

Disability Discrimination

JobWatch
Employment Rights Legal Centre

What is discrimination?

Discrimination means direct or indirect discrimination because of a legally protected attribute, including a characteristic that a person with that attribute generally has, or that is generally connected to a person with that attribute.

Direct discrimination

Direct discrimination occurs if a person treats, or proposes to treat, a person with an attribute unfavourably because of that attribute.

For example, an employer refuses to employ a person because of their disability.

Indirect discrimination

Indirect discrimination occurs if a person imposes, or proposes to impose, a requirement, condition or practice—

- that has, or is likely to have, the effect of disadvantaging persons with an attribute; and
- that is not reasonable.

For example, an employer has a requirement that certain equipment must be used in the workplace. This may disadvantage a person because of their disability if that equipment is difficult to use for people with a physical disability. The requirement may not be reasonable if the use of that particular equipment is not necessary to perform the job.

Reasonable adjustments

Anti-discrimination laws require employers to make reasonable adjustments or provide services or facilities for employees with disabilities to enable them to perform the inherent requirements of their job. What is reasonable depends on the circumstances. If making the necessary adjustments would impose an unjustifiable hardship on the employer (for example, if the financial cost were excessive), they are not required to be made.

When are employees protected against disability discrimination?

Federal and state anti-discrimination laws make it unlawful to discriminate against a person because of their disability in the area of employment, which covers employees and independent contractors. They protect workers from discrimination at all stages of employment, including:

- **before employment**, including how positions are advertised, how interviews are conducted, whether employment is offered and on what terms;

About this Fact Sheet

This Fact Sheet discusses state and federal laws that protect workers from discrimination based on disability. It is designed to help you identify your rights and to take the most appropriate action if you believe you have been discriminated against in employment because of your disability.

Disclaimer

This Fact Sheet contains information of a general nature only and is not a substitute for professional legal advice. You should obtain legal advice from a lawyer about your particular situation before acting on any of the following information. This Fact Sheet is designed for employees and prospective employees in Victoria, Tasmania and Queensland only. If you are not from these states, you should obtain advice about your specific case as soon as possible.

When are employees protected against disability discrimination? (cont.)

- **during employment**, including being given less favourable terms or conditions of employment, being demoted, denied training opportunities, promotion, transfers, performance pay or other employment-related benefits; and
- **at the end of employment**, including being selected for redundancy or dismissed.

When will my employer be liable for discrimination?

If a person engages in discriminatory conduct during employment, the employer is vicariously liable for the discriminatory conduct unless the employer took reasonable precautions to prevent their employee from engaging in discriminatory conduct.

It is also unlawful to victimise a person, for example, dismissing or threatening to dismiss an employee because they made a complaint about discrimination.

Conduct is discriminatory if disability is among the reasons for the conduct – it does not need to be the only reason.

The employer will also be liable for discrimination if it fails to make reasonable adjustments or provide the necessary services or facilities for employees with disabilities.

Note: In determining whether a person discriminates, the person's motive is irrelevant.

The employer may have a defence if the employee cannot perform the inherent requirements of their job (for example, the ability to drive a vehicle for a person employed as a driver), or where the requirement, condition or practice is reasonable. Other exceptions and exemptions may apply.

What action can I take?

If you have been dismissed from your job or other discriminatory conduct has occurred because of your disability, you may be able to make a **state or federal discrimination complaint**. The process for lodging a complaint in each jurisdiction is set out below.

Victoria

Under the *Equal Opportunity Act 2010* (Vic) (EOA), "disability" is defined to mean:

- total or partial loss of a bodily function; or*
- the presence in the body of organisms that may cause disease; or*
- total or partial loss of a part of the body; or*
- 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*

Note: You cannot make both state and federal claims at the same time. Once you have lodged a complaint in a state jurisdiction, you cannot lodge a complaint under federal anti-discrimination law about the same conduct. However, you may be able to lodge a complaint in the federal jurisdiction and then change to the state jurisdiction. Legal advice and representation is strongly recommended.

Note: For further assistance, contact JobWatch, your union, or a lawyer.

