

Australian Centre for  
**Disability Law**

# Using Disability Discrimination Law in New South Wales

This book talks about people who live in NSW, or are affected by, the law as it applies in NSW as at 1 September 2018. We believe that the legal information in this book is accurate at the time of printing. But laws change, and everyone's case is different. Get legal advice if you are not sure where you stand.

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# How to Use This Booklet

Australian law offers protection from disability discrimination. If you experience discrimination because of your disability, the law may be able to help you. You may find this booklet a useful starting point when deciding what to do next.

Part One describes Disability Discrimination Law in New South Wales (NSW) and Commonwealth law.

Part Two explains how to make a formal complaint if you experience discrimination.

## **You can use this booklet to:**

- > **Help you identify your options; and**
- > **Understand what might happen if you decide to take legal action.**

Throughout this booklet we have included real life stories about people who have made a complaint. These stories show the practical difficulties you might come across. Where necessary, names and details have been changed for privacy reasons.

We recommend that you read both sections to better understand what your rights are, and what you can do if you have been discriminated against.

This booklet is also a useful resource for advocates and lawyers who want to assist clients who may have experienced disability discrimination.

This booklet is not a substitute for legal advice or assistance. It is intended as a guide that you can use with a lawyer or advocate. No reader should act or fail to act on the basis of material in this booklet.

If you have been discriminated against in your employment contact one of the organisations listed in this booklet, as soon as possible. There is often a shorter time-frame to take legal action.

If you think you may have a discrimination case keep a written record of everything that happens: dates, notes of conversations and what was said, medical reports and any letters or emails you receive from the person who discriminated against you.

You should always try to talk to a lawyer before you make a discrimination complaint. At the end of this booklet, there is a list of organisations that might be able to help you with your complaint.

The law in this booklet is current as at 1 September 2018. Please note that the law can change so please talk with a lawyer to make sure that it is still current.

## **Important Things to Know:**

If you want to make a complaint, you need to take action within a certain time frame.

- > **You have six months from an act of discrimination occurring to lodge a complaint to the Australian Human Rights Commission.**
- > **You have twelve months to lodge a complaint to the NSW Anti-Discrimination Board.**

# Abbreviations

**ACDL**

Australian Centre for Disability Law

**ADA**

*Anti-Discrimination Act 1977* (NSW)

**ADB**

Anti-Discrimination Board of NSW

**AHRC**

Australian Human Rights Commission

**DDA**

*Disability Discrimination Act 1992* (Cth)

**NCAT**

NSW Civil and Administrative Tribunal

**FCA**

Federal Court of Australia

**FCCA**

Federal Circuit Court of Australia

# Table of Contents

<b>Part One: Disability Discrimination Law in New South Wales</b>	<b>1</b>
1. Overview of Discrimination Law	2
2. What is a Disability	3
3. Areas of Disability Discrimination	6
4. Unlawful Discrimination	8
5. Other Areas of Unlawful Discrimination	12
6. Exemptions and Defences	16
<b>Part Two: Taking Action Against Discrimination</b>	<b>19</b>
1. Before You Make a Complaint	20
2. Preparing a Formal Complaint	22
3. What to Expect after Making a Complaint	27
4. Going to a Conciliation Conference	28
5. Settlement Proposals	32
6. Reaching a Settlement	36
7. Taking Your Complaint to a Court or Tribunal	38
8. Conclusion	42
9. Finding Help	42
<b>Appendix</b>	<b>45</b>

# Part One: Disability Discrimination Law In New South Wales

## YOU CAN USE THIS SECTION TO FIND OUT ABOUT:

- › Laws that exist to protect people from disability discrimination;
- › The legal definition of disability discrimination and areas of life where discrimination law applies; and
- › Direct and indirect discrimination.

# 1. OVERVIEW OF DISCRIMINATION LAW

## Human Rights

Freedom from discrimination is a basic human right. It is recognised in international human rights treaties and declarations.

An international convention called the **Convention on the Rights of Persons with Disabilities** was adopted by the United Nations General Assembly in 2006 and Australia has agreed to comply with it. It says that Australia has an obligation to prevent discrimination against a person because of their disability.

The full text of that convention could be found at:

<https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html>

International human rights are not automatically part of Australian laws. Protection against disability discrimination in NSW depends upon the laws in NSW and federal laws that apply everywhere in Australia. The laws that make disability discrimination unlawful in NSW include:

- > **Disability Discrimination Act 1992** (Cth)
- > **Disability Discrimination Regulations 1996** (Cth)
- > **Australian Human Rights Commission Act 1986** (Cth)
- > **Australian Human Rights Commission Regulations 1989** (Cth)
- > **Fair Work Act 2009** (Cth)
- > **Anti-Discrimination Act 1977** (NSW)
- > **Industrial Relations Act 1996** (NSW)

## Federal Laws

The *Disability Discrimination Act 1992* and the *Australian Human Rights Commission Act 1986* apply everywhere in Australia. They are overseen by the Australian Human Rights Commission (AHRC). The AHRC used to be called the Human Rights and Equal Opportunity Commission (HREOC).

The Disability Discrimination Act makes some areas of discrimination on the basis of disability unlawful. The Australian Human Rights Commission Act sets out the procedures for how to make a complaint about discrimination under the Disability Discrimination Act.

The Australian Human Rights Commission Act and its Regulations also give a person the right to complain about discrimination and unfair treatment by federal agencies that is in breach of the *Convention on the Rights of Persons with Disabilities*.

In some circumstances, the *Fair Work Act 2009* makes disability discrimination in **employment** unlawful. It also deals with unfair dismissal. There is a much shorter amount of time to exercise your rights in employment law under the Fair Work Act. **You should immediately contact one of the following:**

- > Fair Work Australia;
- > Your local community legal centre;
- > LawAccess NSW;
- > Legal Aid NSW;
- > An employment lawyer; or
- > One of the other legal organisations listed at the end of this booklet.

Your complaint may be covered by federal or state laws, or both. If it is covered by both, you must decide which one to use. Part Two of this booklet talks about this.

## New South Wales Laws

The *Anti-Discrimination Act 1977* (ADA) applies only in New South Wales and is similar to the Disability Discrimination Act. Complaints under the ADA are handled by the Anti-Discrimination Board (ADB).

In NSW, there are other laws which deal with the rights of injured workers and unfair dismissal because of disability.

Since there is a shorter amount of time available to you to file an employment law application, you should **immediately** contact one of the following:

- > NSW Industrial Relations Commission;
- > Your local community legal centre;
- > An employment lawyer;
- > LawAccess NSW; or
- > One of the other legal organisations listed at the end of this booklet.

#### **NOTE:**

When we use DDA in this booklet, we mean the Disability Discrimination Act. When we use ADA we mean the NSW Anti-Discrimination Act.

### **Laws in Other States and Territories**

Other states and territories have discrimination laws like in NSW but they differ in some of the details of what they cover and how they deal with complaints.

### **Limitation Dates**

Most actions you bring under laws have time limits called 'limitation dates'. If you want to take legal action you may need to act quickly.

If you want to lodge a complaint with the NSW Anti-Discrimination Board you must do so within twelve months of the date of the discrimination.

If you want to lodge a complaint with the AHRC, you should lodge within six months of the date of the discrimination. If you do not lodge within this time the President of the AHRC may decide not to investigate your complaint. If the event or events being complained about happened more than six months ago, you will have to provide reasons for the delay.

## **2. WHAT IS A DISABILITY**

NSW discrimination law and federal discrimination law use different definitions of disability. In this section we will tell you how they are similar and how they are different. Both definitions are broad and include most health conditions, impairment or illness that you can think of.

The definition of disability under both laws includes the 'traditional' categories of disability, such as:

- > Intellectual disability;
- > Physical disability;
- > Mental illness;
- > Having a disease that is either temporary or permanent;
- > Acquired brain injury;
- > Behavioural disability;
- > Developmental disability; and
- > Learning disability.

The definitions include the manifestations of a disability, or characteristics which people with that disability usually have. These may be types of behaviour, traits or consequences which exist because of the disability.

***On the following page we provide an example of a case where an employer was ordered to pay compensation to an employee because they dismissed him on grounds linked to manifestations of his disability.***



In some cases, discrimination can occur even if you don't currently have a disability. Both NSW discrimination law and federal discrimination law cover temporary, permanent, past, present, future and imputed disabilities.

- > A **temporary disability** is something which exists for a short time, like a broken leg or the chickenpox.
- > A **future disability** may be something that runs in the family which you may develop in the future, like cancer.
- > An **imputed disability** is something which someone believes you have, whether or not you actually do. For example, a person may believe that a person from a tropical island has malaria.

### Use of Devices or Disability Aids

Both NSW discrimination law and federal discrimination law deal with discrimination that results from a person using:

- > A guide dog, hearing dog or trained assistance animal;
- > An interpreter, reader, assistant or a carer;
- > A disability aid (like a wheelchair); or
- > A palliative or therapeutic device.

### Associates

If a person has a relationship with someone who has a disability, such as a friend or family member, then they are called an 'associate'. If an associate is treated less favourably because of their relationship with a person who has a disability, then that treatment of the associate may also be unlawful and the associate can bring a complaint too. Case study 2 describes a case of discrimination against associates of a person with disability.

### Drug Addiction

Addiction to a 'prohibited drug' is a disability under both federal and NSW discrimination law.

However, it is not unlawful to discriminate on the basis of addiction to a 'prohibited drug' in the area of employment under NSW discrimination law. This means that an employer can, in some cases, lawfully discriminate against an employee with a drug addiction.

### Other Types of Discrimination

There are other types of discrimination that are unlawful. These include discrimination on the basis of race, sex, pregnancy, marital status, age, transgender status, homosexuality and carer's responsibilities. If you feel that you have been discriminated against because of any of these reasons, you should contact your closest community legal centre. Contact details are listed at the end of this booklet.

*In case study 3, a man made a complaint of discrimination on the grounds of age and disability.*

## CASE STUDY 1

### Court finds employee's dismissal linked to manifestations of his disability

A young man was assessed by a psychologist as having a mild learning disability. He left high school at the end of year 11 and started work as a trainee in a warehouse. The young man's job was to sort and arrange stock. After some months, he was dismissed because he had trouble with the numbering system used in the employer's warehouse. The court decided that this was a manifestation of his disability, and that this was the reason he was dismissed. The court also decided that his disability was a big reason why he wasn't offered other employment. The court ordered his employer to pay him \$14,701.

*Randell v Consolidated Bearing Co (SA) Pty Ltd [2002] FMCA 44*

## CASE STUDY 2

### **Discrimination against associates**

The parents of a child with disability complained about their child's school. The parents said that they were treated less favourably than parents of children without their child's disability.

They claimed that they were seen as 'trouble makers' or 'problem people' whenever they tried to ensure that the needs of their child's disability were properly met.

It was found that the parents had been discriminated against on the ground of being associates of a person with a disability. The school was ordered to apologise and compensation was also awarded to the parents.

*Murphy and Grahl on behalf of themselves and Sian Grahl v The State of New South Wales (NSW Department of Education) and Houston* [2000] HREOCA 14 (27 March 2000)

## CASE STUDY 3

### **Different reasons for discrimination**

Mr Mooney was 65 and had gallbladder disease, abdominal pain, osteo-arthritic knees, migraines, viral infections, gastrointestinal problems, diarrhoea and a chest infection. He needed to take a lot of time off work on sick leave. This resulted in him being dismissed from his employment. He complained of disability and age discrimination. The Tribunal found that the reason for the discrimination and his dismissal was not his age or his disabilities but a characteristic that people who have Mr Mooney's combination of disabilities usually have, namely a tendency to take a lot of sick leave. He had, therefore, been unlawfully discriminated against on the ground of disability and not his age.

