available for all unlawful discrimination cases on the ground of disability, except harassment and victimisation
- c. there is a clearer definition of what the matters to be considered are when figuring out what unjustifiable hardship is
- d. it is clear the person who is claiming unjustifiable hardship is the one who has to prove their claim
- e. the definition of disability includes a person who might develop a disability because it runs in their family and also includes that behaviour is a symptom or manifestation of a disability
- f. the 'proportionality test' in the definition of indirect discrimination will be replaced with the requirement to prove that people with the disability of the person who made the complaint were disadvantaged by the condition imposed
- g. the person who is saying they did not indirectly discriminate will need to prove that the condition they imposed was reasonable
- h. there will be more power to make standards under the Act
- i. there will be a clearer definition of what an assistance animal is, and what makes lawful or unlawful discrimination of persons who rely on an assistance animal.

The federal and Victorian Acts use slightly different definitions of disability but they are substantially the same.

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Under Victoria's Equal Opportunity Act, disability is referred to as 'impairment' and means:

- total or partial loss of a bodily function
- the presence in the body of organisms that may cause disease
- total or partial loss of a part of the body
- malfunction of a part of the body, including:
 - a mental or psychological disease or disorder
 - a condition or disorder that results in a person learning more slowly than people who do not have that condition or disorder, or
- malformation or disfigurement of a part of the body.

The Victorian Act's definition of discrimination includes present, past, future and imputed disability.

Under the federal Disability Discrimination Act disability means:

- total or partial loss of the person's bodily or mental functions
- total or partial loss of a part of the body
- the presence in the body of organisms causing disease or illness
- the presence in the body of organisms capable of causing disease or illness
- the malfunction, malformation or disfigurement of a part of the person's body
- a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction, or
- a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour.

Both definitions are quite broad and include conditions that people might not think of as disabilities or impairments. Having an infection, for example, would fit into both definitions. If you experienced discrimination because of this you could make a complaint.

Obesity is not considered a disability under Victorian law but a person who experiences discrimination because of obesity may be able to make a complaint of discrimination on the basis of physical feature. The Australian Human Rights Commission is of the view that the definition of disability under the federal Act is broad enough to include obesity.

Both definitions include future disability and 'imputed' disability. An example of a future disability is a condition that runs in the family, which you may develop. An 'imputed' disability is something that someone believes another person has, even if they do not. For example, someone may assume that a gay man has HIV/AIDS.

Your discrimination problem may be covered under the Victorian and federal Acts or only one of them. If it is covered by both, you will have to decide which one to use. This is discussed further in 'Complaints process'.

Imputed discrimination - an example

A man worked in a hostel where he was required to be on-call after hours. Because of a condition called transient adjustment disorder, he went on sick leave for a lengthy period of time. The employer concluded that he suffered clinical depression and terminated his employment on that basis. He claimed that the man's disability stopped him from performing the inherent requirements of the job.

Decision: The court found that the employee did not have a long-term illness, as 'imputed' by his employer and that his disability did not stop him from performing his role. It found that he had done so for about four weeks between returning from leave and the date he was dismissed. The court held that the employer was responsible for damages because the man's termination was discriminatory and unlawful.

Power v Aboriginal Hostels Limited (2003) 133 FCR 254

Other types of discrimination

It is important to remember that there are other types of discrimination that are unlawful. These include discrimination on the basis of race, gender, age, religion, political belief, marital status, sexuality, criminal record and industrial activity. Sometimes you can complain on more than one ground. It can sometimes be difficult to work out the real basis of the discrimination. You can get legal advice about this.

See 'Where to get help' at the back of this booklet.

This booklet only covers disability discrimination.

What is unlawful discrimination?

In deciding to make a complaint about disability discrimination, you need to work out if you are experiencing discrimination that is against the law.

Sometimes unfair things happen to you but they might not be discrimination or they may not be unlawful. It is unlawful to discriminate against people with disabilities only if particular conditions apply. You need to know about these so you can decide if your situation fits into anti-discrimination law.

It is not enough to prove that a person has done something wrong to you. You need to prove that it was done because of your disability.

In federal and Victorian laws, only two types of unlawful discrimination are recognised:

- direct discrimination
- indirect discrimination.

Both laws define the two in fairly similar ways. You do not require proof of intention to show that there has been discrimination.

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Direct discrimination

Direct discrimination is when someone treats you less favourably, or proposes to treat you less favourably, than they would treat someone in similar circumstances who does not have a disability. Less favourable treatment may mean that you have been ridiculed or denied something to which you are entitled.

In deciding if you are experiencing direct discrimination you need to think through every part of the definition:

- Is someone treating you in a way that is less favourable than the way they treat, or would treat, someone else?
- Is that 'someone else' a person who does not have your disability?
- Are the circumstances where they are treated more favourably similar to those where you are treated less favourably?
- Is your disability the reason or one of the reasons why you are being treated less favourably?

Ultimately, only a court or tribunal can decide if you are experiencing direct discrimination.

But you need to think about these questions yourself and you need to feel reasonably confident that you can answer 'yes' to them all before deciding to go ahead with your case.

An example of direct discrimination is where a person with schizophrenia is refused accommodation in a caravan park because the manager believes that a caravan park is not a suitable place for a person with a mental illness to live.

It is not enough just to show that the person you are complaining about has treated you badly. You also have to show that the reason or one of the reasons that they treated you badly is because of your disability and that they treat, or would treat, others without your disability better.

The people who you are comparing yourself with in this situation are called the 'comparators'. This is a person in the same situation as you who does not have your disability. When complaining about direct disability discrimination, you need to be clear who your comparators are. You also need to show that your 'comparator' gets better treatment than you.

If you are treated the same as another person without your disability, you do not have a comparator. In this case, you need to think about whether the discrimination is indirect rather than direct.

Direct discrimination - an example

The parents of a four and a half year old child with spina bifida applied to enrol their daughter in the local school. With the application they gave the details of her disability and her particular needs. They later met with the school registrar to give him more information about their daughter and her disability.

Some months after this interview the registrar wrote to the parents to say that school did not feel it was able to enrol their daughter.

The parents complained to the Australian Human Rights Commission claiming that the school had directly discriminated against their daughter.

Decision: The commission agreed that by refusing the girl's enrolment because of her disability, the school was treating her less favourably than it would treat a child without spina bifida. The Federal Court confirmed that the school had directly discriminated against her.

Scott and Bernadette Finney v The Hills Grammar School (1999) HREOC 14 (20 July 1999)

Indirect discrimination

Indirect discrimination is when:

- you are expected to meet some sort of criteria that you cannot meet because of your disability
- this is a criteria that people without your disability would probably be able to meet.

For indirect discrimination to be unlawful, the expectation or criteria placed on you has to be something that is unreasonable in the circumstances.

You need to think through each part of the definition in order to know if you are experiencing indirect discrimination.

- Is there something that you are expected to do, or some criteria that you are expected to meet, that you cannot do or meet because of your disability?
- Would people who do not have your disability probably be able to do this thing that you cannot do or meet this criteria that you cannot meet?
- Is the requirement something that is not reasonable in the circumstances?

Ultimately, only a court or tribunal can decide if you are experiencing indirect discrimination.

But you need to think about these questions yourself, and you need to feel reasonably confident that you can answer 'yes' to them all before deciding to go ahead with your case.

With indirect discrimination, you need to be able to show that being treated the same as everyone else puts you at a disadvantage because of your disability. An example of indirect discrimination that affected people with a vision impairment was when the Sydney Olympics Organising Committee did not produce ticketing information in Braille.

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Indirect discrimination - an example

The parents of a child who was profoundly deaf since birth applied to enrol their son into a Catholic secondary college. They asked for sign language support for their child. During the boy's primary education, Australian Sign Language (Auslan) had helped the boy to learn. The college accepted the enrolment on the condition that the boy was to follow the college's 'model of learning support', which did not include Auslan.

The parents withdrew the enrolment as they felt that their son would not have been able to fully take part in all learning activities without sign language support. The parents complained to the Australian Human Rights Commission claiming that the school had indirectly discriminated against their child by not giving sign language support.