Note: There are significant differences between the state and federal jurisdictions, including in relation to costs. Additionally, time limits have been listed below but may not be strictly applied in some circumstances. For further assistance, contact JobWatch, your union, or a lawyer before deciding which jurisdiction to choose.

Victoria (cont.)

This definition includes a disability that may exist in the future, and behaviour that is a symptom or manifestation of a disability.

If you have been discriminated against in employment because of your disability in Victoria, you have **12 months** from the date of the discriminatory conduct to lodge a complaint under the EOA with the Victorian Civil and Administrative Tribunal.

It is also possible to lodge the complaint initially with the Victorian Equal Opportunity and Human Rights Commission to make use of the voluntary conciliation process they offer, aimed at settling the matter by agreement between the parties.

Queensland

Under the *Anti-Discrimination Act 1991* (Qld) (ADAQ), the term “impairment” is used rather than disability, and is defined to mean:

- a. *the total or partial loss of the person’s bodily functions, including the loss of a part of the person’s body; or*
- b. *the malfunction, malformation or disfigurement of a part of the person’s body; or*
- c. *a condition or malfunction that results in the person learning more slowly than a person without the condition or malfunction; or*
- d. *a condition, illness or disease that impairs a person’s thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour; or*
- e. *the presence in the body of organisms capable of causing illness or disease; or*
- f. *reliance on a guide, hearing or assistance dog, wheelchair or other remedial device*

This definition includes past or present conditions originating from birth or caused by illness, disease or injury.

If you have been discriminated against in employment because of your disability in Queensland, you have **12 months** from the date of the discriminatory conduct to lodge a complaint under the ADAQ with the Queensland Human Rights Commission (QHRC).

If the complaint is accepted, the QHRC will conduct a conciliation process aimed at settling the matter by agreement between the parties. If this is unsuccessful, the complainant may have the matter dealt with by the Queensland Industrial Relations Commission for arbitration.

Tasmania

Under the *Anti-Discrimination Act 1998* (Tas) (ADAT), “disability” is defined to mean:

- a. *a total or partial loss of the person’s bodily or mental functions;*
- b. *total or partial loss of a part of the body;*
- c. *the presence in the body of organisms causing or capable of causing disease or illness;*
- d. *the malfunction, malformation or disfigurement of a part of a person’s body;*

Victorian Civil and Administrative Tribunal (VCAT)

Phone: 1300 018 228

Website:

vcat.vic.gov.au

Victorian Equal Opportunity and Human Rights Commission (VEOHRC)

Phone: 1300 292 153

Website:

humanrights.vic.gov.au

Queensland Human Rights Commission (QHRC)

Phone: 1300 130 670

Website:

qhrc.qld.gov.au

Queensland Industrial Relations Commission (QIRC)

Phone: 1300 592 987

Website:

qirc.qld.gov.au

Tasmania (cont.)

- e. *disorder, malformation, malfunction or disfigurement that results in the person learning differently from a person without the disorder, malformation, malfunction or disfigurement;*
- f. *a disorder, illness or disease that affects a person's thought processes, perceptions of reality, emotions or judgment or that results in disturbed behaviour;*
- g. *reliance on a guide-dog, wheelchair or other remedial or therapeutic device.*

This definition includes past, present or future conditions originating from birth or caused by illness, disease or injury.

If you have been discriminated against in employment because of your disability in Tasmania, you have **12 months** from the date of the discriminatory conduct to lodge a complaint under the ADAT with the Anti-Discrimination Commissioner (Equal Opportunity Tasmania).

If the complaint is accepted, the Commissioner will conduct a conciliation process aimed at settling the matter by agreement between the parties. If this is unsuccessful, the Commissioner may refer the matter to the Tasmanian Civil and Administrative Tribunal for investigation and/or arbitration.

Australia-wide

Under the *Disability Discrimination Act 2004* (Cth) (DDA), "disability" is defined to mean:

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

This definition includes past, present and future conditions, behaviour that is a symptom or manifestation of a disability, and a condition imputed to a person regardless of whether the condition actually exists.

If you have been discriminated against in employment because of your disability anywhere in Australia, you have **24 months** from the date of the discriminatory conduct to lodge a complaint under the DDA with the Australian Human Rights Commission (AHRC).