*Mooney v Commissioner of Police, New South Wales Police Service (No 2)* [2003] NSWADT 107 (19 May 2003)

### 3. AREAS OF DISABILITY DISCRIMINATION

Disability discrimination is unlawful only in particular areas of life. A list of these areas and some explanations are provided below:

**Employment and work** – an employer cannot discriminate on the basis of disability against job applicants in the employment process or against employees in the terms and conditions of employment, in promotion, in training, in access to workplace benefits or by dismissing them from employment.

Both NSW and federal discrimination law cover people working on commission, contract workers, partnerships, union membership, employment agencies and qualifying bodies. Laws such as the *Fair Work Act 2009* (Cth) and *Industrial Relations Act 1996* (NSW) provide additional protection against disability discrimination in employment.

In employment law, the time that you have to pursue your legal rights is shorter. You should talk to a lawyer **as soon as possible** about what you can do.

Under NSW law, disability discrimination in employment is not unlawful if:

- > You work in somebody's house;
- > There are five or fewer employees in the workplace; or
- > You work for a private educational authority.

Federal discrimination law covers some things which NSW discrimination law does **not**:

- > Working in private educational authorities;
- > Some forms of domestic work; and
- > Where there is discrimination by employers (no matter how many employees there are in that workplace).

**Education** – includes discrimination in:

- > Enrolment;
- > How a student is treated while at school;
- > What facilities are provided or not provided;
- > The ability of the student to use facilities;
- > Access to support services;
- > Being bullied or victimised on the basis of disability;
- > Suspension; and
- > Expulsion.

NSW discrimination law does not apply to private schools.

In addition, federal discrimination law also says that education providers must follow the Disability Standards for Education '2005' (Education Standards).

The Education Standards list the responsibilities of education providers to a student with a disability. Education providers include preschools, schools, colleges, TAFEs and universities – basically almost anywhere you can go to get an education.

These Standards set out three main responsibilities for education providers:

- > To consult with students with disability and their associates;
- > To make reasonable adjustments; and
- > To eliminate harassment (bullying) and victimisation.

**Goods, services and facilities** – both NSW and federal discrimination law include discrimination on the ground of disability in the provision of all types of goods, services and facilities, such as shopping, banking, transport, insurance, entertainment and recreation, or services from doctors, lawyers, trades people, banks or government departments. Federal discrimination law also provides 'Transport Standards' that require transport providers to meet minimum access requirements.

**Access to public places** – includes discrimination on the ground of disability in access to almost all public buildings like libraries, government offices, hospitals, doctors' surgeries, restaurants or shops. For example, wheelchair access to public buildings would fall under this category.

Under federal discrimination law access to public places is a distinct area of discrimination. In NSW law, this type of issue falls under ‘provision of goods and services.’

**Accommodation** – includes discrimination on the basis of disability in the provision of residential and commercial accommodation. It covers applications for accommodation, the terms on which it is offered (e.g. rent) and evictions.

Where housing is provided by the government, both NSW and federal discrimination law apply.

NSW and federal discrimination law does not apply where the accommodation is provided by someone who also lives at the same premises. The NSW discrimination law does not apply where accommodation is provided by a charity or not-for-profit organisation.

**Land** – federal discrimination law makes it unlawful to discriminate on the ground of disability in the sale of land.

**Clubs and associations** – includes discrimination on the ground of disability in joining a club or association, the terms of membership, access to members’ benefits or expulsion from membership.

Federal discrimination law covers all types of clubs and associations that provide and maintain club facilities from their own funds.

NSW discrimination law only covers ‘registered’ clubs. A registered club is one that meets the requirements of the Registered Clubs Act in NSW.

**Sport** – federal discrimination law makes it unlawful to exclude a person from a sporting activity on the ground of their disability. NSW discrimination law does not specifically include discrimination in sport but it could be covered under ‘discrimination in the provision of services,’ and could also fall under ‘discrimination by clubs and associations.’

Both NSW and federal discrimination law have exceptions where the person with disability is not reasonably capable of performing the actions needed for a sporting activity.

**NSW local government** – under NSW discrimination law it is unlawful for a council member to discriminate on the ground of disability when acting officially.

**Commonwealth laws and programs** – under the federal discrimination law, it is unlawful to discriminate on the ground of disability while doing anything under a Commonwealth (federal) law or program.

## 4. UNLAWFUL DISCRIMINATION

There are two types of unlawful discrimination: direct discrimination and indirect discrimination.

### Direct Discrimination

#### **‘Direct discrimination’ is:**

When someone treats you less favourably, or plans to treat you less favourably, than a person in similar circumstances who does not have your disability.

It happens when people act on stereotypical ideas or make unfair assumptions about how a person’s disability affects them.

Examples of direct discrimination might include:

- > Refusing to serve a person in a shop because of a speech impediment;
- > Charging more for a person who uses a wheelchair to catch a bus;
- > Dismissing someone from a job because they have mental illness;
- > A school refusing to enrol a child because they have autism;
- > Not renting a flat to a person because they have a guide dog.

Direct discrimination may not be intentional. However, if it results in less favourable treatment, it is still discrimination.

To decide if you have been subject to direct discrimination, ask yourself:

- > Is someone treating me less favourably than they would treat somebody else in a similar situation?  
AND
- > Is that ‘somebody else’ a person who does NOT have my disability? AND
- > Is my disability a reason why I am being treated less favourably?

It is not enough to show that you have been treated badly. You must show that at least one of the reasons they treated you that way is because of your disability and you have to show that someone, without your disability but in the same or similar circumstances, would not be treated in the same way.

The people who you are comparing yourself with are called ‘comparators’. Think about who your comparator is – that is, who is treated differently to you. If you are unsure, a lawyer may be able to help.

### Indirect Discrimination

#### **‘Indirect discrimination’ is:**

Where a rule or condition, that might seem fair because it applies to everyone, in practice disadvantages people with your disability. It will not be indirect discrimination if the rule or condition is reasonable in the circumstances.

In legal terms it is where you cannot meet a condition, rule or requirement because of your disability and people without your disability can meet it.

The treatment may not be aimed at someone with a disability but its effect is that it disadvantages people with a disability and is not reasonable having regard to the circumstances.

Indirect discrimination includes someone planning to put such a condition, rule or requirement in place, for example a proposed change in a workplace policy which will have a discriminatory effect on you because of your disability.

For there to be indirect discrimination, the condition, rule or requirement must be unreasonable in the circumstances.

Examples of indirect discrimination might include:

- > When the only entrance to a building is by stairs, so people who use wheelchairs can't access the building;
- > Requiring all students to be taught in spoken English only, which means that a student who is deaf and uses Auslan cannot participate in class;
- > Allowing smoking in the workplace, which may affect a person with a breathing problem.

To help you decide whether you have been subject to indirect discrimination ask yourself:

1. Is there a condition, rule or requirement being imposed that I am unable to meet because of my disability? AND
2. Does the rule, requirement or condition disadvantage me? AND
3. Is it unreasonable for that condition, rule or requirement to be imposed in the circumstances?

To answer point 3 above on what is reasonable, ask yourself:

- > What would happen if I did not meet the condition, rule or requirement or I did not do what was expected?
- > Would other people be disadvantaged if the condition, rule or requirement was changed?
- > Are there other ways to achieve what the condition, rule or requirement is seeking to do?
- > What would it cost to make other arrangements for me?
- > What can the person who has made the condition, rule or requirement afford to spend to make it easier for me to meet it?

You need to feel reasonably confident that you can answer 'yes' to all of these questions, before deciding to complain under NSW or federal discrimination laws.

**Case study 5 illustrates that although a rule may not be aimed at a person with disability, it can have the effect of disadvantaging them.**

## CASE STUDY 4

### **Australia Post found to have indirectly discriminated against worker with disability**

Ms Daghlian worked at Australia Post, and had to sit on a stool at work because of her back and leg problems. She had done this for more than ten years with Australia Post's permission.

Australia Post then decided that staff could not sit on stools, and sent her home on forced sick leave. They also suggested that she should think about retiring.

Australia Post said there were work health and safety risks with sitting at a counter while reaching and lifting to serve customers and the stool could trip other workers.

The court decided that most employees without back and leg problems could comply with the requirement to stand, but Ms Daghlian could not because of back and leg problems and it was not reasonable to expect her to do so because no one had ever been injured while sitting at a counter. The court found that requiring her to stand was unlawful indirect discrimination.

*Daghlian v Australian Postal Corporation* [2003] FCA 759

## Making Reasonable Adjustments

### A 'reasonable adjustment' is:

A modification or an accommodation which you need, because of your disability, so that you are able to participate or access something equally to someone without your disability.

Federal discrimination law imposes a requirement to make reasonable adjustments on many of the people, businesses and organisations that you come into contact with. **The failure to make reasonable adjustments may be direct or indirect discrimination.**

An adjustment is reasonable where it balances the interests of all the parties affected in the circumstances and does not impose 'unjustifiable hardship' on the person making that adjustment. See the section on unjustifiable hardship for more information.

***In case study 5 a railway provider was found to have failed to make reasonable adjustments for a man with vision impairment.***

Some adjustments that could be reasonable, are:

- > Allowing a person with a psychiatric disability to work flexible hours;
- > Providing textbooks in an alternative format;
- > Allowing extra time for an assessment or exam;
- > Staff members at a government agency reading a written form to a person who has dyslexia and cannot read;
- > Providing an enlarged computer screen for someone with a vision impairment;
- > A low workbench for an employee who uses a wheelchair; and
- > Alternative assessment methods for a student who has difficulty writing.

## CASE STUDY 5

### Railway provider fails to make reasonable adjustments

Graeme is blind and catches the train to work. In order to know which station to get off, he needs the train to provide audible announcements for each upcoming station. On a number of occasions, over some months, on some of his train journeys, there was no announcement at all or it was almost impossible to hear what the person was saying. Graeme ended up missing his stop on a number of occasions and also felt quite anxious each time he took the train.

The court found the railway network provider failed on those occasions to make a reasonable adjustment for Graeme, namely audible announcements, and so discriminated against him. The court ordered the railway network provider to pay \$10,000 in compensation.

*Graeme Innis v Rail Corporation of NSW (No2)*  
[2013] FMCA 36



It may be **direct discrimination** if a person does not, or proposes not to, make a reasonable adjustment for you, and this has the effect of treating you less favourably than someone in a similar situation who does not need the adjustment.

It may be **indirect discrimination** if a person imposes a condition, rule or requirement on you that because of your disability, you cannot meet without reasonable adjustments, and the person does not, or proposes not to, make adjustments for you. The treatment may not be aimed at someone with a disability but has the effect of disadvantaging people with your disability and is not reasonable.

### **Unjustifiable Hardship**

Unjustifiable hardship is where it is too hard not to discriminate against you, or the costs of making an adjustment for your disability outweigh its benefit to you and others. Whether something is an unjustifiable hardship will depend on all relevant circumstances of each case. The relevant circumstances that need to be taken into account include:

- > The benefits of the adjustment to you as well as to other people;
- > The disadvantages of the adjustment to other people;
- > The effect of the disability on you and the adjustments you need;
- > The cost of making the adjustment;
- > Whether the employer, organisation or service provider is receiving or is eligible to receive any financial or other types of help to make the adjustment; and
- > Any relevant Disability Action Plans.