Decision: The commission and Federal Court both agreed that by not giving sign language support, the college was indirectly discriminating against the boy and awarded compensation. This was because the college was imposing a condition of education that would have seriously disadvantaged his education. The court found it was unreasonable for the college to not give the necessary sign language support that was required.

Clarke v Catholic Education Office (2003) 202 ALR 3407

Indirect discrimination and what is 'reasonable' - an example

A man, who regularly went to council meetings, used elbow crutches because of a disability. The council refused to install a lift to the first floor of the council building, so he had no means of access other than the stairs. The council intended to relocate the municipal offices at some time in the future. A person was made available to help anyone wishing to use the stairs. The man complained to the Victorian Equal Opportunity and Human Rights Commission about this indirect discrimination.

Decision: The commission said that the requirement to use the stairs was not reasonable in the circumstances, taking into consideration the following:

- The cost of the installation of the lift was about \$150,000.
- The resources of the council were great enough to meet the cost of installing the lift.
- Without the lift, the complainant could not reach the first floor independently. A substantial number of other people (such as people using wheelchairs or mothers with prams) would not be able to reach the first floor via the stairs.
- The premises is a public building substantially maintained by public money.
- Ratepayers have a right to go to council meetings.

Byham v Preston City Council (1991) EOC 92-377

In deciding if the expectations or criteria that are placed on you are 'reasonable in the circumstances', Victoria's Equal Opportunity Act sets out some of the things that should be taken into account.

These include:

- the consequences if you cannot meet the criteria or do what was expected of you
- the costs of making alternative arrangements
- the financial circumstances of the person who is placing these expectations on you.

The federal Disability Discrimination Act does not set out which factors should be looked at in deciding if something is 'reasonable in the circumstances'. But they would be similar to those that are considered under the concept of 'unjustifiable hardship'.

For more information on this, see 'Adjustments to overcome discrimination' earlier in this chapter.

Assistance animals

If you are not allowed to enter a building or shop because you have a guide dog or another animal that is trained to help with your disability, this also constitutes discrimination. If the animal does not have training, then it is only a pet or a companion animal.

As well as seeing or hearing dogs, there are other types of assistance animals. When choosing an assistance animal, consider how effectively it can help you as well as how it may affect the people around you. Any animal must be trained to behave appropriately in public. You are responsible for the behaviour of the animal.

Assistance animals are allowed almost everywhere but there are places, like zoos or national parks, where an assistance animal may not be allowed. This is to stop a risk of transmission of disease between your animal and other animals. Some places of worship may not allow animals because of religious beliefs.

At present, there is no system in Victoria for formal registration of assistance animals. It is not against the law for a person to ask for proof that your animal is more than a pet, so it is helpful to keep an explanatory letter from a veterinarian or animal trainer. The letter does not need to include information about yourself or your disability.

Harassment

Harassment on the grounds of disability is unlawful under the federal Act if the harassment happens in employment, education or the provision of goods and services.

The federal Act does not define harassment, so the word is interpreted according to its common English meaning along with other interpretations that might have emerged through case law.

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Harassment is included in the Victorian Act under the definition of 'subjecting a person to detriment'. The Victorian Act defines detriment as including humiliation and denigration. It applies in all the areas covered by the Victorian Act.

See 'Areas of discrimination' earlier in this chapter.

If someone harasses you in a situation not covered by either Act, such as on the street, disability discrimination laws will not help you. If you feel unsafe because of harassment you can inform the police, even if the harassment is not covered by discrimination laws.

Harassment - an example

A man with multiple sclerosis was harassed in his workplace by his team leader, who referred to the man's disability when he criticised him. Over time, the team leader increased the man's workload in the hope that he would leave the section. He moved bookshelves near the man's desk and was heard to say that the shelves were put there 'to block him out' of view. When the man complained to the Australian Human Rights Commission about being moved to a hotter part of the building, which could have made his condition worse, the team leader said, 'That is why we put you here'.

Decision: The commission agreed that the team leader had unlawfully harassed the man because of his disability. The commission said that behaviour or remarks designed to cause the man discomfort or humiliation concerning his disability constituted harassment, even though these happened within the broader context of a bad relationship between the man and his team leader.

McDonald v the Hospital Superannuation Board [1999] HREOCA 13 (16 July 1999)

Discriminatory questions

Under the Victorian and federal Acts, it is generally unlawful for someone to ask you for information about your disability that may be used to discriminate against you. For example, it might be unlawful in a job interview or when applying for some sort of service for someone to ask about your disability or how it affects you.

An example of a discriminatory question is 'Does any member of your family have any one of the following medical conditions?' It is not unlawful to ask you for information about your disability after you have been offered a job, or before the offer, if your disability is linked to the tasks of the position.

If your disability could be aggravated by the job, you are expected to let your employer know. However, if there is no likely problem for you or the employer, it is not necessary to disclose your disability. You need to ask your doctor about medical restrictions.

Remember that it is not unlawful for someone to ask you about 'adjustments' that you need to ensure that you are not treated less favourably because of your disability.

See 'Adjustments to overcome discrimination' later in this chapter.

Disclosing disability - an example

Mr Randell had a mild dyslexic learning difficulty. He got a traineeship where he was employed for seven weeks before he was dismissed. Because of his disability, he had difficulty with one of the job's most important tasks. The task was reading numbers on stock parts and bins, which were in alphanumerical order. He took longer than a person without his disability did to learn and become skilled at the tasks that he was set. His poor performance at this task resulted in his dismissal. Mr Randell did not tell his employer about his disability when he applied for the position. He answered 'no' to the following questions: 'Do you consider yourself to have a permanent and significant disability? Will you be requesting special assistance owing to the disabilities?' and 'Do you have any physical disability or medical condition that would affect your ability to do the job? If yes, give details.'

Decision: The court found that the wording of the forms allowed a person with his disability to genuinely believe (as he did) that he would not have difficulty with the job that he was told he would do. The court concluded that Mr Randell acted in good faith taking into account his age, inexperience and advice given to him by an employment support person.

Randell v Consolidated Bearing Company (SA) P/L [2002] FMCA 44 (3 April 2002)

Disability standards

The Disability Discrimination Act gives the government the power to set standards, known as 'Disability Standards'. It is unlawful for a person to breach a disability standard. At this stage, only the 'Disability Standards for Education' and the 'Accessible Public Transport Standards' have been passed. The Draft Access to premises Standards is currently before the House of Representatives Standing Committee on Legal and Constitutional Affairs. For more information about disability standards contact the Australian Human Rights Commission.

See 'Where to get help' at the back of this booklet.

The disability standards for education were developed after consultation with people involved in education, training and disability. The standards aim to make education accessible and to encourage inclusion of people with disabilities. They have been written to make sure students with disabilities have the same opportunities as all other students.

The standards set out the rights of people with disabilities and what service providers must do to comply with the Disability Discrimination Act. They cover enrolment, participation, curriculum development, accreditation and delivery, student support service and more. They also cover harassment and victimisation.

There are some situations where it is lawful for an education provider to fail to comply with the standards. These can include unjustifiable hardship, statutory authority, public health and special measures.

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Areas of discrimination

Disability discrimination is unlawful only in some areas.

In general terms, these are:

- **employment** – which means an employer cannot discriminate in their terms and conditions of employment, during the application process, in promotion or dismissal. For example, it is unlawful to refuse employment to a courier with a hearing impairment just because they cannot use a mobile phone to receive calls, see 'Employment' later in this chapter
- **education** – includes enrolments and the educational facilities provided. For example, it is unlawful to refuse to accept your application because you need changes made to accommodate your cerebral palsy, see 'Adjustments to overcome discrimination' later in this chapter
- **access to premises used by the public** – this includes libraries, government offices, hospitals, doctors' surgeries, restaurants or shops. For example, public buildings should have wheelchair access
- **accommodation** – if you rent a room, a flat or a house. For example, it is unlawful not to allow you to have a guide dog or assistance animal in your flat
- **goods, services and facilities** – when you are shopping or getting services from anyone such as doctors, tradespeople, banks or government departments. For example, it is unlawful to make a person with a disability wait until last to be served in a shop because of any extra time needed to serve them
- **clubs and associations** – you cannot be discriminated against if you want to join a club or association. This includes their terms of membership. It is unlawful for example, to refuse membership of a social club to a person because their behaviour is considered unusual because of a mental illness
- **sport** – includes all sports except elite sports like the Olympics and serious competitive sports. For example, if you have the skills to play cricket or swim competitively, you cannot be excluded because you have asthma or are deaf
- **local government** – this includes being a councillor, and all aspects of council services, amenities, by-laws and programs
- **federal laws and programs** – when you want to use government programs or facilities.

