USING DISABILITY DISCRIMINATION LAW IN NEW SOUTH WALES

This book talks about people who live in, or are affected by, the law as it applies in NSW as at 1 June 2010. 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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ABOUT THIS BOOKLET

Disability discrimination is unlawful in Australia. 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. We have created it by joining two booklets into one.

(**Please Note**: this side of the booklet deals with Part One. Flip the book over and turn it upside down for Part Two.)

PART ONE – WHAT IS DISABILITY DISCRIMINATION?

Part One explains what disability discrimination is. Read Part One to understand how the law might apply to you.

Part One also explains some of the differences between New South Wales and Federal laws.

Part One is a useful resource for advocates and legal practitioners who want to assist clients who are experiencing disability discrimination.

PART TWO – ACTING AGAINST DISCRIMINATION

Part Two outlines your options and explains how to complain about discrimination. It explains how to apply the law to your situation, so you can do something about being discriminated against.

Part Two also discusses what can happen if you decide to take legal action. In this section we have included real life stories about people who have made a complaint. These illustrate the practical hurdles 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 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. The NSW DDLC and the authors disclaim all liability for errors or omissions of any kind whatsoever, or for any loss or damage, in whole or in part, arising from any person relying on any information in this publication.

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

The law in this booklet is as at 1 June 2010. Please note that the law can change so please consult a lawyer to make sure that it is still current.

SUMMARY – USING DISCRIMINATION LAWS

1 Do you, or someone whom you want to assist, have a disability?

If yes, go to Question 2. (Go to Part One, section 2, page 1 - 8, to see if you have a disability or are an associate of someone who has a disability.)

If no, you cannot use disability discrimination laws, but some other laws may be relevant to you. Contact one of the legal organisations at the back of the book for advice.

2 Have you been treated unfairly in an 'area of life' that is covered by discrimination laws?

If yes, go to Question 3. (Go to Part One, section 3, page 1- 10, to see if you have been discriminated against in an area of life that is covered by discrimination laws.)

If no, go to Question 4.

3 Is this unfair treatment either direct or indirect discrimination under discrimination laws?

If yes, go to Question 5. (Go to Part One, section 4, page 1 - 12, to see if what happened to you is either direct or indirect discrimination.)

If you are unsure (this is a very confusing area) contact one of the legal organisations listed at the back of the book to clarify this for you. There may also be some defences that apply that the lawyer can talk through with you.

4 Is this unfair treatment harassment, victimisation or vilification under discrimination laws?

If yes, go to Question 5. (Go to Part One, section 5, page 1 - 15.)

If no, you probably do not have a complaint of disability discrimination, but contact one of the legal organisations listed at the back of the book to clarify this for you and to give you advice on other legal avenues.

5 Did the discrimination happen less than 12 months ago?

If yes, go to Question 6. Remember your complaint may be declined if it is filed more than 12 months after the discrimination occurred.

If no, contact a lawyer straight away for advice.

6 Have you tried to resolve the issue by non-legal means (e.g. talking to the person or writing a letter)?

If no, go to Part Two, section 1, page 2 - 2.

If yes, and this has not worked, go to Question 7.

7 Would you like to make a complaint?

If yes, go to Part Two and work your way through the complaints making process. You will need to choose which body to complain to. Remember, DDLC or one of the other legal organisations at the end of the book, can help you with this process.

Snapshot of Important Things You Need to Know:

You have 12 months from when the discrimination happened to make a complaint. If you make a complaint more than 12 months after the discrimination occurred your complaint may be declined.

If you have been discriminated against in your employment, you may have additional legal remedies available to you. These often have a shorter time frame to take legal action. Contact one of the organisations listed at the back of this booklet as soon as possible.

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.

Legal organisations can help you to make a complaint. Their details are at the end of this booklet.

PART ONE: WHAT IS DISABILITY DISCRIMINATION?

Part One explains what is and what is not unlawful disability discrimination and the differences between New South Wales and Federal Laws.