This applies to all the areas of discrimination with four exceptions: discriminatory questions and requests for information, harassment, victimisation and vilification. These are discussed later in this booklet.

***In case study 7, a court ruled against a council that claimed it was unable to make adjustments for a person with disability on the basis of unjustifiable hardship.***

## **CASE STUDY 6**

### **Indirect Discrimination**

Jacob was born deaf. Even though he relied on an Auslan (sign language) interpreter to learn in primary school, his high school made him sit in lessons without an interpreter. As a result, Jacob wasn't able to participate in class, and he was left feeling confused and frustrated. Jacob's parents made a complaint of disability discrimination which went to court.

The court found that the school had indirectly discriminated against Jacob. In doing so, it took into account the problems Jacob had with communicating using methods other than Auslan, such as note-taking and lip-reading. It also found that it would not have been very difficult or very costly for the school to hire an interpreter for Jacob.

The court ordered the school to pay \$20,000 in compensation.

*Clarke v Catholic Education Office* [2003] FCA 1085



## CASE STUDY 7

### **Council fails to convince court that installing wash basins would cause unjustifiable hardship**

KH was born with spina bifida. Because of her disability, she uses a catheter to go to the bathroom. The catheter needs to be carefully cleaned before and after each use.

KH enjoys going to the park with her family and friends. However, the toilet facilities at her local park only have external hand basins, meaning that other people at the park can see KH cleaning her catheter when she uses it. KH feels very upset about this.

In response to a complaint, the council argued that installing internal basins would impose an unjustifiable hardship on it. The court disagreed.

The court said that only having external basins led to very embarrassing and undignified experiences for people like KH. Installing internal basins would also allow more people to enjoy the park. The court also considered the financial costs and said the council could afford them.

*Access for All Alliance (Hervey Bay) Inc v Hervey Bay City Council [2004] FMCA 915*

## 5. OTHER AREAS OF UNLAWFUL DISCRIMINATION

### **Disability Standards**

The *Disability Discrimination Act 1992* (Cth) gives the Federal Government the power to set Disability Standards which say what a service provider or education provider must do in order not to discriminate.

It is against the law to breach a Disability Standard. At the time of writing this booklet, there are Disability Standards for:

- > Accessible Public Transport;
- > Education; and
- > Access to Premises.

Complaints about breaches of the standards can be made to the AHRC.

The Disability Standards provide an additional form of protection under the Disability Discrimination Act, in addition to direct and indirect discrimination.

For more information about Disability Standards, please contact Australian Centre for Disability Law.

### **Discriminatory Questions and Requests for Information**

Under the Disability Discrimination Act, it is unlawful for someone to ask you for information that relates to your disability, if they then plan to use that information to discriminate against you and if people without your disability would not have been asked to provide the information in similar circumstances.

However, it may not be unlawful for someone to request information about your disability if they need the information to assist you, for example, to provide you with a reasonable adjustment.

In employment, information about your disability can be lawfully requested by your employer to decide whether you need reasonable adjustments, or to determine whether you can do the 'inherent requirements' of a job.

### **‘Inherent requirements’ are:**

The essential elements or tasks of your job.

Often employers ask job applicants and employees to complete health questionnaires or assessments that ask questions about disability. Requests for this information should only include questions that are relevant to assess your ability to perform the inherent requirements of the position.

It is unlawful for an employer to refuse to employ or promote someone because they disclose a disability, unless the employer can show that the disability limits the person meeting all of the inherent requirements of the position.

It’s your choice whether to disclose you have a disability, and if so, when to disclose.

People may choose not to disclose that they have a disability because:

- > They can meet all of the inherent requirements of the position without needing any adjustments or workplace modifications;
- > Their disability may be in remission and therefore not considered relevant to the position; or
- > They may not consider their condition as a ‘disability’ at all; or
- > Disability information may not be requested on any questionnaire or in any interview.

You don’t have to tell anyone that you have a disability. However, if they do not know about your disability, it might be difficult to show later that it was a reason you were treated less favourably later.

If you require adjustments to meet the inherent requirements of a position, you will need to disclose your disability so that your employer can make these adjustments for you. It is also lawful for someone to request information showing that an assistance animal is properly trained.

***Case study 8 shows the difficulty of claiming you were unfairly treated due to disability if you have not disclosed that you have a disability.***

## **CASE STUDY 8**

### **Court finds no discrimination because cricketer did not disclose disability**

Mr Tate played cricket with a local club. He complained about not being selected to play and about being expelled from the club. One of the reasons he was expelled was his on-field behaviour.

Mr Tate said his behaviour was caused by a psychological disability.

The court found that no one at the club knew Mr Tate had a psychological disability because he had not told them. The court said that it could not, therefore, find that the club discriminated against him on the ground of his psychological disability.

*Tate v Rafin* [2001] FCA 1582

### **‘Harassment’ is:**

Any form of bullying, intimidation or offensive, humiliating or hostile treatment that happens because of your disability.

### **Harassment**

Harassment on the ground of disability is unlawful under the Disability Discrimination Act, but only if it happens in:

- > Employment, for example by a colleague or supervisor; or
- > Education, for example by a teacher; or
- > The provision of goods and services by the service provider or one of their staff.

In other areas harassment may also be unlawful if it can be classified as direct or indirect discrimination. Disability discrimination laws will not help if the harassment occurs outside the above situations, for example if you are harassed by a stranger on the street. If you feel unsafe because of harassment, you should contact the police, even if the harassment is not covered by discrimination laws.

### **Victimisation**

### **‘Victimisation’ is:**

Where a person makes a complaint about disability discrimination and then they are treated unfairly for doing so. It also applies when someone treats you badly because they think you are going to make a complaint or because you have helped someone else to make a complaint.

It is unlawful under both NSW and federal discrimination law to victimise a person because they have complained or are going to complain using anti-discrimination laws. It is also a crime under federal discrimination law punishable by up to six months imprisonment.

## **CASE STUDY 9**

### **Manager found to have harassed employee due to disability**

A man with multiple sclerosis was harassed at work by his team leader. The team leader criticised him, while referring to his disability. He also increased the man’s workload in the hope that he would leave.

The team leader moved bookshelves near the man’s desk, and said they were put there ‘to block him out’ of view. Later, the man was moved to a hotter part of the building, which could have made his condition worse. When he complained about it, the team leader said, ‘that is why we put you here’.

The court decided that the behaviour or remarks were designed to cause the man discomfort or humiliation because of his disability and were harassment, even though there was conflict between the man and his team leader which was unrelated.

*McDonald v Hospital Superannuation Board*  
[1999] HREOC 13 (16 July 1999)

You do not need to have lodged a formal complaint to be victimised. It can be enough that you have told the person discriminating against you that you believe they are discriminating against you, or that you plan to make a complaint, and this has resulted in you then being treated badly by them.

Some people worry that they will be victimised if they complain about discrimination, particularly if the complaint is against someone they have to keep seeing, such as their teacher, boss or fellow worker.

If you are victimised because you have made a complaint, you can make another complaint to the same place, either the AHRC or the ADB, about victimisation.

## Vilification

### ‘Vilification’ is:

Where someone does something in public that could make other people ridicule or hate people with HIV/AIDS. It can include things people say or do that make you feel extremely uncomfortable, embarrassed or scared.

Under NSW discrimination law it is unlawful to vilify a person because they are living with HIV or AIDS or because people think that they have HIV or AIDS. Anti-vilification laws apply in all areas of life and not just the areas that apply to disability discrimination law. There is no protection for disabilities in general other than HIV or AIDS in discrimination law.

## Aiding and Abetting

It is unlawful for a person to cause, instruct, induce, aid or permit another person to commit unlawful disability discrimination. It is unlawful to do this under both NSW and federal discrimination laws.

When you are making a complaint, you can sometimes make it against two different people – the person/organisation that actually did the act of discrimination against you, and also any person that caused, instructed, induced, aided or permitted it to happen.

## CASE STUDY 10

### Tenants found to have committed act of vilification

Shortly after moving into his apartment, R was abused by two other tenants where he lived about his homosexuality. R was HIV positive. The abuse continued and included leaving soiled baby’s nappies and oranges splattered on his balcony. He complained to his Department of Housing office and to his doctor. He was still abused and threatened two or three times a week by the tenants.

The Tribunal found that the two other tenants committed acts of homosexual and HIV/AIDS vilification against R. It awarded R the maximum amount allowable at the time of \$40,000.

*R v D & E Marinkovic* [1996] NSWEOOT

## CASE STUDY 11

### **Council permitted unlawful discrimination**

A local cinema lodged a council application to redevelop its premises. Its proposal did not provide for any wheelchair access.

The council approved the application.

The court found that in allowing the redevelopment to go ahead, the council acted unlawfully because it permitted the cinema to discriminate against people who require wheelchair access. The court said that it did not matter in this case that the council did not believe the cinema was doing anything wrong, because the belief wasn't reasonable.

*Cooper v Coffs Harbour City Council* [2000] HEROCA 19 (12 May 2000)

## 6. EXEMPTIONS AND DEFENCES

### **Exemptions**

Both NSW and federal discrimination law say that some discrimination is lawful. It is lawful, for example, to treat people with disability more favourably than people without disability to help prevent disadvantage. This is sometimes called 'positive discrimination'.

Below is a list of other exemptions. An exemption is where the law specifically states that an area of public life is not covered by the law, which means it may be lawful to discriminate.

**Court orders** – discrimination is lawful when a person is complying with a decision of a commission, court or tribunal.

**Insurance and superannuation** – discrimination is lawful when an insurer does something reasonably relying on appropriate actuarial or statistical information. However not all acts of insurers are exempt, so contact one of the organisations at the end of this booklet if you have a question about an insurer.

**Visa applications and other migration matters** – decisions that are permitted or required by immigration law are exempt from federal discrimination law. However, not all decisions are exempt. You can still complain where a decision-maker, like the Minister, does not have to follow a particular course but exercises a discretion. Also immigration processes should be accessible to people with disability. For example, if a person can't read the forms provided to them because of their disability this is something that they could make a complaint about.

**Public health** – discrimination is lawful where a person has an infectious disease and the discrimination is 'reasonably necessary' to protect public health.

**Peacekeeping and combat duties** – a small number of jobs in the Defence Force involving combat or peacekeeping roles, are exempt from the sections relating to discrimination in employment under federal discrimination laws.

**Assistance animals** – where an assistance animal is suspected of having an infectious disease and the discrimination is ‘reasonably necessary’ to protect public health or the health of other animals.

**Pensions** – many Centrelink decisions are exempt from the federal discrimination laws. However, if Centrelink exercises a discretion and you think that the decision discriminates against you because of your disability, you can complain about this decision. Also, if you were not able to access Centrelink processes because of your disability, then you can complain about this.

**Special exemptions** – exemptions can be granted for up to ten years under NSW discrimination law or five years under federal discrimination law (and may be extended) for particular organisations and areas of life. This is usually where the organisation (like a transport company) needs more time to make its systems, buildings or vehicles accessible for people with disability and it can show it is taking steps to do so.

**Other laws** – where another law makes it impossible for a person or organisation to avoid discrimination in something it does, then it may be lawful for them to discriminate. You or your lawyer need to look carefully at the wording of the law in these cases.

If you feel that you are discriminated against in one of these areas, contact your nearest community legal centre for advice.