These are all covered under federal and Victorian law, except for 'federal laws and programs'. Also 'access to premises' is covered under the Victorian Act only under the category of provision of goods and services.

Key points

It is unlawful to:

- directly discriminate against a person because of their disability
- indirectly discriminate against a person because of their disability
- harass a person because of their disability
- require a person with a disability to provide information that might be used to discriminate against them
- victimise a person because they have made a disability discrimination complaint.

Providing services – an example

Parents of children who had attention deficit disorder claimed that their children could not safely use a bus stop in the highway without supervision because of their disabilities, which other children without disabilities could do. They complained that the municipal council discriminated against their children in how they provided services because it refused to upgrade an adjoining road so that it could be used as a bus route.

Decision: The tribunal held that the council was not in breach of the Act because the services were provided to the community, not an individual. The tribunal said that the repair, maintenance and upgrading of roads were for the municipal district as a whole. The refusal to upgrade a particular road at the request of these complainants could not be said to be the refusal of a service. The upgrading of a road when asked by a particular individual was not a service that the council had to provide.

Gregor v State of Vic [2000] VCAT 414 (29 January 2000)

Complaints and relationships

Anti-discrimination law only allows you to make a complaint about a person with whom you have a legally regulated relationship.

The sorts of people you can complain about under disability discrimination law include:

- **an employer** where you are working or wanting to work, either full-time or part-time, casually or as a contractor. You must be a paid worker as volunteers are not covered by either Act. However, if a volunteer commits discriminatory conduct, the volunteer is considered an employee for purposes of holding the employer responsible for the actions of its employees
- **an education provider** where you are studying, or wanting to study
- **a provider of public premises** that you want to use
- **a landlord or real estate agent** who you rent from or want to rent from
- **a provider of goods, services and facilities** where you are a consumer or want to be a consumer
- **a committee, board or group** that governs a club or association where you are a member or want to join

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- a **qualifying body for a trade or profession** which you want to qualify for
- a **union or other industrial organisation** where you are a member or which you want to join
- a **person running a sporting event** or selecting people for a sport in which you are participating or want to participate
- a **local councillor** where you are also a councillor or a member of a council committee
- a **provider of federal laws and programs** that you are using or want to use.

This means that it is not possible for you to make a complaint about people who you have only a personal connection with, such as neighbours, members of the public, the people you live with, or your friends.

Exemptions

The Victorian and federal Acts allow for some lawful discrimination. For example, it is lawful to treat a person with a disability more favourably than a person without that disability in order to meet their special needs. Discrimination is also allowed in the following situations:

- **court orders** – it is lawful to discriminate if it is necessary to comply with a decision of the commission, a court order, an award made by an industrial court or tribunal, or if done by a statutory authority
- **insurance** – it is lawful to discriminate in the provision of insurance if it is based on reliable actuarial or statistical data
- **visa applications and other migration matters** – discriminatory provisions of the *Migration Act 1958* are exempt from the Disability Discrimination Act
- **public health** – under the Equal Opportunity Act it is lawful to discriminate against someone to safeguard public health and safety. Public health is mentioned in the Disability Discrimination Act only in relation to infectious diseases. It is lawful to discriminate against a person with an infectious disease if the discrimination is ‘reasonably necessary’ in order to protect public health
- **military service** – the Australian Defence Force may lawfully discriminate against job applicants or employees whose disability may stop them from being deployed on combat duties.

Exemptions can be granted under either Act. They are usually subject to terms and conditions. Exemptions apply for a fixed period of up to three years (under the Victorian Act) or five years (under the federal Act) but may be extended on further application.

Discrimination that is not unlawful – an example

In 1994 a man took out income protection insurance for both his home and personal loans. Later, he was diagnosed HIV positive, stopped work and was granted a disability pension. In February 1997 he submitted an insurance claim. The insurer declined his claim on the basis that ‘the policy excludes all claims made on the basis of the condition of HIV/AIDS’.

Decision: The court found that the man had been the victim of discrimination within the meaning of section five of the Disability Discrimination Act, as the insurance policy treated him less favourably than a person who did not have HIV. But the court was satisfied that there was a reasonable basis for the exclusion in the policies offered by the insurer from 1991 to 1996.

The court said that while it may not have been reasonable to rely on this information when the man made the claim, it was reasonable when the policy was made.

Theodore Xiros v Fortis Life Assurance Ltd [2001] FMCA 15

Employment

If you are complaining about disability discrimination in relation to employment, you need to show that your disability does not stop you doing what the job is essentially about. This does not mean that you have to be able to meet all the requirements of the job, only the really essential ones.

This is called meeting the ‘inherent requirements of the job’ in the federal Act. It is called performing the ‘genuine and reasonable requirements of the employment’ in the Victorian Act.

This means discrimination in employment is lawful if you are not able to meet the inherent or genuine and reasonable requirements of the job. For example, an essential part of a telephonist’s job is to be able to communicate by telephone. But it is not an inherent or genuine and reasonable requirement to hold the telephone in the hand. However, it is probably an inherent or genuine and reasonable requirement of a painter’s job to be able to climb ladders and carry paint tins.

When you are applying for a job, the employer has a responsibility to tell you what the essential requirements of the job are.

Whether a particular duty on a job description really is ‘inherent’ or ‘genuine and reasonable’ is something that is decided on a case by case basis. If you want to argue that you are being unlawfully discriminated against, then you will need to show that the job could still be done without carrying out that particular duty.

In order to meet the requirements of the job, you might need some adjustments to be made. The employer is not allowed to discriminate against you simply because you need adjustments.

See ‘Adjustments to overcome discrimination’ later in this chapter.

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Inherent requirements - an example

Mr Vickers applied for a job as an ambulance officer with the Ambulance Service of New South Wales. During the medical assessment, he told them that he had Type 1 diabetes and provided a letter from his endocrinologist supporting his appointment to the position. However, the independent body conducting the assessment recommended that Mr Vickers was unsuitable for the position because of his diabetes, and so the Ambulance Service rejected his application.

Mr Vickers claimed direct discrimination under the Disability Discrimination Act. The Ambulance Service said that the inherent requirements of the job include the ability to treat and transfer patients, and argued that because of his condition Mr Vickers could not do this safely. The Ambulance Service said that diabetic persons need to act promptly when their blood glucose levels need adjusting, which would divert Mr Vickers from his job. They also argued if he could not do so, he could quickly become ill, impairing his ability to work.

Decision: The Federal Magistrates Court found that Mr Vickers' medical evidence confirmed that he managed his condition well and it was unlikely that a risk would arise at all during his work as an ambulance officer. The court also felt that the few seconds needed to either pull the ambulance over or stop treating a patient in order for Mr Vickers to eat or drink some glucose were not likely to be critical to the wellbeing of his patient. The court awarded compensation to him.

Vickers v The Ambulance Service NSW [2006] FMCA 1232

Inherent requirements of original position - an example

Mr Cosma began working with Qantas in 1988 as a porter. The job involved moving baggage and cargo between the baggage room and aircraft, as well as loading and unloading the aircraft. In 1991 Mr Cosma injured his right shoulder. As part of his rehabilitation program, he was working on other duties and different roles. In 1997 he still could not carry out his pre-injury duties. Qantas notified him that it would try to find redeployment opportunities for two months, but if nothing could be found in that time his employment would end. Mr Cosma alleged that his termination amounted to discrimination under the Disability Discrimination Act.