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1. INTRODUCTION

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 a country has an obligation to prevent discrimination against a person because of their disability. When this booklet was printed the full text of that convention could be found at:

www.un.org/disabilities/convention/conventionfull.shtml

International human rights are not automatically part of Australian laws. Protection against disability discrimination in New South Wales depends upon the laws in New South Wales as well as Federal laws that apply everywhere in Australia. The laws that make disability discrimination unlawful 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* (DDA) and *Australian Human Rights Commission Act* (AHRCA) apply everywhere in Australia. They are overseen by the Australian Human Rights Commission (AHRC), which used to be called the Human Rights and Equal Opportunity Commission (HREOC).

The DDA makes some areas of discrimination on the basis of disability unlawful. The AHRCA sets out how to make a complaint about breaches of the DDA.

The AHRCA and the 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* (FWA) makes disability discrimination in **employment** unlawful. It also deals with unfair dismissal.

Since there is a shorter amount of time available to you to exercise your rights in employment law under the FWA, you should **immediately** contact one of the following:

- Fair Work Australia;
- Department of Education, Employment and Workplace Relations (DEEWR);
- Your local community legal centre;
- An employment lawyer; or
- One of the other legal organisations listed at the end of this booklet.

New South Wales laws

The *Anti-Discrimination Act* (ADA) applies only in NSW and is similar to the DDA. It is overseen 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 exercise your rights in employment law, you should **immediately** contact one of the following:

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

Other laws

Other States and Territories have laws like the *Anti-Discrimination Act* but they differ in what they cover and how they deal with complaints.

Limitation Dates

Most actions under law have use-by dates. These are called 'limitation dates'.

For disability discrimination law, you usually have **12 months** from the date of the event to make a formal complaint to the Anti-Discrimination Board (ADB) or Australian Human Rights Commission (AHRC). After 12 months have passed the President of the ADB or AHRC may decline your complaint.

> You should make a complaint about disability discrimination within **12 months** of the problem happening.

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. This is talked about in Part Two. There is also a table at the end of this booklet that can help you understand the differences.

2. WHAT IS A DISABILITY?

Definition of disability

The *Disability Discrimination Act* (DDA) and *Anti-Discrimination Act* (ADA) use slightly different definitions of disability, but both definitions are very broad and include almost any health condition, impairment or disability that you can think of. It includes what have been called 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 behaviour, traits or consequences which exist because of the disability.

CASE STUDY 1 – Manifestations of a 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) EOC 93-216 (Federal Magistrates Court)

Other types of disability

Discrimination can occur even if you don't currently have a disability. Both the DDA and ADA 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 a short illness.

A **future disability** may be something that runs in the family which you may develop in the future.

An **imputed disability** is something which someone believes you have, whether or not you actually do. For example, a person may believe that a man who is gay has HIV/AIDS.

Use of devices or aids

The DDA and ADA 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, e.g. 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.

Drug addiction

Addiction to a 'prohibited drug' is a disability under the DDA.

However, addiction to a 'prohibited drug' is not a disability under the ADA.

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 these reasons, you should contact your closest community legal centre. Contact details are listed in the back of this booklet.

CASE STUDY 2 – Discrimination against associates

The parents of a child with disability complained against a school. They argued that they were discriminated against because they were 'associates' of a child with a disability. The parents alleged that they were treated less favourably than parents of children without a disability. They claimed that they were seen as "trouble makers" or "problem people" whenever they tried to ensure that the needs of their child 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 awarded to the parents of the child.

Murphy and Grahl on behalf of themselves and *Sian Grahl v The State of New South Wales (NSW Department of Education) and Houston (2000) EOC 93-095*

Case Study 3 shows that sometimes you can complain about more than one type of discrimination.

CASE STUDY 3 – Different reasons for discrimination

Mr Mooney was 65 and had gall bladder 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 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. The Tribunal also decided that the reason for his treatment was 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. These are:

Employment and work – an employer cannot discriminate 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 in dismissal.