## Defences

### A ‘Defence’ is:

An argument that somebody can raise against what you say, that is supported by law.

### Can You Do the Job?

A defence that can be raised, but only in the area of discrimination in employment, is that of ‘inherent requirements’. An employer can use this defence against your complaint of disability discrimination by claiming that you couldn’t do the ‘inherent requirements’ or essential tasks of your job.

### ‘Inherent requirements’ are:

The essential elements or tasks of your job.

When you apply for a job, normally you will know what the inherent requirements of the job are, from the job advertisement or from an information pack for people applying for the job. Whether a particular job requirement is ‘inherent’ has to be decided on a case by case basis.

To argue unlawful discrimination, you have to show that the job could still be done without that particular requirement or that you could actually do all of the inherent requirements of the job.

Also, if you can do all of the inherent requirements with the employer making a reasonable adjustment for your disability, then the ‘inherent requirements’ defence won’t apply.

Examples of 'inherent requirements' are:

- > An essential part of a job at a call centre is to be able to communicate by telephone, but it is not an 'inherent requirement' to hold the telephone by hand. You can use a speaker phone or headphones;
- > It is an 'inherent requirement' of a taxi driver's job to have a current driver's licence, but it is not an 'inherent requirement' to have perfect vision;
- > It is an 'inherent requirement' of a bank teller that they can talk with customers and assist them at the counter, but it is not an 'inherent requirement' that they must stand up on their feet all day long doing so. They can still do the inherent requirements sitting on a tall stool, for example.

To do the job, you might need some adjustments to be made. An employer is not allowed to discriminate against you just because you require adjustments in order to do the inherent requirements of your job. Federal discrimination law says that the employer must make reasonable adjustments for you. This is so long as the adjustments do not cause unjustifiable hardship on the employer.

## **Part Two: Taking Action Against Discrimination**

### **YOU CAN USE THIS SECTION TO FIND OUT:**

- › **What to do before making a formal complaint;**
- › **The steps involved in making a formal complaint;**
- › **What to expect after making a formal complaint.**

#### **Please note:**

**Complaints to the AHRC should be made within six months of the discrimination occurring.**

**Complaints to the NSW Anti-Discrimination Board should be made within twelve months of the discrimination occurring.**



# 1. BEFORE YOU MAKE A COMPLAINT

If you feel that you have been treated less favourably because of your disability, there are several ways to address this.

One way is to make a complaint of disability discrimination. Making a complaint is a key way that you can try to fix the problem. Sometimes making a complaint can also help other people with your disability in the future. However, you may have other options too. This section lists things for you to consider before making a complaint.

## Limitation Dates

Like most laws, the *Disability Discrimination Act 1992* (Cth) and the *NSW Anti-Discrimination Act 1977* (NSW) have time limits. For more information, see *Part One*.

## Working Out Your Options

A disability discrimination complaint is only one way to solve what has happened to you and may not always be the best starting point.

You should also consider:

**Legal action under other laws** – such as workplace laws, consumer protection law, worker’s compensation, tenancy law, contract law or the law of negligence.

**Internal grievance procedures** – making an internal complaint or writing a letter of complaint to the organisation or the company that has discriminated against you.

**Dispute resolution bodies** – you can make formal complaints to independent organisations that handle a range of complaints, such as the NSW Ombudsman or the NSW Office of the Information Commissioner.

**Professional bodies** – there may be a professional body regulating the organisation or government department which is discriminating against you.

For example, if you are a tenant in NSW and feel you have been treated badly or discriminated against, you might be able to complain to Fair Trading NSW.

**Private mediator** – you could ask the person or organisation who you feel has discriminated against you to come to a private mediation meeting with you, for example through your local Community Justice Centre.

## Raise Your Concern

If you think you have been discriminated against, your first step should be to raise your concern directly with the person or organisation you believe has discriminated against you.

### You could:

- > Call and ask for a meeting; or
- > Write a letter or email about what has happened and how you would like it fixed.

Sometimes, it is possible to fix the situation by simply talking with the right person.

## Here are some tips:

**Keep written records** – such as a diary. Always write down what was said when you talk with a person about a discrimination problem, including any reasons they give you for their actions, agreements you reach, or promises they make. Also note down who else was present and the date it occurred. This could be important later if the problem continues, or they do not do what they said they would. If you have been communicating via email, text message or letter make sure you keep copies of these.

**Always be polite** – if the other person is rude or refuses to listen, ask them to stop. You should leave if they continue to be rude. It is best not to respond rudely, even if someone is rude to you.

**Take your time** – it is better not to write or say anything if you are angry or upset. Wait until you are feeling calmer and think carefully. It can be a good idea to ask someone you trust to look over a letter, email or text message before you send it.

**Bring a support person** – if you are nervous about a meeting, think about asking someone, like a friend or family member, to come with you for support. Usually they should be silent during the meeting and not ask questions, as it is not the role of a support person to speak for you.

**Plan what you want to say** – it may be useful to summarise your main points on paper first, so you have something to refer to at either a meeting or on the phone.

**Consider an internal complaint process** –

is there an internal complaint process you can use to help solve the discrimination problem?

A large organisation might have a human resources department that will hear complaints against management or a university might have a disability officer to help you raise concerns about a teacher. If an informal letter or conversation does not help solve the problem, ask about internal complaint processes.

Remember that what you say or write in these first stages may be important later as evidence in a formal complaint. So think carefully about what you say or write at the early stages.

***Not every organisation or person is as responsive and supportive as Danielle's boss was in case study 12.***

Sometimes, you might not want to speak to your employer or they might be the very person who is discriminating against you. In these cases, you might like to think about making a formal complaint first.

**Thinking about a Formal Complaint**

Making a complaint can take up a lot of your time and be a drain on your emotions. Some cases are dealt with quickly, whilst others can go on for a long time.

You may have to go over unpleasant events in a lot of detail. The process can be stressful for you, your family and friends.

However, finding a resolution to your situation can also be really satisfying and may make a major difference to your life and the lives of others.

Before making a complaint, think about how making a complaint might affect your life and what support you can get to help you to deal with the process.

## CASE STUDY 12

### Talking through a problem

Danielle was diagnosed with Hepatitis C. She worked at an accounting firm and did not tell them about it when she got the job. She was worried about what they would think and she did not think that her diagnosis would affect the way she did her job.

One day, she told a close workmate. When she came to work the next day, she found that her workmate had told other people. After lunch, there was a note on her desk calling her a 'druggie'.

Danielle was really upset. After a few days, she decided to ask for a meeting with her boss to tell her what had happened. Danielle's husband came with her for support. Danielle's boss was shocked to hear about the behaviour of the others and wanted to know more about Hepatitis C.

Danielle's boss then called an urgent staff meeting to discuss the importance of a safe work place and the policy on harassment and discrimination. Danielle's complaint was then dealt with in accordance with the workplace grievance policy and the problems stopped immediately.

Danielle might have been able to complain under the law, but she felt able to talk with her boss and she was happy with the result.

The ADB and AHRC are government complaint bodies that receive disability discrimination complaints. They try to resolve them by getting you and the person or organisation you say has discriminated against you in to talk about the complaint and try to reach a resolution. When the parties meet, it is called a ‘conciliation conference’.

A formal complaint to the AHRC or the ADB can help all the parties to talk about the issues and try to come to a resolution without the need to go to a court or tribunal. Please note that you cannot go straight to a court or tribunal. You first have to make your complaint to the AHRC or the ADB, which may be done in writing or over the telephone. The contact details for these organisations are at the back of this booklet.

## 2. PREPARING A COMPLAINT

### Which law should I use – state law or federal law?

Both the *Anti-Discrimination Act 1977* (NSW) and the *Disability Discrimination Act 1992* (Cth) aim to stop disability discrimination. However, while you can complain under both laws, the Australian Human Rights Commission (AHRC) may refuse to take your complaint if you have already made a complaint with the Anti-Discrimination Board (ADB) about the same matter. The ADB may also do the same thing if you have already complained to the AHRC.

If, after reading the information in this booklet, you don’t know whether you should complain under the *Anti-Discrimination Act* (NSW) or the *Disability Discrimination Act* (Cth), then the Australian Centre for Disability Law (ACDL), community legal centres or a private lawyer might be able to help you. See the contact details at the end of this booklet for organisations in NSW where you can get **free advice** and receive help with disability discrimination law.

Some things to think about are:

- > Whether the conduct is covered by the state law or federal law (see *Part One*);
- > Whether there are exemptions which apply under one Act but not the other;
- > What outcome you want;
- > At later stages in the legal process, a Disability Discrimination Act complaint can be filed in a court whereas an Anti-Discrimination Act complaint has to be referred to a tribunal.

If you think taking the complaint past conciliation might be an option for you, be aware that generally court proceedings are more complex and they cost a lot more than tribunal proceedings, particularly if you lose. This may affect whether you decide to file your complaint under the Disability Discrimination Act or the Anti-Discrimination Act. We discuss this further in *Section 7* of this Part.

## CASE STUDY 13

### State or federal law?

Leanne is in Year 11 and attends a private school in NSW. She has a vision impairment that makes reading very difficult and she feels that the school has discriminated against her because it refused to provide class handouts in a large font that she can read. She considers making a disability discrimination complaint.

Leanne gets legal advice from ACDL. They tell her that the **Anti-Discrimination Act in NSW does not cover private schools**. However, the Disability Discrimination Act does allow for a complaint to be made against a private school. So Leanne can only complain under the Disability Discrimination Act.

## CASE STUDY 14

### What if both the state law and federal law apply?

Ahmed has a vision impairment that makes reading very difficult. His school refuses to provide him with class handouts in a large font. Ahmed goes to a public school. Ahmed calls the ACDL. They tell him that both the state and federal laws apply to public schools.

Ahmed can choose which law he wants to use. Under the Disability Discrimination Act there is a lot more detail about discrimination in education. He learns that the federal law also has the 'Education Standards', which are disability standards that list things a school should do in order not to discriminate against students with disability. One of the standards is to provide students with materials in different formats, so students can properly participate in class. Ahmed decides to make a complaint to the AHRC under the federal law.

There are also rules about whether making complaints under other types of laws (such as under employment laws) is allowed at the same time and about the same problem. The legal organisations listed at the end of this booklet can help you decide the best course for you to follow.

**See case study 14, to find out how legal advice helped Ahmed make a decision about what law to use.**

### **Costs**

Making a complaint to the ADB and the AHRC is free and both bodies try to be as user-friendly as possible. You should remember though that if your complaint is not resolved and you choose to have a court or tribunal decide if you have been discriminated against there may be costs involved in the court or tribunal process.

### **Timing**

Some complaints may take a long time to reach a conclusion. Most take between three and six months before they get to a conciliation conference. If the complaint goes to a court or a tribunal, it can take more than twelve months to resolve.

This means there can be a long delay between when the discrimination occurred and when you get to talk about it. Be organised and keep notes.

Sometimes it can be necessary to take urgent action to prevent irreparable harm. It is possible to get special orders from the court or tribunal to prevent action being taken while the complaint is being investigated. These orders are called interlocutory orders.

**An example of this is in case study 15.**

## **CASE STUDY 15**

### **Orders to prevent irreparable harm**

Mr Beck was a council worker for 15 years. After a workplace injury he was unable to do his day-to-day duties. The council didn't have other work and decided that because of his disability he could not return to his former job. Mr Beck was told that the council was going to dismiss him. He complained under the federal discrimination law and asked for a court order to stop the council dismissing him before the complaint was resolved. The court agreed to his request and made the order.