Decision: The Federal Court said that the dismissal did not breach the law. At the time of his dismissal Mr Cosma was employed as a ramp porter, and the duties he performed after injury did not change the nature of his employment. The new duties he had were only a temporary measure intended for his rehabilitation and were not his new job. As Mr Cosma could not perform the 'inherent requirements' of a ramp porter, his termination did not amount to unlawful discrimination.

Cosma v Qantas Airways Ltd [2002] FCA 640

Adjustments to overcome discrimination

Once you are satisfied that your situation fits within the law's definition of direct or indirect discrimination (see 'What is unlawful discrimination?' earlier in this chapter), you need to think about what needs to be done for the discrimination to stop. In other words you are asking 'What sort of changes – or adjustments – need to be made?'

Then you need to think about how difficult it would be for the person discriminating against you to make these adjustments. Under the federal Act, they do not have to make the adjustment if it would be an 'unjustifiable hardship' for them to do so.

Factors that need to be taken into account are:

- the benefits the adjustment will have for other people who may be affected
- the disadvantages the adjustment will have for other people who may be affected
- the effect of the disability on the particular person, and what this means in terms of the adjustments they need
- the costs of making the adjustment.

Under the Victorian Act, an adjustment does not have to be made if it is unreasonable in the circumstances to expect the adjustment to be made.

So, depending on which Act you use, you have to show that the adjustments you need are not unreasonable or would not be an unjustifiable hardship for the person who is discriminating against you.

This can sometimes be difficult to gauge. For example, you might not know the costs involved in making the adjustment or the financial position of the person you are complaining about.

Do not let these issues put you off. They can be dealt with through the complaint process.

Examples of the sorts of adjustments that could reasonably be expected are:

- providing an enlarged computer screen for an employee with a vision impairment
- lowering a workbench for an employee who has a wheelchair
- providing other assessment methods such as oral exams for a student with difficulty writing or providing study notes in audio formats for a student with a vision impairment.

An example of 'unjustifiable hardship' under the federal Act is given below. In contrast, the Victorian Act provides for 'reasonable adjustments' to accommodate people with a disability. What would be considered reasonable accommodation under the Victorian Act is a matter for the court or tribunal to decide. This will depend on your circumstances, as you will see in the second example.

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Unjustifiable hardship – an example

A person who was deaf needed access to TTY facilities (a typewriter telephone that provides a readable message from the caller). A major telecommunications company made standard telephone handsets available to the community generally, but did not make TTY facilities available. The person and an advocacy organisation complained to the Australian Human Rights Commission that the telecommunications company discriminated against them by refusing to supply the TTYs. The company argued, among other things, that supplying the TTYs would be an unjustifiable hardship.

Decision: The commission rejected the company's argument and found that the enormous benefit of TTYs for people with profound hearing loss far outweighed the hardship that the company would experience through being forced to supply them. The commission considered how the cost of the supply of the TTYs could be managed over time to minimise the financial burden on the company. It also considered the extra profits that the TTYs would give the company. The company argued that if it provided TTYs to people who are deaf, then it would also be expected to supply other specialised equipment to other people. The commission found that this argument was not relevant to the case.

Scott v Telstra Corporation (1995) EOC 92-717

Reasonable requirements – an example

A passenger's inflexible left knee caused her discomfort in standard economy-size seats. She needed a non-wheelchair, bulkhead seat to fly in comfort. In three separate flights booked with Qantas she did not know until the last minute if she would have a bulkhead seat. On some flights she did not get a bulkhead seat but was seated in business class or conversion seats. She experienced 'detriment' in the form of seat uncertainty, delays and the need to negotiate with the airline. During one flight she strained her back moving her leg out of the passage to make room for trolleys.

Decision: The tribunal rejected her claim of indirect discrimination. It found that the airline's requirement that economy class passengers should be able to sit in an economy seat size space was reasonable. The tribunal accepted that to accommodate the complainant's space requirements, Qantas would lose revenue of about \$37 million per year from the removal of three seats per aircraft, or 198 seats for the entire fleet. Less than half of Qantas' fleet had economy bulkhead seating, and the demands of flight scheduling meant that aircraft allocated to a flight months in advance were frequently changed. Pre-allocation of bulkhead seats was not practical.

Perrett-Abrahams v Qantas Airways Limited [2000] VSC 504 (27 November 2000)

Action plans

Under the Disability Discrimination Act service providers can promote equal opportunity by developing and implementing a Disability Action Plan to stop disability discrimination. A Disability Action Plan is a tool for organisations to implement changes that remove barriers to access for people with a disability. The *Disability Act 2006* now requires Victorian public sector bodies (government departments and statutory bodies) to prepare a Disability Action Plan.

Many organisations, both public and private, have now lodged an action plan with the Australian Human Rights Commission. More information can be found on their website www.hreoc.vic.gov.au or at www.officefordisability.vic.gov.au

An action plan may be used as a part of a defence to a complaint by an organisation if the actions complained of are covered in the plan. Action plans can also be used by consumers to their advantage if they can show that the service provider is not following their own action plan.

Who can make a complaint under the Act?

Under the federal Act you can make a complaint of disability discrimination if you:

- have a disability and you believe that you have been unlawfully discriminated against because of your disability
- are a personal associate (such as a spouse, partner, relative or carer) of a person with a disability and you believe that you have been discriminated against because of that person's disability
- are acting on behalf of a person with a disability (or an associate of a person with a disability) who is experiencing unlawful discrimination because of that disability.

If you are acting on behalf of persons who have an intellectual disability or are not capable of making decisions for themselves, it is best to get legal advice before making a complaint.

Under the Victorian Act, you can make a complaint of disability discrimination if you:

- have an impairment and you believe that you have been unlawfully discriminated against because of it
- are acting on behalf of someone with an impairment who believes that they have been unlawfully discriminated against, if they cannot complain because of their impairment
- are acting on behalf of a person with an impairment whom you believe has been unlawfully discriminated against, if they cannot complain or ask you to complain
- are the parent of a child with an impairment whom you believe is experiencing unlawful discrimination.

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Under the Victorian Act, the carer of a person with an impairment, or anybody who is personally associated with a person with an impairment, can make a complaint if they experience discrimination because of their role.

Both Acts can be used by people who are not Australian citizens, provided the discrimination does not relate to a visa application.

Representative complaints

The federal Act allows you to make complaints on behalf of more than one person at the same time, if those people are all affected by the same act of discrimination. The Federal Court has rules about representative actions that are complex. You should get legal advice when making a complaint on behalf of a group or association.

Representative complaints are also permitted under the Victorian Act.



Deciding what action to take

If you have decided you have a disability discrimination issue, you need to work out how to deal with it. Legal action under disability discrimination law is one option.

You could also:

- take legal action in a different area of law, such as industrial relations law, consumer law, contract law or the law of negligence
- make a complaint through the internal grievance procedures of the organisation or company that is discriminating against you
- make a complaint to an independent dispute-resolution body, such as an ombudsman or complaints-handling scheme
- make a complaint to a professional body that regulates the work of the person who is discriminating against you
- have the matter dealt with an independent person, such as a private mediator.

Public inquiries

Under the federal Act, the Australian Human Rights Commission can conduct public inquiries into disability rights issues. Public inquiries can be useful where many individuals have complained about an issue but where an outcome is needed for all people with disabilities. An example is the captioned TV inquiry. You may also discover that your type of complaint is already the subject of an inquiry by the commission. So you may choose to wait for the outcome of the inquiry rather than making an individual complaint.

Collective action

Sometimes it is more effective for a group of people to take action together. You could join or form a lobby group and develop campaign strategies for change by talking to politicians or public servants. Making complaints under the Act may be part of the campaign. The public inquiry process mentioned above may also be part of a campaign.