If the complaint is accepted, the AHRC will conduct a conciliation process aimed at settling the matter by agreement between the parties. If this is unsuccessful, the complainant may take the matter to the Federal Circuit and Family Court of Australia or the Federal Court of Australia.

Equal Opportunity Tasmania

Phone: 1300 305 062

Website:
equalopportunity.tas.gov.au

Tasmanian Civil and Administrative Tribunal

Phone: 1800 657 500

Website:
tascat.tas.gov.au

Australian Human Rights Commission (AHRC)

Phone: 1300 656 419

Website:
humanrights.gov.au

Note: Note that compared to state tribunals, the federal courts are considerably more formal, and the unsuccessful party is more likely to be liable for the other party's costs. Legal advice and representation are strongly recommended.

What other action can I take?

If you have been dismissed from your job or other discriminatory conduct has occurred because of your disability you may be able to make one of the following claims under the *Fair Work Act 2009*:

- An **unfair dismissal claim** to the Fair Work Commission (FWC).
Please see JobWatch's Unfair Dismissal Fact Sheet for more information.
- a **General Protections Dispute** if unlawful adverse action was taken against you because of your disability.
Please see JobWatch's General Protections Dispute – Termination claim and General Protections Dispute - Non-Termination claim Fact Sheets for more information.

Note that only national system employees are eligible to make these claims. In general, the national system applies to any employees covered by a nationally-registered collective agreement and:

- Most Victorian employees other than those providing essential services of core state government functions,
- Most Queensland employees other than state and municipal government employees, and
- Most Tasmanian employees other than state government employees.

If you are not eligible for these claims, you may be eligible to make a claim under the unlawful termination provisions in the *Fair Work Act 2009* (**21 day time limit**). For further assistance, contact JobWatch, your union, or a lawyer.

Generally, you must choose only one of discrimination, unfair dismissal, or General Protections Dispute claims, because you can only make one claim at a time in relation to the same conduct. In some circumstances it may be possible to file a claim about a dismissal and a claim about discriminatory conduct that occurred prior to that dismissal.

Further information

Depending on your situation, you should also see our other Fact Sheets:

- Unfair dismissal
- General Protections Dispute - Termination claims
- General Protections Dispute - Non-Termination claims
- Constructive dismissal

These Fact Sheets are available at www.jobwatch.org.au

Note: you only have 21 days from the date that your dismissal took effect to file your unfair dismissal or General Protections Dispute - Termination claim with the Fair Work Commission. Strict eligibility requirements apply.

If you were not dismissed but other unlawful adverse action was taken against you for discriminatory reasons, you have 6 years from the date of the adverse action taking place to file a General Protections Dispute - Non-Termination claim.

Where to get help

JobWatch's free and confidential Telephone Information Service

P: (03) 9662 1933 (Melb Metro), 1800 331 617 (Regional Vic, Qld, Tas)

W: jobwatch.org.au

Fair Work Infoline (Office of the Fair Work Ombudsman)	13 13 94
Fair Work Commission	1300 799 675
Victorian Equal Opportunity and Human Rights Commission (VEOHRC)	1300 292 153
Victorian Civil and Administrative Tribunal (VCAT)	1300 018 228
Queensland Human Rights Commission (QHRC)	1300 130 670
Equal Opportunity Tasmania	1300 305 062
Australian Human Rights Commission (AHRC)	1300 656 419
Community Legal Centres Australia	02 9264 9595
ACTU Worker Information line (for referral to a union)	1300 362 223
Law Institute of Victoria's Legal Referral Service	03 9607 9311
Queensland Law Society (for referral to a lawyer)	1300 367 757
Law Society of Tasmania (for referral to a lawyer)	03 6234 4133

Acknowledgements

JobWatch acknowledges and is grateful for the financial and other support it has received from the Victoria Law Foundation, the Commonwealth of Australia Attorney-General's Department, the Victorian State Government and Victoria Legal Aid.

JobWatch acknowledges the Aboriginal and Torres Strait Islander peoples of this nation. We acknowledge the traditional custodians of the lands on which we are located and where we conduct our business. We pay our respects to ancestors, and Elders, past, present and emerging.