*Beck v Leichhardt Municipal Council* [2002]  
FMCA 331

## Who Can Complain?

Under both state and federal discrimination law, you can complain about disability discrimination if:

- > You have a disability and believe you have been unlawfully discriminated against because of your disability; or
- > You are an associate (such as a spouse, partner, relative, friend or carer) of someone with disability and you believe that you have been discriminated against because of that association; or
- > You are acting on behalf of a person with disability (or an associate) who is experiencing unlawful discrimination because of that disability (or association). You will need to have that person's permission to make a complaint on their behalf.

It is possible to make representative complaints on behalf of a group of people who are being discriminated against, because of disabilities they share in common. There are strict rules, however, so you should get legal advice before you lodge this type of complaint.

Both the *Anti-Discrimination Act 1977* (NSW) and the *Disability Discrimination Act 1992* (Cth) aim to stop disability discrimination. The ACDL, a community legal centre or a private lawyer can help you decide whether to complain under either of these Acts.

## Submitting a Complaint

Complaints must be in writing and sent to either the ADB or the AHRC. Both have standard complaint forms which are helpful as they prompt you about the important things to include in your complaint, but you don't have to use the forms. Look at the end of this booklet for information about how to get a complaint form.

If you can't write you can get assistance to put your complaint in writing from either the ADB or AHRC by telephoning them or going to their offices.

The ADB and AHRC can also help you make a complaint if you write in a language other than English.

The ADB and AHRC will accept complaints in a range of written formats, including:

- > Letters;
- > Audio format;
- > Braille;
- > Faxes; or
- > Email.

Make sure you make a copy of your complaint before you put it in and keep that copy in a safe place.

## What to Include in Your Complaint

The more information you can include about the discrimination the better. It will help the ADB or AHRC to understand your complaint and to act quickly. Set out your complaint clearly and try to emphasise the main parts. You might want to have a 'summary' section for the main points.

***See case study 16 for an example of the types of information a complaint may include.***

You will need to include information relevant to your complaint.

Here are some ideas about setting out your complaint:

- > Put the events in chronological order, with dates of when incidents happened.
- > If possible, type your complaint, or get someone to type it for you and use numbered paragraphs.
- > Be as specific as possible about times, dates and locations of important events. Also, if there were witnesses present when events happened, include their names and ask them if they would be prepared to support you and your complaint.
- > If you are complaining about something that someone said to you, write the exact words that they said, as best as you can remember.
- > Write a list of what you would like to see happen to fix the problem.
- > It is also a good idea to avoid becoming too emotional in your complaint. For example, don't insult the person you are complaining about.
- > Keep in mind that the person or organisation you are complaining about will be given a copy of your complaint. It is best to stick to the facts.



- > Make sure you are complaining against the right organisation. If you want to complain about something a person did when they were at their work, make sure you also include details of their employer, because in most cases their employer will also be responsible for what their employee has done at work. Try to find out the registered legal name of the organisation and put it on the form.
- > Make sure you attach copies of documents relating to your complaint (for example, payslips, diary notes, letters, emails and medical reports).
- > You only need to provide the ADB and the AHRC with documents that are directly relevant to what you are complaining about. It is more beneficial to stick to the main points.
- > Complaints to the AHRC must set out unlawful discrimination that is 'reasonably arguable' and must set out, as fully as you can, the details of the discrimination. This means that the AHRC will not accept all complaints it receives for investigation.

### **Getting Legal Advice**

It is not necessary to have a lawyer, but some aspects of the law are difficult. It is a good idea to get some legal advice when writing your complaint. This will ensure that it fits with the law and that it is given to the most appropriate complaint body.

### **Urgent Complaints**

If the complaint is urgent, clearly write the word 'URGENT' on the front page. Also write the reasons why. You may like to put this in a letter. Some reasons could include:

- > Your child has been expelled from school or is missing lessons;
- > You are about to be evicted by your landlord;
- > You are about to be fired from your job.

The ADB or the AHRC will then decide if they can speed up your complaint.

## **CASE STUDY 16**

### **Making a complaint to the AHRC or the ADB in writing**

Jane is vision impaired. She applied for a teaching job and was asked to do a literacy test. The school only had printed forms for this test, so Jane couldn't do it as she couldn't read the test because of her disability. As a result, she didn't get the job. Jane felt this was not right because she knew she could have done the test in Braille or electronically, using her screen-reader software. The school was very unhelpful when she suggested this, so she decided to make a complaint to the AHRC.

#### **In her complaint, Jane included:**

- > Her contact details;
- > Details of her disability;
- > A description of the job and the name, address and contact details of the school;
- > In her own words, what happened and why she felt that she was discriminated against because of her disability;
- > When it happened;
- > Where it happened;
- > Who was involved;
- > Relevant documents that might help explain what happened; such as letters and emails between her and the school and medical reports about her disability;
- > Lots of detail on the steps she had taken to try to sort out the problem herself, including dates of phone calls, what was said, letters and emails she had sent to the school.

### 3. WHAT TO EXPECT AFTER MAKING A COMPLAINT

The NSW Anti-Discrimination Board (ADB) or the Australian Human Rights Commission (AHRC) will either accept or reject your complaint after you lodge it with one of them. If your complaint is in writing and sets out how you have been discriminated against, when this occurred and who you are complaining about, it will probably be accepted. But not all complaints that are given to the ADB or the AHRC are accepted for further investigation.

#### Investigating Your Complaint

After the ADB or AHRC accepts your complaint, the next step is an investigation. This can take weeks or even months.

The ADB or AHRC will contact the person or organisation you are complaining about to get their side of the story. Sometimes they will ask the person or organisation to provide a written response, which you will get a copy of. They might also contact you for more information about your complaint. In some cases, there may have simply been a misunderstanding that can be easily solved through this informal process.

At this stage the AHRC may terminate your complaint if:

- > Your complaint has been made more than six months after the act of discrimination occurred and there is no good reason for your delay in lodging the complaint; or
- > The complaint has already been dealt with in another way; for example you might have taken it to the ADB already; or
- > The AHRC thinks that there is a better way to deal with it, for example, by using workers' compensation law; or
- > There is nothing in the complaint which shows the AHRC that discrimination has occurred or it thinks the complaint was made only to frustrate or annoy the other person or organisation.

The ADB can also decline your complaint at this early investigation stage if:

- > The thing you are complaining about does not amount to discrimination or any other problem covered by the Anti-Discrimination Act 1977 (NSW); or
- > The complaint has been made more than twelve months after the act of discrimination occurred and there is no good reason why there was a delay in filing it; or
- > In the case of a vilification complaint, if you are not a person to whom vilification protection applies; or
- > If it is not satisfied that the complaint was made by or on behalf of the person named in the complaint.

The ADB or the AHRC must give written reasons for declining or terminating your complaint. The ADB will tell you within 28 days. The AHRC will tell you when they terminate your complaint. If your complaint is terminated by the AHRC and the law permits, you could take your complaint to court. You will have 60 days after the date of the termination notice to file a claim in the Federal Court or Federal Circuit Court.

We recommend you contact a lawyer straight away for legal advice if your complaint is terminated.

If your complaint is not terminated by AHRC or the ADB at an early stage and once the investigation is finished, they will usually ask you and the other side to come to a conciliation conference.



## CASE STUDY 17

### AHRC investigates complaint made by woman with vision impairment

In case study 16, we met Jane. Jane has a vision impairment and was unable to complete an application to be a teacher when she could not complete a literacy test that was only available in written form. She made a complaint to the Australian Human Rights Commission (AHRC).

An AHRC staff member contacted Jane about a week after she lodged her complaint and asked for more information. They asked Jane for copies of her diary notes about the complaint. This gave them a clearer picture about what had happened.

Once the AHRC had received this information, they contacted the school and gave them a copy of Jane's complaint. The AHRC asked the school some questions about what happened and about its policies. The school was asked to reply in writing, within 21 days. Jane did not have to personally contact the school at all. She was relieved about this. Jane was also given a copy of the school's written response (in electronic format) by the AHRC.

After collecting as much information as possible, through talking with Jane and the school, the AHRC again assessed whether the complaint should go to a conciliation conference or be terminated because there was no prospect of the parties resolving the complaint at conciliation. Based on the information provided by Jane, and the school's response, the AHRC felt that there may have been discrimination (that it was 'reasonably arguable') and that there should be a conciliation conference. At the conciliation conference, the school apologised to Jane and organised another test for her in Braille

## 4. GOING TO A CONCILIATION CONFERENCE

If you have made a complaint to the Australian Human Rights Commission (AHRC) or the NSW Anti-Discrimination Board (ADB), they may convene a conciliation conference.

### A 'conciliation conference' is a:

Meeting between you and the person or organisation you have complained about with a conciliator from the ADB or AHRC.

In the meeting, you and the other people there talk and negotiate to try to settle the complaint and avoid having to go to a court or tribunal.

### What to Expect at a Conciliation Conference

Everything that happens at a conciliation conference is confidential. At a conciliation conference, both sides get to have a say, to listen to one another and to work out if there is any chance of an agreement to settle the complaint.

The meeting is run by a trained conciliator from the ADB or the AHRC. They will organise the time, venue and the rules of the meeting.

**The conciliator does not take sides or give advice and is not there to judge the complaint or decide if discrimination happened.** They are there to help the parties communicate, negotiate, and hopefully reach a settlement.

Conciliation conferences are not as formal as a court or tribunal. Usually, everyone sits around a table and discusses the problem. However, conciliation conferences are flexible in how they can be run. If you are worried about the conference, you can ask for a range of things to make the experience easier, including taking a support person with you or asking not to be in the same room as the other party.

## CASE STUDY 18

### Having your say at conciliation

George has a stutter. He made a complaint to the Australian Human Rights Commission (AHRC) about his boss, who was embarrassing him by mimicking his stutter in front of other people. This upset George and made his stutter worse.

George told the AHRC conciliator, who was running the conciliation conference, that he was worried about confronting his boss face-to-face. He felt that his boss might again upset him and make his stutter worse. The conciliator invited him to bring a support person.

George was still worried about seeing his boss. The conciliator talked separately to George and his boss, and it was agreed that the conciliation conference could be done by 'shuttle negotiation'. This means each party sits in a separate room and the conciliator goes back and forth between them to tell each party how the other one feels and what they want to settle the complaint.

This meant that George did not have to see his boss face-to-face. Instead, the conciliator passed on everything that he wanted to communicate to his boss in a separate room.

Before he arrived for the conference, George prepared a written statement. He included how he felt his boss had discriminated against him and how this had affected him. He asked the conciliator to read it to his boss.

George also prepared a settlement proposal. This listed all of the things that he wanted to happen to settle his complaint. Mostly, George wanted an apology and an assurance it would not happen again. He also asked for \$10,000 in compensation.

The conciliator went from George to his boss and back again with their ideas on the settlement proposal. The conciliator also talked through the issues with each of them and helped them identify their worries and areas of compromise. George's boss agreed to apologise and not to make fun of George again, but he refused to pay the compensation. After more negotiations, he offered to pay \$2,000 for George's time off work. George decided that this was a good outcome, agreed to this and they made a deed to record their agreement.

You can also ask for the conciliation conference to be over the phone, although it is usually best if all people can be present in person. Generally, the AHRC or the ADB will only hold a conciliation conference if they believe that the parties are willing to discuss the complaint and are open to resolving it. The AHRC and the ADB also have the power to require a person or a representative of an organisation to attend a conciliation conference, though they will usually only do this in exceptional circumstances.