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Outcomes

If you decide to take legal action, it is important to think about what you want to get out of it. In general, taking action under anti-discrimination law can achieve the following sorts of outcomes:

- changes to policy or practice
- reversal of discriminatory action, for example, job reinstatement or promotion
- getting someone to apologise, either publicly or privately, for something they have done
- getting someone to pay you compensation for loss or harm that you have experienced because of the discrimination.

Some complaints result in policy changes that can benefit other people with disabilities. For example, as a result of a complaint made by an individual, Melbourne City Council made changes to their parking policy so that now all people with disabilities can park their car without buying and displaying a ticket.

Another example is the case of a person who was excluded from a recruitment process because he failed the standard medical colour vision test. The terms of the conciliation agreement included that the employer (Australian Protective Service) change its recruitment policy. Applicants who failed the test would not be automatically excluded but given the chance to show their ability to perform the job's inherent requirements.

Systemic change and increased awareness of disability issues will only happen if people speak out and make complaints.

Compensation

To get compensation you have to show that you have suffered 'harm' or 'loss' as a result of the discrimination. You need to provide objective evidence of that loss or damage.

Under federal and Victorian law, compensation can be paid for:

- financial loss
- physical injury
- pain and suffering, including emotional distress.

You may need independent witnesses to back up your argument, particularly in some less tangible areas, such as emotional distress. You will probably need legal advice.

See 'Where to get help' at the back of this booklet.

Compensation - some examples

1. A woman was working as private secretary to a general manager when she developed occupational overuse syndrome. The Victorian Equal Opportunity and Human Rights Commission held that her former employer had discriminated against her because of her impairment when she was demoted to a position involving menial duties, an inadequate work environment and inadequate supervision and later terminated her employment.

Decision: She was awarded general damages of \$9,000 in addition to damages for loss of income and \$37,690 in special damages for her loss of income between the termination and the date of the hearing.

Corp v Peninsula Country Golf Club Inc [1995] VADT 10 (5 December 1995)

2. Ms Bassanelli intended to travel to Japan and applied for travel insurance with the company. The company refused her application for any insurance because she had breast cancer.

Decision: The court found that there was no actuarial or statistical data when it came to the decision to refuse an insurance policy to Ms Bassanelli and that refusal was unreasonable and discriminatory. The company was ordered to pay her damages of \$5,000 together with interest.

Bassanelli v QBE Insurance [2003] FMCA 412 (26 September 2003)

How long will it take?

Legal action can be a very slow process. Complaints can take months, although an urgent matter can be dealt with more quickly. If the case ends up going to a court or tribunal hearing, it is likely to take even longer.

You need to keep this in mind when deciding to pursue your case through legal processes. Time delays can be stressful and can make it hard to remember the details of what happened. It is a good idea to be organised and keep records. You also need to be patient. It will be worth the wait if you get the outcome you are after.

Be emotionally prepared

Taking any sort of legal action can be stressful, and disability discrimination complaints are no exception. On the other hand, it can be very difficult to feel that you have been discriminated against, and nothing was done about it. Sometimes taking action is a way of overcoming the stress of having experienced discrimination.

Our legal system in Australia is adversarial, which means one side taking action against another. Conflict is often a part of the process. You may have to go over unpleasant events many times and in a lot of detail. You need to think about how this sort of stress might impact upon other areas of your life and what support you can find to help you along the way.

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Ultimately the choice is up to you. If you are unsure about what to do, you can contact the Victorian Equal Opportunity and Human Rights Commission or the Australian Human Rights Commission to discuss your options and the complaint process. You may also contact a legal advice organisation.

See 'Where to get help' at the back of this booklet.

Victimisation

Some people worry that they will be harassed or victimised if they make a complaint, particularly against someone they have a continuing relationship with, such as their employer.

Under the federal and Victorian Acts, it is unlawful to victimise a person because they have taken action under anti-discrimination law. Victimisation is when one person subjects, or threatens to subject, someone else to some form of detriment or harm.

Victimising someone who has made a complaint is against the law and there are penalties if someone does this to you. Making a complaint might seem hard, but friends and family can give you good advice and support. Remember, advocacy organisations and community legal centres are also there to help you.

Refusal of employment - an example

Mr Drury had worked as a skilled laborer for Andreco for almost 27 years. After suffering a workplace injury Drury brought an unsuccessful claim against Andreco for unfair dismissal and disability discrimination. When he became fit to return to work again, he applied to Andreco for work. Andreco initially told Drury that there was no work available at his original worksite. He said he was willing to travel to Whyalla where he knew there was a vacancy but the company said that there were no positions for him in Whyalla. Mr Drury made a disability discrimination complaint against Andreco. He claimed that the company victimised him because of his earlier complaints by refusing to rehire him under the pretext of lack of vacancy.

Decision: The Federal Magistrates Court agreed and ordered that Andreco pay \$5000 in general damages. The court was satisfied that there was work for Mr Drury to perform at Whyalla, and that Andreco had not considered his application according to his merits and skills. The court made it clear that when assessing candidates for employment employers should not be influenced by the fact that the employee may have made a complaint about the employer in the past.

Drury v Andreco Huurill Refractory Services Pty. Ltd (2005) FMCA 1226

Checklist

- Does your disability fit in with the law's definition of disability?
- Are you someone who is eligible to make a complaint? Or is someone else able to make a complaint on your behalf?
- Is the discrimination happening in an area covered by the law?
- Are you complaining about somebody who the law allows you to complain about?
- Are you within the time limits?
- Do you know what outcome you want?
- Are you prepared for possible costs, stress and delays?

Complaints process

Remember the law is changing, see 'Defining disability' in 'Explaining the law' at the start of this booklet.

There are various steps that you need to go through when you make a complaint of unlawful disability discrimination. The steps are similar under federal and Victorian laws, although there are some important differences when you get to the hearing stage.

Most complaints will go through all of the stages listed here until a resolution is found. In some cases, however, the case goes straight to a hearing after the complaint has been made. This is explained later in this booklet. Your case will not necessarily go to a court or tribunal hearing. Most cases are settled before they get to that stage.

Time limits

Generally you have to make a complaint within 12 months from when the discrimination took place.

If you lodge a complaint outside this time your complaint may be declined unless one of these things applies:

- you can show that the discrimination was continuing and so you experienced discrimination during different times outside the 12-month period within the time, even if it began before then
- you can show that there was some undue hardship that stopped you lodging the complaint within the time, such as illness or family care.

Getting help from the commissions

You can get help from either the Australian Human Rights Commission or the Victorian Equal Opportunity and Human Rights Commission to write and lodge your complaint. They cannot give you legal advice, but they can help you understand what you have to do, and make sure you follow the right procedure.

See 'Where to get help' at the back of this booklet.

Costs

It does not cost anything to make a complaint to the Victorian Equal Opportunity and Human Rights Commission or the Australian Human Rights Commission. If your case can be sorted out through conciliation, there will be no costs involved, unless you are paying for your own lawyer. If conciliation is unsuccessful and you decide to continue with your case at a court or tribunal, there will be costs involved. These may include:

- legal fees
- court filing fees
- a court order against you for the other side's costs.

Legal fees

If you decide to go ahead to a court hearing, you will need help from a lawyer. Legal fees can be quite expensive if you are using a private solicitor. They can include the fee charged by the solicitor as well as costs for obtaining documents, reports and paying any expert witnesses. You may be able to get free legal help from one of the organisations listed in 'Where to get help' at the back of this booklet.

Filing fees

There are no fees for lodging your original complaint with the Victorian Equal Opportunity and Human Rights Commission or the Australian Human Rights Commission. However, if you go to a hearing, you may have to pay a filing fee at the court. A fee of \$50 is usually charged for lodging an application under the federal Act in the Federal Court or the Federal Magistrates Court. You can apply to have this fee waived if you have a concession card or are experiencing financial hardship. There is no fee for lodging an application to the Victorian Civil and Administrative Appeals Tribunal under the Victorian Act.

The rules about filing fees can change. You can check with the relevant court or tribunal.