If you have a suggestion about how the conciliation conference might be made easier or more comfortable, you should tell the conciliator.

*See case study 18 to see what role the conciliator played in George's case.*

### **Do I Need a Lawyer to Come With Me to the Conciliation Conference?**

If you would like a lawyer at conciliation, you will need to ask the conciliator if that is alright. Because the conference is meant to be as informal as possible, they might say that a lawyer cannot come, especially if the other party doesn't have one.

If you would like a lawyer to come with you, you will need to approach one of the organisations listed at the back of this booklet or hire a private lawyer. Get in contact with them as soon as possible in the complaint process, and at least two weeks before the conciliation conference.

### **Preparing for Conciliation**

You will need to prepare for your conciliation conference:

**Be mentally prepared** – remember the conciliator will not take sides and if things are getting stressful you can ask for a break. You can also ask the conciliator to stop and explain anything that you do not understand.

## **CASE STUDY 19**

### **ADB limits number of people at conciliation**

John is going to attend a conciliation conference at the Anti-Discrimination Board (ADB) with his local soccer club. The soccer club has asked the ADB if it can bring three solicitors to 'assist' in conciliation. John had asked the conciliator if he could bring a solicitor from the Australian Centre for Disability Law to support him. The conciliator contacted the soccer club and told them that the ADB preferred that the parties have equal numbers and so the soccer club could only bring one solicitor.

**Bring all relevant information and documents** – you may need to refer to them.

For example, you might like to bring:

- > A list of issues written down to make sure that you don't forget them during the conference;
- > Points you would like to cover in your opening statement, or a prepared statement;
- > Your diary, to remind you of important dates and events;
- > Documents which help to explain why you are asking for certain things to resolve your complaint. That way, you can show the other party why they should do what you want them to, and how much it might cost. For example, old payslips and wage records are helpful if you are asking for compensation for lost wages. If you are asking for reasonable adjustments, you should bring medical certificates, reports, or recommendations from specialists such as occupational therapists about adjustments.

### **What to Expect on Conciliation Day**

The conciliation will begin with the conciliator talking to each party separately. They will then bring everyone together in one room and discuss the rules for the conference, which include that you treat everyone with respect and that everything said in the conciliation is confidential.

You will then make what is called an 'opening statement.' This is where you get to say what has happened to you and how you have been impacted by it. Many people say that being able to express how they feel is a very valuable part of the process, and that they find it good to get their emotions off their chest. It is a good idea to write something out beforehand and take it with you.

The other side will then get to have their say. You may not agree with everything they say, but you need to give the other side the chance to speak.

Once both sides have spoken, you will talk about the outcomes you are seeking and try to work toward a solution.

You can take your time at the conciliation conference to think about the suggestions made and also to ask questions if you do not understand what is going on. You can always ask for time out if you need it and talk to the conciliator or your support person in private about what has happened.

You don't need to agree to anything then and there, or sign any agreements on the day of the conciliation. You can ask to have some more time to think over a proposal. The conciliator would then adjourn the conference and give both sides a few days to think about any proposal.

***Read case study 20, to find out how to research for your proposal and see how Tara could have prepared for her conciliation conference.***

## CASE STUDY 20

### Researching for your settlement proposal

Tara works in a warehouse and has an anxiety disorder. Because of this, it is very hard for her to do things in front of groups of people. The warehouse is upgrading and all employees have to do a training course in driving a forklift. The training is to be done in a group and there will be a test of each person at the end.

Tara knows that she will not be able to perform well in front of a group and will probably fail. She feels that she could pass it if she was allowed to be trained and tested one-on-one.

She asks her boss, but he refuses to provide the one-on-one training. Tara's boss then dismisses her for not doing the training. She files a complaint with the Australian Human Rights Commission (AHRC) that goes to conciliation.

At the conciliation conference, Tara's main aim is to get one-on-one training and return to work. Her boss claims that this is impossible because no trainers offer one-on-one training. After talks, the conciliator decides that the parties cannot agree and the complaint is terminated.

Later, Tara rings some trainers and asks about their courses. She finds out that many do offer one-on-one courses but they cost a little more to do. She is very sorry that she didn't know this at the time of the conciliation conference because it might have helped her to reach an agreement with her boss.

## 5. SETTLEMENT PROPOSALS

In your complaint form, you will be asked what you want to see happen to settle your complaint. Later, you might even be asked for more details in the form of a 'settlement proposal'.

### A 'settlement proposal' is:

A list of the things you want the other party to do to settle your complaint, like giving you an apology or paying you some compensation.

### Be Flexible

You can ask for anything in your settlement proposal; however, being flexible and open to suggestions will often produce the best results.

### Be Realistic

Asking for unrealistic things, like millions of dollars in compensation, will not help you and the other side to come to an agreement.

### Be Prepared to Compromise

Consider seeking advice on what to ask for. Another person may be able to see a solution that meets the needs of both parties. There may need to be some compromise. Both parties might agree that they cannot get everything they want and will have to compromise.

Try to make the most of the complaint process and conciliation and have realistic expectations. It can be a very satisfying, effective and empowering experience.

## Be Creative

You can be creative about what you would like to settle your complaint.

Some things that people ask for are:

- > An apology, either in writing or, sometimes in person;
- > Adjustments, for example, in the workplace or school;
- > Changes to policies or practices;
- > Disability awareness or anti-discrimination/harassment training;
- > Financial compensation;
- > A written reference or to get their job back;
- > Counselling paid for by the other side.

***We talk about some of these in the case studies that follow.***

## An Apology or Statement of Regret

People often want an apology and ask for a written statement of apology or expression of regret. If the other side agrees to do this, you may want to suggest the wording that you would like them to use.

***See case study 21 to find out what happened in Seo-Yun's case.***

## Adjustments

You may want to ask for specific adjustments to be made, so you can participate in work or at school. For example, you may need changes to be made to your workplace so you can access all areas by wheelchair, or additional time in an exam to accommodate chronic fatigue.

***Case study 22 shows the adjustments made for Karlo's requirements at school.***

## CASE STUDY 21

### Employer apologises for treatment of employee with disability

Seo-Yun has a mild repetitive strain injury in her left hand. She asked her employer, the Flower Shop, to give her modified scissors and pruning equipment. They refused. Seo-Yun felt really upset that her employer did not want to help her disability and so she made a complaint to the Anti-Discrimination Board (ADB).

Seo-Yun's employer received the complaint from the ADB, setting out the difficulties she faced at work. The employer gained a better understanding of her disability and realised that the adjustments were necessary and worthwhile. They agreed to make the adjustments.

Seo-Yun also asked for an apology. After some negotiations about the wording, her employer apologised in writing. Seo-Yun felt a lot better and relieved after this happened and was able to continue working for her employer. When she returned to work she also felt reassured that her employer better understood her disability.

## CASE STUDY 22

### School makes adjustments so student can take part in lessons

Karlo is a high school student. He has muscular dystrophy, which affects his fine motor skills. Karlo also uses a wheelchair. Karlo was unable to use the classroom laptop because the buttons were too small for him. Karlo needed a separate keyboard with larger keys to plug into the laptop. Also he could not fit his wheelchair under the desk that he was provided with and needed a height-adjustable desk.

Karlo's parents asked the school to provide these adjustments but the school refused. Karlo's parents lodged a complaint with the Australian Human Rights Commission on his behalf.

At the conciliation, the school agreed to order a keyboard and height-adjustable desk for Karlo. They also apologised that not having these adjustments had made him feel left out. Having the right keyboard and height-adjustable desk meant that Karlo could now participate in school on an equal basis with his classmates.

### Changes to Policies or Practices

You may want to ask an organisation or government department to change its systems, policies and practices. This could help other people with disability in the future.

*Read case study 23 to find out how Maryam was successful in getting the system changed at her local swimming pool.*

### Disability Awareness Training

Discrimination can sometimes occur because people do not understand disability and how their behaviour, policy or practice can impact on the person with a disability. Another outcome you can seek is to ask for employees of the organisation that discriminated against you to attend disability awareness training.

*See case study 24 to find out what happened in Mickey's case.*

### Financial Compensation

You can also ask for compensation at conciliation. Compensation might be for lost wages, lost work leave, medical expenses or for hurt feelings – but you will have to prove why you are asking for a particular amount. Compensation is supposed to put you back in the position you would have been in if you had not been discriminated against.

If you ask for compensation you need to show that the amount you are asking for has been carefully thought out. It is a good idea to ask a lawyer to help you do this.

*In case study 25, Hinata initially asked for an unrealistic amount of money as compensation.*



## CASE STUDY 23

### **Swimming pool changes the system for pool users who need wheelchair access**

Maryam uses a motorised scooter because of her arthritis. She uses her local pool which used to have a gate that allowed her to drive her scooter right up to the change rooms. Recently, the management of the pool decided to lock the gate as they were concerned that it was being used by people to avoid entry fees. When she asked the management to reconsider the decision, they refused. Maryam complained to the Australian Human Rights Commission.

The pool management suggested that Maryam could ring before coming to the pool and staff could open the gate for her. Maryam was still not happy, because other people with scooters would still face the problem.

After a lot of talking, Maryam and the pool management agreed that a bell would be put on the gate, so that staff could open it for pool users who needed scooter or wheelchair access. Maryam was happy with this outcome.

## CASE STUDY 24

### **Council agree to undertake disability awareness training**

Mickey is 22 years old and has cerebral palsy. He went to his local council to ask about accessible parking. The staff there did not give him enough time to ask questions. They told Mickey: 'We have no time to waste on people like you. Bring your mother in to help next time'. Mickey was extremely embarrassed and complained to the Anti-Discrimination Board.

Mickey wanted the staff to understand that his disability is physical and does not affect his thinking. At the conciliation, staff and management agreed to have disability awareness training twice a year. This was a great victory for Mickey and it meant that other people with disabilities in his local area would also benefit, as the council would be more aware of how disability affects people's lives. He was very happy with this outcome. Mickey also now felt comfortable talking to the council about the accessible parking issue.



## CASE STUDY 25

### Job applicant wins financial compensation for loss of earnings

Hinata is a man with a learning disability (dyslexia). He was refused a job as a truck driver with a large company after he told them about his disability in the interview. He complained to the Australian Human Rights Commission (AHRC).

Because it was such a big company, Hinata decided to ask for a large amount of compensation. His first settlement proposal was \$50,000. He later realised that this was too much. He was asked for evidence, such as medical costs and wage records, to show why he wanted this amount. He also looked at the AHRC website and its section on 'conciliated outcomes' for examples of previous cases.

Hinata saw that his expectations were unrealistic and after some negotiation agreed that \$2,500 was acceptable. This was the amount he would have earned in a month if he'd been given the job.

## 6. REACHING A SETTLEMENT

When all parties agree to a settlement offer, a settlement agreement will be drawn up.

### A 'Settlement Agreement' (or 'Deed') is:

A legal contract where each party agrees to do certain things to address the discrimination. It usually involves the other party agreeing to do something in return for you agreeing you will withdraw or end the complaint and not take it to a court or tribunal.

Often an agreement is reached at the conciliation conference or shortly after it. However a party can make an offer of settlement at any time during the complaint process.

Almost always, reaching an agreement involves compromises by both parties. Usually, one side will make an offer of settlement and ask the other side whether they agree to it. Once you receive an offer, think carefully about whether you want to accept it. A lawyer can help you work out whether the offer is beneficial to you or not.

If you are not happy with the offer, you can ask them to change it, or you could write down what you would be prepared to settle for and give your 'counter offer' to the other party. Generally speaking, the person who has brought the complaint will be asked to make an offer of settlement first. A 'settlement proposal' is an offer of settlement.

You should always write down what you agree to in the conciliation conference or throughout the complaint process so that everyone is clear about it. This is usually done in a document called a 'deed of settlement' or a 'deed of release' or 'deed' for short. It is very important to make sure that the deed states accurately what you and the other party have agreed to do.

***In case study 26, Francis decided not to sign a deed because it did not give him the settlement he was expecting.***

Once signed and dated by both parties, the deed becomes a legal contract and if the parties do not do what it says, they can be sued for breaching the agreement. It is extremely important to think very carefully before signing a deed and, if you can, talk about it with a lawyer first.

## **CASE STUDY 26**

### **Responding to a settlement offer**

Francis enjoyed going to his local pub to play pool. During renovations, the pool tables were moved upstairs. Francis uses a wheelchair and, because of the renovations, he could no longer access the pool tables.

Francis asked the manager of the pub if they could do something about it – such as leaving one table downstairs. The manager refused, so Francis sent a complaint to the ADB. The ADB sent a letter to the pub asking them about it. After the pub received this letter, the manager began to act differently.

He apologised and agreed to move half of the pool tables back downstairs once the renovations were complete. He also offered Francis \$500 in compensation for the inconvenience and hurt feelings. Francis thought that this was fair and agreed to sign a 'deed of release' to settle the complaint.

When a copy of the deed was given to him, some of the terms written in it worried him. It stated that the pub accepted no responsibility for the problem and did not have to apologise. Another term said that the pub would only 'review and assess' whether moving half the pool tables downstairs was financially worthwhile. In other words, the pub did not guarantee to move the tables. Francis rang the Australian Centre for Disability Law (ACDL) and asked them to have a look at the deed.

ACDL recommended that Francis not sign the deed. ACDL was very concerned that the deed did not actually mean that the pub had to move the pool tables, only that they would think about it. Francis decided not to sign the deed and the complaint went to a conciliation conference.

## 7. TAKING YOUR COMPLAINT TO A COURT OR TRIBUNAL

Sometimes conciliation doesn't work. The parties may be too angry to compromise or see each other's point of view. Or one of them may not take a complaint seriously enough and may not cooperate in the conciliation. If an agreement cannot be reached in an AHRC complaint, the AHRC will terminate the complaint. If an agreement cannot be reached in an ADB complaint, the ADB will ask if you wish for your complaint to be referred to the tribunal. Not all terminated complaints can be automatically taken to a court or tribunal.

### 'Termination' means:

That the complaint will not be taken any further by the AHRC. You will then need to decide if you want to take it to court.

### 'Referral' means:

That the complaint will not be taken any further by the ADB and will be sent to the NSW Civil and Administrative Tribunal (NCAT).

Parties can also ask the AHRC or ADB for the complaint to be terminated or referred earlier in the process if they are simply unable to negotiate. Once a complaint terminates, neither the ADB nor the AHRC has the power to order the sides to do anything.

### If You Have an AHRC Complaint

If an agreement cannot be reached, the conciliator will 'terminate' the complaint. Termination means that the complaint will not be taken any further by the AHRC.

You will need to decide if you want it determined by a court.

The AHRC will send you a document called a 'Notice of Termination'. It will include a letter saying why the complaint was terminated. It will also include a copy of your original complaint.

You have 60 days from the date on the notice to apply for a hearing in court. You should generally apply to the Federal Circuit Court unless there are complex questions of law, in which case you should apply to the Federal Court.

If you apply after 60 days, you will need to apply to the court for an extension of time. You will need good reasons for the delay.

The court has specific forms which must be filled in. The forms can be downloaded from the Federal Circuit Court's website. You should get legal advice to ensure you have completed the forms correctly and included all the necessary information. There are also filing fees associated with filing your complaint in court but these can be waived if you meet certain criteria.

The court holds 'directions hearings' to prepare the case for a final hearing. In a directions hearing, the court may order you and the other side to prepare statements and provide documents. The court may also order you to try mediation.

You can represent yourself at a hearing or have another person act on your behalf. You are not required to have a lawyer, but it is a very good idea to have obtained legal advice by this stage.

### If You Have an ADB Complaint

If parties cannot agree at conciliation, the ADB will usually ask you whether you want to take the complaint to the NSW Civil and Administrative Tribunal (NCAT). If you do want to proceed to the NCAT here are some steps on what can happen next:

You have **21 days** to write to the ADB to ask them to refer your complaint. At the time of printing there was no fee for applying to the NCAT but you should check this to be sure.

- > If the President of the ADB agrees that your complaint is suitable to be referred to the NCAT they will send a President's Report to the NCAT, with a copy of your complaint and the other party's reply.

- > You will receive a letter from the NCAT telling you to attend a Case Conference. The aim is to prepare the case for a final hearing. At the case conference you might have to write a statement explaining what happened and the legal issues you want addressed and send in any relevant papers.
- > The other side will be asked to prepare statements and provide documents to you.
- > A date for the final hearing will then be set.
- > You might be asked if you would like to try mediation. Mediation is similar to conciliation. If you agree, this will be organised before your case goes to final hearing.
- > If mediation fails it will go to a final hearing.

You can represent yourself at a final hearing or have another person act on your behalf. You are not required to have a lawyer, but it is a very good idea to have obtained legal advice by this stage.

The case is decided by three members of the NCAT at the final hearing, who will decide whether what happened to you was unlawful discrimination or not.

### **Costs**

Going to a court or tribunal is a serious step and often involves a lot of time, effort and stress. It can cost a lot of money. Costs can include:

- > A lawyer's fees;
- > Costs for getting documents and reports;
- > Payment for expert witnesses (like a doctor or specialist);
- > Paying the other side's legal costs if you lose.

***If you lose your case in court, you might have to pay the other side's legal costs. This could be many thousands of dollars.***

Alternatively, if you win in court, the other party may be ordered to pay your legal costs.

However, even if the other party is ordered to pay your legal costs, it is unlikely to compensate you for all the money you have spent bringing the case to court.

There are some kinds of free legal assistance available if you cannot afford a lawyer and you fit within certain criteria. You may get free legal help from one of the organisations listed at the end of this booklet.

### **What Happens at a Final Hearing?**

Although a final hearing in both the NCAT and the federal courts is like a court trial, a final hearing in the Federal Circuit Court or Federal Court is more formal than a final hearing at the NCAT. In both situations, you and the other side will have to present your version of the story and back it up with evidence. You will be able to ask questions of one another and of the witnesses. You need to be properly prepared and organised, because there are certain procedures and rules that you will need to follow.

If you win in court, the other side can be ordered to do certain things – called remedies or relief. If you lose in court your case will be dismissed and you will probably be ordered to pay the legal costs of the other side. At the NCAT, the general rule is that you do not have to pay the other side's legal costs if you lose, unless you behaved badly during the NCAT process, such as by failing to attend at the NCAT when requested or causing unnecessary delays.

### **What to Expect from a Court or Tribunal**

Although information in this booklet describes some of the difficulties with taking a matter to a court or to a tribunal this does not mean that you should never go to court. There are many examples of decisions made in favour of people with disability that have made a really positive difference to the lives of many other people with disability.

### **What Remedies Do I Want?**

If the complaint gets to the court or NCAT, the range of outcomes, or remedies, is much more limited than at conciliation and it will be up to the court or NCAT to decide what they order. They may not agree to give you the remedy or to make the orders you want. For example, they may be reluctant to order an apology.

Generally, a court has the power to decide whether you were unlawfully discriminated against or not, and award an amount of compensation. If you are claiming compensation, you will need proof of the loss and damages suffered by you. This means that the loss and damages can't just be what you say they are. You will need written evidence like doctors' reports, psychologists' reports, letters or pay slips. The NCAT or court aims to place you in the position you would have been in if the discrimination did not occur.

If you are seeking compensation, get a lawyer to help you work out how much compensation you should claim. The NCAT or court can order compensation for economic loss such as lost wages, and non-economic loss for feeling humiliated or upset by the discriminatory conduct.

The amount of compensation will depend upon the amount of the loss you can prove.

Try to have realistic expectations. You can only get what you can prove you have lost. The aim of legal action is to compensate you, not to punish the other side.

***Read case study 27 on the following page to find out about Hal's successful outcome.***

### **Appealing to Another Court**

If you are not happy with the decision the court comes back with, you may be able to appeal. You cannot appeal just because you feel that the decision was wrong, or because there is something extra that you want to say. You can appeal if you think the NCAT or the court made a mistake in the law. This is an even bigger step to take and there is no guarantee you'll win.

***See case study 28 on the following page to find out what Nathan decided to do when he lost his case in the Federal Court.***

### **Don't Forget Settlement**

Remember that settlement can occur at any time during the complaint process – even if you've taken your case to court or to the tribunal. Offers of settlement can be very important if your case goes to court. If the other side makes an offer which you refuse and the offer is better than what the court later orders, the court might order you to pay for the other side's legal costs even though you have won your case.

You should, therefore, consider every offer of settlement very carefully and get advice from a lawyer.

## CASE STUDY 27

### **Man is discriminated against and finds way to successful outcome – and a new job**

Hal applied for a job as an ambulance officer. He did well on the application and was asked to come in for a medical assessment. At the medical assessment he told the ambulance service that he had diabetes. The ambulance service told Hal they could not employ him because they felt that Hal's diabetes would impact on his ability to do the job safely.

Hal made a complaint to the AHRC, claiming that the ambulance service had discriminated against him because of his disability. The matter went to conciliation, which was unsuccessful. Hal took the matter to court.

At court Hal argued that his disability would not affect how he did his job because he knew exactly how to manage and control any potential health problems. Hal used medical reports and other evidence to show the court that by eating the right food and using the right medication the chances of him feeling unwell on the job were very low.

The court agreed with Hal. It ordered the ambulance service to re-consider Hal's application on the basis that having diabetes did not mean he could not do the job. The court awarded Hal financial compensation for the emotional distress he had suffered, and to cover his legal costs.

Hal went on to pass the medical assessment and get the job.

Hal's case is based on *Vickers v The Ambulance Service of NSW* [2006] FMCA 1232

## CASE STUDY 28

### **Should you appeal to another court?**

Nathan made a complaint to the AHRC about disability discrimination. After conciliation failed, he took his case to the Federal Court. Unfortunately, the Federal Court didn't agree that there had been any unlawful discrimination and it ordered Nathan to pay the costs of the other side, which were \$60,000.

Nathan was extremely upset, both with the decision and the orders that he had to pay the other side's legal costs.

He went to Jenny, a solicitor from his local community legal centre, for advice about what to do. Jenny said he could appeal to a higher court but Jenny didn't think he had a very strong case. She said his chances of success were very low. Jenny also said that, because she thought it was unlikely that Nathan would succeed at court, she could not take on his case.

Nathan already knew how expensive it is to go to court. He thought back to all the money he had already paid. The cost included:

- > His solicitor's and barrister's fees
- > Court filing fees
- > Costs of phone calls, letters and time off work for meetings.

On top of all that, because he lost, the court ordered him to pay the other party's legal costs.

Considering his situation carefully, Nathan decided not to appeal to a higher court.

## 8. CONCLUSION

Disability discrimination law aims to ensure that people with disability can participate in the community as equals with everybody else. It provides a way to stand up to people or organisations that treat people less favourably because of their disability.