Court order for costs

Sometimes legal costs can be awarded against the party that loses the case. Generally, this will happen in Disability Discrimination Act cases heard in the Federal Court or the Federal Magistrates Court, but it is up to the court to decide. This does not usually happen with complaints made under the Victorian Equal Opportunity Act, although the tribunal has the power to do so.

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Which Act to use

You need to decide if you will complain under the federal Disability Discrimination Act or the Victorian Equal Opportunity Act. You cannot change your mind after the commission you have selected has begun investigating your complaint.

You need to make the complaint under the federal Act in some cases like complaints against Commonwealth service providers or employers.

The following types of complaints need to be made under the federal Act:

- complaints against Australia Post
- complaints against private clubs
- complaints about provision of services by municipal governments to the general public
- complaints of discrimination because of assistance animals (other than guide dogs)
- complaint against the Victorian Equal Opportunity and Human Rights Commission or the Victorian Civil and Administrative Tribunal
- complaints about employment for personal or domestic services or political employment
- complaints about offer of employment in business with not more than five full-time employees or about offer of employment in family business
- complaints about employment in relation to a dramatic or an artistic performance, entertainment, photographic or modelling work
- complaints which refer to events that took place outside Victoria.

The following types of complaints need to be made under the Victorian Act:

- complaints involving obesity when obesity is a consequence of a lifestyle choice rather than a medical condition
- complaints involving two attributes of discrimination, for example, disability and gender identity or sexual preference
- complaint against the Australian Human Rights Commission in the provision of services.

The Victorian Civil and Administrative Tribunal is also obliged to consider the provisions of the Charter of Human Rights when interpreting the Equal Opportunity Act and determining legal issues in the cases before the tribunal. The Federal Magistrates Court cannot do this.

The Victorian Equal Opportunity and Human Rights Commission usually has a faster complaint handling process than the Australian Human Rights Commission. It has a maximum 70-day period for investigation of the complaint and reaching a decision to decline it or refer it for conciliation. The federal commission is also based in Sydney so unlike the Victorian commission, the investigators and conciliators need to plan and maximize their trips to Victoria.

See 'Where to get help' at the back of this booklet for contact details and a list of other legal organisations, which can help you decide which Act to use, and may be able to help you with your complaint.

At the end of this booklet, there is an appendix that outlines the main differences between the federal Act and the Victorian Act. Many of these differences are also mentioned throughout this booklet.

You cannot make the same complaint in both jurisdictions at the same time. Once you have made a complaint under the Victorian Act and they have begun investigating it, you cannot make another complaint about the same matter under the federal Act.

In contrast, the Victorian commission may consider complaints that have been terminated by the federal commission, even after the complaint has gone through the whole investigative and conciliatory process of the federal commission. The decision about which jurisdiction to use can be important. Each one has its own advantages and disadvantages and so the right one for you will depend very much on the circumstances of your case. It is not advisable to file and then withdraw and transfer your case from one commission to another, because the other party to your case may say that your complaint is an abuse of process.

One of the main differences is that under the federal Act, if your complaint cannot be sorted out through conciliation, it will go to the Federal Court or the Federal Magistrates Court.

Under the Victorian Act, complaints that cannot be sorted out go to the Victorian Civil and Administrative Tribunal. The processes in the courts under the federal Act may be a little more daunting, formal and costly. Costs are discussed on the previous page.

Remember that whichever Act you use, it will not cost you anything to make a complaint and go through conciliation. You do not have to proceed to a court hearing if you do not want to. You can also withdraw after conciliation.

Making the complaint

In most cases, you need to begin by putting your complaint in writing.

The Australian Human Rights Commission has a complaint form, but there is no requirement that you use this form when making your initial complaint.

It is important to provide clear and accurate details of your complaint. The Victorian Equal Opportunity and Human Rights Commission usually provides a form that asks a number of questions about the events you are complaining about. The commission would use the answers that you have provided to prepare a statement of complaint.

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Stages in the complaint process

The stages of a discrimination complaint can include the following:

1. making the complaint – writing and lodging it
2. investigation of the complaint
3. conciliation
4. court or tribunal hearing.

Information to include

In your complaint you need to include:

- your name, address and how you can be contacted. If you are making a complaint on behalf of someone else, make sure that you also provide their name and contact details
- details of your disability, or of the other person's disability if you are an associate of a person with a disability
- the name of the person or organisation you are complaining about, and their contact details
- the relationship between yourself and the person you are complaining about, that is, they are your employer, or you are a customer at their store, or you are someone who wants to have access to their building
- the details of the discriminatory acts that happened to you, including:
 - **when** it happened
 - **what** happened
 - **where** it happened
 - **who** was involved
- the effect the discrimination has had on you
- any steps that you have already taken to deal with the situation
- what you want to see happen as a result of the discrimination that you experienced.

If you are not sure of the set-up of the company about which you are complaining, you may ask either commission to do a company search, or require the organisation to provide its legal name and identity.

Lodging the complaint

Lodging the complaint is simple. Complaints under the federal Act can be lodged by mail, fax or electronically through the Australian Human Rights Commission's website.

If you make a complaint under the federal Act at the Victorian Equal Opportunity and Human Rights Commission in Melbourne, the commission will not investigate your complaint, but will return it to you for filing at the Australian Human Rights Commission.

If your complaint is under the Victorian Act, send it to the commission in Melbourne.

See 'Where to get help' at the back of this booklet for contact details.

Make sure that you keep a copy of the complaint for yourself.

Investigation of your complaint

After you have made the complaint, it will be checked by the relevant commission to see if it fits within the legislation. The commission might need to contact you to get more information before it can make this decision.

If your complaint is refused

If your complaint does not meet the basic requirements of the legislation, or if it is vexatious or trivial, the commission might refuse it at this stage. The commission will inform you of this and the reasons why. If this happens you can:

- apply to the Federal Court to have the issues in your complaint heard (for a Disability Discrimination Act complaint), or
- ask the Victorian Equal Opportunity and Human Rights Commission to refer the matter to the Victorian Civil and Administrative Tribunal for hearing (for an Equal Opportunity Act complaint).

There are costs associated with these options. Get legal advice first.

The risk that you will have costs awarded against you is greater when your complaint has already been dismissed by the commission.

If your complaint is accepted

If the commission accepts your complaint, they will contact the respondent (the person you are making the complaint against) and the investigation will start. The respondent will be sent a copy of your complaint. The commission might ask the respondent to make a written response to your complaint. This is more likely to happen in cases where the complaint is complex.

The early stages of investigation will focus on seeing if the matter can be sorted out quickly and easily. Sometimes the respondent is prepared to sort out the situation at the beginning. If this appears unlikely, then the commission will investigate the complaint further. They might want more details of:

- the evidence you have to support your allegations
- the evidence the respondent has to deny your allegations.

The commission can legally make a person provide information that it needs when investigating a complaint.

Conciliation

Conciliation is a way to try to get you and the respondent to come to an agreement. You can ask for this at any stage of the investigation process. The aim of conciliation is not to prove your case but to discuss your complaint, and to arrive at a position where both sides can agree.

Some complaints are sorted out through negotiation by telephone or correspondence. Often the commission will organise a conciliation conference unless they believe that there is no real chance of your matter being conciliated.

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The commission can make attendance at the conciliation conference compulsory. A trained conciliator conducts the conference. It will be run in whatever way the conciliator thinks best. Generally the conciliation is an informal conference and follows a simple format.

Both sides get the chance to have a say and to listen to one another, and to work out if there is any possibility of an agreement. Sometimes the conciliation will happen with the two of you in the room, or sometimes it will happen with you in separate rooms. You can have a lawyer or another person with you at the conciliation conference. The respondent can have a lawyer if the conciliator agrees.

Confidentiality

What happens in conciliation is completely confidential. Any agreement reached in conciliation is also confidential unless there is mutual agreement otherwise. While not many respondents allow this, if the agreement can be made public, it can be helpful to gain wider public exposure of the outcome of the complaint.

If you do not reach an agreement, and the matter goes on to a court or tribunal hearing, what has been discussed in conciliation cannot be used in evidence in the hearing.