There are many different steps involved in making a disability discrimination complaint. At times, making a complaint is not easy, however, it can sometimes lead to a satisfactory result.

Deciding what action to take needs careful consideration. If you think that you might have a disability discrimination complaint, contact the organisations in this booklet for free advice and assistance.

## 9. FINDING HELP

If you feel that you have been discriminated against because of your disability the following organisations may be able to help.

### LEGAL ORGANISATIONS

#### **Australian Centre for Disability Law**

We are a community legal centre for people with disabilities who want to complain about disability discrimination. We give free legal advice and may be able to help you find an advocate, help you write your complaint, prepare your case, or represent you at conciliation or at the court level.

Phone: (02) 9370 3135

Freecall: 1800 800 708

Fax: (02) 9370 3131

E-mail: [info@disabilitylaw.org.au](mailto:info@disabilitylaw.org.au)

Website: [www.disabilitylaw.org.au](http://www.disabilitylaw.org.au)

If you are deaf, or have a hearing or speech impairment, you can contact us through the National Relay Service (NRS). Ask for Australian Centre for Disability Law on 1800 800 708, or choose the available NRS video relay contact on Skype. For more information, visit: [www.relayservice.gov.au](http://www.relayservice.gov.au).

You can also use the National Relay Service to communicate with many of the organisations listed below.

### COMMUNITY LEGAL CENTRES NSW

You can find your local community legal centre by visiting [www.clcnsw.org.au](http://www.clcnsw.org.au).

#### **National Association of Community Legal Centres**

The NACLCLC provides a list on their website of all community legal centres in Australia. All community legal centres are free.

Website: [www.naclc.org.au](http://www.naclc.org.au)



## **LawAccess NSW**

LawAccess NSW is a free government telephone service that provides legal information, referrals and in some cases, advice for people who have a legal problem in NSW. Contact LawAccess NSW between 9am-5pm, Monday to Friday (excluding public holidays).

Phone: 1300 888 529

TTY: 1300 889 529

If you are deaf, hard of hearing or have a speech impairment, contact LawAccess NSW through the National Relay Service (NRS) and ask for LawAccess NSW on 1300 888 529.

Website: [www.lawaccess.nsw.gov.au](http://www.lawaccess.nsw.gov.au)

## **Legal Aid NSW**

Legal Aid NSW provides free or low cost legal aid and other legal services to disadvantaged people. It has offices throughout Sydney and NSW and can assist you at the court level.

Legal Aid NSW (Head Office)

Ground Floor, 323 Castlereagh St, Sydney NSW 2000

Phone: (02) 9219 5000

Fax: (02) 9219 5935

TTY: (02) 9219 5126

Website: [www.legalaid.nsw.gov.au](http://www.legalaid.nsw.gov.au)

## **Justice Connect Self Representation Service**

Justice Connect's Self Representation Service may be able to help you if you decide to represent yourself in the Federal Court or the Federal Circuit Court in NSW.

Phone: 1800 727 550

Website: [www.justiceconnect.org.au/our-programs/self-representation](http://www.justiceconnect.org.au/our-programs/self-representation)

## **Legal Information Access Centre (LIAC)**

LIAC provides free legal information and assistance, including toolkits and guides on the law in plain language. It is run through the State Library of NSW.

State Library of New South Wales

Macquarie Street, Sydney NSW 2000, Australia

Website: [www.legalanswers.sl.nsw.gov.au](http://www.legalanswers.sl.nsw.gov.au)

## **COMPLAINT BODIES**

The Australian Human Rights Commission and the Anti-Discrimination Board can help you to write and lodge your complaint. Their standard complaint forms are good guides for the sort of information they will need. They cannot give legal advice, but they will help you understand what to do to get your complaint in, and make sure you follow the right procedure.

You can find complaint forms on their websites. Alternatively, you can call and ask for one to be posted to you.

### **Australian Human Rights Commission**

Level 3, 175 Pitt Street Sydney NSW 2000

Phone: 1300 656 419

Fax: (02) 9284 9611

TTY: 1800 620 241

Postal address: GPO Box 5218 Sydney NSW 2001

Email: [infoservice@humanrights.gov.au](mailto:infoservice@humanrights.gov.au)

Website: [www.humanrights.gov.au](http://www.humanrights.gov.au)

### **Anti-Discrimination Board of NSW**

Level 4, 175 Castlereagh St, Sydney NSW 2000

Phone: (02) 9268 5555

Toll Free Phone: 1800 670 812 (for rural and regional New South Wales)

Fax: (02) 9268 5500

TTY: (02) 9268 5522

Postal address: PO Box A2122 Sydney South NSW 1235

Website: [www.antidiscrimination.justice.nsw.gov.au](http://www.antidiscrimination.justice.nsw.gov.au)



## COURTS AND TRIBUNALS

Information about the following courts and tribunals, as well as forms, guides and decisions are available on their websites.

### **Federal Circuit Court of Australia**

Level 17, Law Courts Building, Queens Square, Sydney NSW 2000

Phone: (02) 9230 8567

Fax: (02) 9230 8295

Email: [nswdr@fedcourt.gov.au](mailto:nswdr@fedcourt.gov.au)

Website: [www.federalcircuitcourt.gov.au](http://www.federalcircuitcourt.gov.au)

### **Federal Court of Australia**

Level 17, Law Courts Building, Queens Square, Sydney NSW 2000

Phone: (02) 9230 8567

Fax: (02) 9230 8295

Email: [nswdr@fedcourt.gov.au](mailto:nswdr@fedcourt.gov.au)

Website: [www.fedcourt.gov.au](http://www.fedcourt.gov.au)

### **NSW Civil and Administrative Tribunal**

Administrative and Equal Opportunities Division

Level 10 John Maddison Tower,

86-90 Goulburn Street Sydney NSW 2000

Phone: 1300 006 228

Fax: (02) 9307 6888

Website: [www.ncat.nsw.gov.au](http://www.ncat.nsw.gov.au)

## GOVERNMENT BODIES RELATING TO EMPLOYMENT

### **Fair Work Commission**

The Fair Work Commission is the national workplace relations tribunal and deals with most employment law complaints.

Fair Work Commission (NSW Office)

Level 10, Terrace Tower, 80 William Street, East Sydney NSW 2011

Phone: (02) 8374 6666

Fax: (02) 9380 6990

Email: [sydney@fwc.gov.au](mailto:sydney@fwc.gov.au)

Website: [www.fwc.gov.au](http://www.fwc.gov.au)

### **Fair Work Ombudsman**

The Fair Work Ombudsman helps employees to understand their rights and responsibilities in the workplace. They investigate complaints and enforce compliance of Australian workplace laws.

Phone: 131 394

Website: [www.fairwork.gov.au](http://www.fairwork.gov.au)

TTY: 133 677

# Appendix

## COMPARING THE NSW AND FEDERAL ACTS

In choosing which Act you should make your complaint under, you should take note of the differences between the laws, and make sure that what you are complaining about is covered by the appropriate law. If you are not sure, ask for legal advice.

	<b><i>Disability Discrimination Act 1992 (Commonwealth) (DDA)</i></b>	<b><i>Anti-Discrimination Act 1977 (NSW) (ADA)</i></b>
<b>Who investigates complaints?</b>	Australian Human Rights Commission.	Anti-Discrimination Board.
<b>How is disability defined?</b>	The definition of disability is the same for state and federal law: Present, past and future disability is covered. Behaviour that is a symptom or manifestation of the disability	
<b>What areas of discrimination are covered?</b>	The areas that are covered by both include: <ul style="list-style-type: none"> <li>&gt; Employment and related areas;</li> <li>&gt; Education;</li> <li>&gt; Access to premises;</li> <li>&gt; Goods, services (and facilities under the DDA);</li> <li>&gt; Accommodation.</li> </ul>	
	The federal law covers: <ul style="list-style-type: none"> <li>&gt; Land</li> <li>&gt; Clubs and incorporated associations;</li> <li>&gt; Sport;</li> <li>&gt; Commonwealth laws and programs;</li> <li>&gt; Disability Standards;</li> <li>&gt; Requests for information.</li> </ul>	The state law covers: <ul style="list-style-type: none"> <li>&gt; Registered clubs;</li> <li>&gt; Local government;</li> </ul> It does not: <ul style="list-style-type: none"> <li>&gt; include private schools;</li> <li>&gt; cover discrimination in employment where the employer has less than five employees or is a private school.</li> </ul>
<b>What does the law say about harassment?</b>	Harassment on the grounds of disability is unlawful in employment, education (by staff – not other students) and the provision of goods and services.	There is no specific reference to harassment.

	<b>Disability Discrimination Act 1992 (Commonwealth) (DDA)</b>	<b>Anti-Discrimination Act 1977 (NSW) (ADA)</b>
<b>What does the law say about victimisation?</b>	Under both state and federal law, it is unlawful to victimise a person because they have made a complaint or allegations of discrimination. Under the DDA, it is also a crime punishable by up to six months imprisonment.	
<b>What does the law say about vilification?</b>	It is an offence to incite a breach of the DDA or to provide financial support or otherwise promote a breach of the DDA.	It is unlawful to do a public act which incites hatred towards persons who have HIV/AIDS.
<b>What are the exemptions from unlawful discrimination?</b>	The exemptions covered by both include: <ul style="list-style-type: none"> <li>&gt; Unjustifiable hardship;</li> <li>&gt; Inherent requirements of the job;</li> <li>&gt; Infectious disease if it is reasonably necessary to do so in order to protect public health.</li> </ul>	
	The federal law covers: <ul style="list-style-type: none"> <li>&gt; Pensions, social security;</li> <li>&gt; Migration;</li> <li>&gt; Combat and peace-keeping;</li> <li>&gt; Special exemptions.</li> </ul>	The NSW law covers: <ul style="list-style-type: none"> <li>&gt; Compliance with other laws;</li> <li>&gt; Some voluntary bodies;</li> <li>&gt; Special exemptions.</li> </ul>
<b>Can complaints be made on behalf of more than one person?</b>	Representative complaints are possible.	Provision for representative complaints is available for bodies who are recognised for the purpose of making complaints.
<b>Are there any time limits for complaints?</b>	Six months from date of discrimination.	Twelve months from date of discrimination.
<b>Where can I go to if conciliation does not resolve my complaint?</b>	Federal Court of Australia or Federal Circuit Court of Australia within 60 days.  See <a href="http://www.fedcourt.gov.au">www.fedcourt.gov.au</a> for the cost of filing an application.	The Equal Opportunity Division of the NSW Civil and Administrative Tribunal (no cost). within 21 days. There is no cost to do so.
<b>Are there limits to the amount of compensation that can be awarded?</b>	No upper limit on compensation.	Compensation cannot exceed \$100,000.
<b>Who pays legal costs if it goes to a court or tribunal?</b>	The losing side usually pays the legal costs of the winning side in a court.	Each side usually pays its own costs unless specified otherwise by the Tribunal where there are exceptional circumstances.

**Tel:** (02) 9370 3135 or 1800 800 708  
**Fax:** (02) 9370 3131  
**Email:** [advice@disabilitylaw.org.au](mailto:advice@disabilitylaw.org.au)  
or [info@disabilitylaw.org.au](mailto:info@disabilitylaw.org.au) (for non-advice enquiries)  
**Web:** [www.disabilitylaw.org.au](http://www.disabilitylaw.org.au)

**Australian Centre  
for Disability Law**

PO Box 989  
Strawberry Hills  
NSW 2012