Benefits of conciliation

It is always good to give conciliation a proper go. If you can agree on an outcome at this stage, you will save yourself a lot of the time, stress and possibly cost that is involved in going to a court or tribunal hearing. At conciliation you may also bring an advocate, a family member or a support person to help you.

Remember that when you go to a hearing, someone else decides the matter and you have no real control over what the outcome will be. At a conciliation conference you have more opportunity to have a say in the outcome.

This does not mean that you should settle for something at the conciliation conference if you do not believe that it is fair and reasonable. The conciliator can adjourn the conference and give both of you a few days to consider the proposals.

Court proceedings

If conciliation is unsuccessful, you now need to think about if you have a strong enough case to proceed with legal action at the court or tribunal. If you want to continue, it is best to get legal advice. The onus is on you to prove your case. You need to prove your case 'on the balance of probabilities'. This means you have to show that it is more probable than not that you experienced unlawful discrimination. If you cannot prove that you have been discriminated against, the other party does not have to prove that it has not discriminated against you.

Applying for a hearing

If your complaint is made under the Victorian Act, and the commission notifies you that it has not been sorted out through conciliation, you can write to the commission asking them to refer your complaint to the Victorian Civil and Administrative Tribunal (VCAT) for a hearing.

You have 60 days to do this (or 30 days if it is an 'expedited' complaint, see 'Urgent cases' later in this chapter).

The Victorian Civil and Administrative Tribunal will acknowledge receiving your application for a hearing. You will then have to serve the respondent with a copy of the application and a copy of the commission's report – this can be done in person, by mail or by fax. Get legal help to do this.

If your complaint is under the federal Act, and conciliation has not been successful, you will be notified by the Australian Human Rights Commission that your complaint has been terminated.

You then have 28 days from the date of that notice to lodge your application for hearing with the Federal Court or with the Federal Magistrates Court. Try to avoid the pressure of lodging the complaint on the last day. If the last day falls on a weekend or public holiday, lodge the application on the last working day before the weekend or holiday. You can contact either court for information about which court would be appropriate for your case.

In general you should register your complaint with the Federal Magistrates Court. If you make your complaint after 28 days, you need to apply to the court for an extension of time. You will need good reasons to explain the delay.

The Federal Court has a form (called Form 167) which you must use when lodging a complaint with the Federal Court. This is the same form that you will use to ask for an extension of time if you need one. You also have to attach an affidavit when lodging the form. The affidavit outlines your account of the events leading to the complaint.

The Federal Magistrates Court also has an application form and an information sheet. Like the Federal Court, you must attach an affidavit. After filing the application, you must personally serve a copy on the respondent. After this, all other documents may be served by post.

Directions hearing

Once an application for hearing has been made, the tribunal or court will hold a 'Directions Hearing'. At this hearing, decisions will be made about how the matter is to proceed.

The tribunal or court will say which documents need to be completed and when this needs to happen. This could include details of your complaint, the defence, witness statements of affidavits and other supplementary information. It will also make decisions about which documents each party needs from the other – such as financial documents if the other party is claiming that they cannot afford the adjustments you need.

The tribunal or court will usually ask you if you are prepared to try mediation. If you agree, they will arrange for a mediator to try to settle the matter before it goes to hearing. You will also be asked to give some idea of how long you think the case will run.

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The hearing

If the matter still has not been sorted out then it will go to hearing. A hearing in the Federal Magistrates Court or Federal Court is more formal than a hearing at the Victorian Civil and Administrative Tribunal. But in either case, both of you have to put forward your side of the story and support this with evidence.

You can represent yourself or you can have another person act on your behalf. Your representative does not have to be a lawyer. But it is strongly advised that you have legal representation at this stage, especially if your case is being heard in the Federal Court. The procedures and rules of evidence at any hearing can be very confusing. No matter how strong your case is, you could easily lose if you are not properly prepared and organised at the hearing. If the respondent has a lawyer, you should have a lawyer, or at least have someone familiar with the rules of the court.

See 'Where to get help' at the back of this booklet.

Each side will have the opportunity to question each other and any witnesses.

After hearing both sides of the argument, the judge (in the Federal Court), the magistrate (in the Federal Magistrates Court) or the tribunal member (in the Victorian Civil and Administrative Tribunal) will make a decision.

The decision will note such things as:

- if there has been any unlawful discrimination against you
- what, if anything, the respondent should do to fix the problem.

Appeals

If you are not happy with the outcome of the hearing, there are some limited opportunities for appeal. You cannot appeal simply because you feel that the decision was not a good one, or because there is something extra that you want to say.

Appeals from the Victorian Civil and Administrative Tribunal are heard in the Victorian Supreme Court. However, an appeal can only be made on a point of law. This means that you have to show that the person who made the decision got the law wrong. If you want to appeal you should get legal advice.

You can apply for a review of decisions of the Federal Magistrates Court to the Federal Court on points of facts or law.

Urgent cases

Under the federal and Victorian Acts the investigation can be expedited, that is it can be done quickly. You need to tell the commission why you think this should happen.

If your case is urgent, you can apply to have it heard by the court more or less immediately.

Usually, an urgent case is one where you need to stop something from happening, because it would be too late to do anything about it later on. In this sort of situation, an interim decision can sometimes be made.

The court or tribunal can rule that nothing changes until the matter is dealt with through a proper hearing. There may or may not be attempts to sort out the matter through conciliation first. To make this sort of ruling, the court has to be convinced that it will not be enough to give you compensation, or whatever else it might decide, if you win your case when it is heard in full.

Urgent matters and interim decisions - an example

A family that had two members with disabilities was threatened with eviction by a public housing authority. The family believed that they were being evicted because of the family members' disabilities and because they were from an indigenous background. They wanted a decision made urgently to stop the threatened eviction, while they waited for a final decision to be made. They applied for an interim determination.

Decision: The Federal Court made a determination that delayed the eviction. The court said that although the case for discrimination was weak, it did not believe it was so weak that the matter should not go for a hearing. The court looked at many factors, for example, if the eviction took place the family would be without a home. The court said that hearing the case in full later on, or providing compensation, would not make up for this period of homelessness. This would be a much greater inconvenience to the family, than any inconvenience that delaying the eviction would create for the public housing authority. The court arranged a final hearing of the case very quickly. The effect of the interim decision was to keep things the same between everyone concerned before a full hearing could be held.

Carol Beverly Michael v The State Housing Commission No. WAG 90 of 1996 FED No. 600/96

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Where to get help

You do not have to have a lawyer to prepare and run a complaint about disability discrimination. However, you are strongly advised to get legal advice. Legal processes can be complex and confusing, and often there are a lot of difficult decisions that need to be made along the way. Getting legal help is one way of maximising your chances of running your case effectively.

If you have difficulty getting legal help for the entire course of your case, you may be able to get advice and help at the more critical stages. These include:

- **Getting advice when you are writing the complaint.** This is important so that your complaint is written in a way that fits in with the legislation. It is also important to get advice about the best jurisdiction to complain in.
- **Getting legal advice before conciliation.** Legal advice at the conciliation stage is valuable so that you know what a reasonable settlement would be, and if you should accept a compromise. Legal advice can also help you plan what strategies and approaches to take during conciliation and your prospects of success if you decide to take your case further.
- **Getting legal representation at the hearing.** Once you get to the hearing stage, it is particularly important to get legal help. The processes of courts and tribunals can be confusing and it is quite easy to make procedural mistakes that could have a serious effect on your case.

You can get legal help by contacting the groups below.

Legal and government resources

Victoria Legal Aid

Contact us for free information about the law and how we can help you. You can speak to someone in English or other languages.



Our Legal Information Service

Open Monday to Friday, 8.45 am to 5.15 pm
Tel: 9269 0120 or 1800 677 402 (country callers)

See back cover for office locations.

www.legalaid.vic.gov.au

Local community legal centres

Community legal centres provide free legal advice and assistance. Ring the Federation of Community Legal Centres to get contact details of the community legal centre nearest to you. Also visit www.communitylaw.org.au for more information.

Tel: 9652 1500

Disability Discrimination Legal Service

This is a community legal service specialising in disability discrimination law. The service offers free information, advice and assistance to people with disabilities experiencing disability discrimination.

See back cover for details.

Also visit www.communitylaw.org.au/ddls for more information.

Villamanta Disability Rights Legal Service Inc.

This is a community legal service specialising in disability-related legal issues. The service offers free information and advice to people with disabilities experiencing disability discrimination.

See back cover for details.

Also visit www.villamanta.org.au for more information.

Do you need an interpreter?

If you need an interpreter to help you speak to any of these services you can call

Telephone Interpreter Service

Tel: 131 450

Ask the interpreter to put you through to the service you need.

Commissions

Australian Human Rights Commission

GPO Box 5218, Sydney NSW 2000

Tel: 1300 656 419

www.hreoc.gov.au

Victorian Equal Opportunity and Human Rights Commission

Level 3, 380 Lonsdale St, Melbourne VIC 3000

Tel: 9281 7111 or 1800 134 142 (country callers)

TTY: 9281 7110

www.equalopportunitycommission.vic.gov.au

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Appendix

Comparing the Victorian and federal Acts

Note: changes are proposed for the Disability Discrimination Act. See 'Explaining the law' at the start of this booklet.

	Disability Discrimination Act (Commonwealth 1992)	Equal Opportunity Act (Victoria 1995)
Definition of disability	<p>Disability includes:</p> <ul style="list-style-type: none"> total or partial loss of the person's bodily or mental functions total or partial loss of a part of the body the presence in the body of organisms causing disease or illness the presence in the body of organisms capable of causing disease or illness the malfunction, malformation or disfigurement of a part of the person's body a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction, or a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour; and includes a disability that: <ul style="list-style-type: none"> presently exists previously existed but no longer exists may exist in the future, or is imputed to a person 	<p>Impairment means:</p> <ul style="list-style-type: none"> total or partial loss of a bodily function the presence in the body of organisms that may cause disease total or partial loss of a part of the body malfunction of a part of the body, including: <ul style="list-style-type: none"> a mental or psychological disease or disorder a condition or disorder that results in a person learning more slowly than people who do not have that condition or disorder, or malformation or disfigurement of a part of the body <p>The definition of discrimination includes present, past, future or imputed disability</p>

	Disability Discrimination Act (Commonwealth 1992)	Equal Opportunity Act (Victoria 1995)
Areas of unlawful discrimination	<p>The areas include:</p> <ul style="list-style-type: none"> education employment and employment-related areas sport access to premises goods, services and facilities accommodation land clubs and incorporated associations federal laws and programs 	<p>The areas include:</p> <ul style="list-style-type: none"> education employment and employment-related areas clubs and incorporated associations goods and services and disposal of land sport local government accommodation
Exemptions	<p>It is not unlawful to discriminate against a person because of his or her disability if the person needs adjustments that would constitute an unjustifiable hardship</p> <p>It is not unlawful to discriminate against a person with a disability in employment if that person cannot meet the 'inherent requirements' of the job</p> <p>It is not unlawful to discriminate against a person with an infectious disease if it is reasonably necessary to do so in order to protect public health</p> <p>Religious beliefs are not a ground for exemption</p>	<p>It is not unlawful to discriminate against a person because of his or her impairment if the person needs adjustments that are 'unreasonable in the circumstances'</p> <p>It is not unlawful to discriminate against a person with a disability in employment if that person can't perform the 'genuine and reasonable requirements' of the employment</p> <p>It is not unlawful to discriminate against a person with an impairment if it is necessary to do so in order to protect the health, safety or property of any person (including the person being discriminated against), or the public generally</p> <p>It is not unlawful for a person to discriminate against another person if it is necessary for them to do so in order to comply with their genuine religious beliefs or principles</p>

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	Disability Discrimination Act (Commonwealth 1992)	Equal Opportunity Act (Victoria 1995)
Exemptions (continued)	Discrimination on the basis of disability is not unlawful in the provision of certain Commonwealth pensions and allowances	Commonwealth programs are not covered
	Discrimination on the basis of disability is not unlawful in relation to certain aspects of combat duties and peacekeeping services	Only private clubs receiving state or local government funding, or operating on Crown land, are covered by the Act – other private clubs are exempt
	Private clubs not exempt	It is not unlawful to discriminate in personal services or domestic employment, political employment, family employment, small business and employment in relation to dramatic or an artistic performance, entertainment, photographic or modelling work
Complaints on behalf of more than one person	Representative actions possible	Provision for class or representative actions was introduced in 2006
Harassment	Harassment on the grounds of disability is unlawful in employment, education and the provision of goods and services	Harassment is covered under the definition of 'subjecting a person to detriment'
Investigation and conciliation of complaints	By Australian Human Rights Commission	By Victorian Human Rights and Equal Opportunity Commission



	Disability Discrimination Act (Commonwealth 1992)	Equal Opportunity Act (Victoria 1995)
Hearing of complaints	In Federal Court of Australia or Federal Magistrates Court	In the Anti-discrimination List of the Victorian Civil and Administrative Tribunal
Lodgement fees for hearing	\$50.00	None
Appeal	The court's decision may be appealed on questions of facts and laws	VCAT decision may be appealed only on question of law

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Disability Discrimination Legal Service

Ross House
Level 2, 247 Flinders Lane
Melbourne VIC 3000
Tel: 9654 8644
Country callers: 1300 882 872
TTY: 03 9654 6817
Email: info@ddls.org.au
www.communitylaw.org.au/ddls

Villamanta Disability Rights Legal Service Inc.

44 Bellerine St
Geelong VIC 3220
Tel: 03 5229 2925
Toll free: 1800 014 111
TTY: 133 677 then ask for 03 5229 2925
Email: legal@villamanta.org.au
www.villamanta.org.au

Victoria Legal Aid

Legal Information Service

Tel: 9269 0120
Country callers: 1800 677 402

Offices

MELBOURNE
350 Queen St
Melbourne VIC 3000
Tel: 9269 0120
Country callers: 1800 677 402

Suburban offices

BROADMEADOWS
North western suburbs
Level 1, Building 1
Broadmeadows Station Centre
1100 Pascoe Vale Rd
Broadmeadows VIC 3047
Tel: 9302 8777

DANDENONG
Westernport region
Level 1, 9-15 Pultney St
Dandenong VIC 3175
Tel: 9767 7111

FRANKSTON
Peninsula region
Cnr O'Grady Ave & Dandenong Rd
Frankston VIC 3199
Tel: 9784 5222

PRESTON
North eastern suburbs
42 Mary St
Preston VIC 3072
Tel: 9416 6444

RINGWOOD
Outer eastern suburbs
23 Ringwood St
Ringwood VIC 3134
Tel: 9259 5444

SUNSHINE
Western suburbs
1/474 Ballarat Rd
Sunshine VIC 3020
Tel: 9300 5333

Regional offices

BALLARAT
Central Highlands region
Area A, Level 1
75 Victoria St
Ballarat VIC 3350
Tel: 5329 6222
Toll free: 1800 081 719

BENDIGO
Loddon-Campaspe region
424 Hargreaves St
Bendigo VIC 3550
Tel: 5448 2333
Toll free: 1800 254 500

GEELONG
Barwon region
Level 2, 199 Moorabool St
Geelong VIC 3220
Tel: 5226 5666
Toll free: 1800 196 200

HORSHAM
Wimmera region
29 Darlot St
Horsham VIC 3400
Tel: 5381 6000
Toll free: 1800 177 638

MORWELL
Gippsland region
Cnr Chapel & George St
Morwell VIC 3840
Tel: 5134 8055

BAIRNSDALE
Gippsland region (branch office)
101A Main St
Bairnsdale VIC 3875
Tel: 5153 1975

SHEPPARTON
Goulburn region
36-42 High St
Shepparton VIC 3630
Tel: 5823 6200

WARRNAMBOOL
South Coast region
185 Fairy St
Warrnambool VIC 3280
Tel: 5559 7222
Toll free: 1800 651 022

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