The DDA and ADA also cover people working on commission, contract workers, partnerships, union membership, employment agencies and qualifying bodies.

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.

Laws such as the *Fair Work Act 2009* (Cth) and *Industrial Relations Act 1996* (NSW) provide additional protection against disability discrimination in employment.

The ADA does **not** make discrimination unlawful in employment where:

- You work in somebody's house;
- There are 5 or fewer employees in the workplace; or
- You work for a private educational authority.

The DDA covers some things which the ADA does not:

- Working in private educational authorities;
- Some forms of domestic work; and
- Discrimination by employers (no matter how many employees).

Education – includes discrimination in:

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

The DDA also says that education providers must follow the 'Education Standards'. The Education Standards list the responsibilities of education providers to a student with a disability. Education providers include preschools, schools, colleges, TAFE and universities – basically almost anywhere you can go to get an education.

These Standards set out three main obligations, or responsibilities, on education providers:

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

Only the DDA applies to private schools.

Goods, services and facilities – includes discrimination 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. This is covered by the DDA and the ADA. The DDA also has 'Transport Standards' that require transport providers to meet minimum access requirements.

Access to public places – includes discrimination 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.

Only the DDA specifically covers access to public places. Access to public places is covered under "services" in the ADA.

Accommodation – includes discrimination 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 the ADA and DDA apply.

The ADA and DDA do not apply where the accommodation is provided by someone who also lives at the same premises. The ADA does not apply where accommodation is provided by a charity or not-for-profit body.

Land – the DDA makes it unlawful to discriminate in the sale of land.

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

The DDA covers all types of clubs and associations that provide and maintain club facilities from their own funds.

The ADA only covers 'registered' clubs. A registered club is one that meets the requirements of the Registered Clubs Act in NSW.

Sport – the DDA makes it unlawful to exclude a person from a sporting activity. The ADA does not specifically include discrimination in sport but it is arguably covered under 'discrimination in the provision of services,' and could also fall under 'discrimination by clubs and associations.'

Both the DDA and ADA have exceptions where the person with disability is not reasonably capable of performing the actions needed for a sporting activity.

NSW local government – under the ADA it is unlawful for a council member to discriminate when acting officially.

Commonwealth laws and programs – under the DDA it is unlawful to discriminate while doing anything under a Commonwealth law or program.

4. WHAT IS 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 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 of a psychiatric disability;
- A school refusing to enrol a child because of their disability;
- 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 are a victim of 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 for why I am treated less favourably?

It is not enough to show that you have been treated badly. One of the reasons they treated you that way has to be your disability and you have to show that others without your disability get better treatment.

The people who you are comparing yourself with are called 'comparators'. You need to know who your comparators are – who gets better treatment than you.

Indirect Discrimination

> Indirect discrimination is:
>
> Where a rule or practice might seem fair because it applies to everyone but in practice it disadvantages people with your disability.

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.

It includes someone planning to put such a condition, rule or requirement in place - for example a proposed change in 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 has to be unreasonable.

Possible examples are:

- When the only entrance to a building is by stairs, so people with a mobility disability can't access the building;
- Requiring all students to speak and understand spoken English, which means that a student who is deaf cannot participate in class;

- Having a smoke filled workplace, which may affect a person with a breathing problem.

To decide if you are a victim of indirect discrimination, ask yourself:

- Am I unable to meet a condition, rule or requirement because of my disability? AND
- Does the rule, requirement or condition disadvantage me? AND
- Is it unreasonable for the condition, rule or requirement to be imposed in the circumstances?

You need to feel reasonably confident that you can answer 'yes' to all of these questions before deciding to complain under the DDA or ADA.

CASE STUDY 4 – Indirect discrimination

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 occupational 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 concluded that most employees without back and leg problems could comply with the requirement to stand but it was not reasonable to expect Ms Daghlian to do so because no one had ever been injured while sitting at a counter. Requiring her to stand was, therefore, indirect discrimination.

Daghlian v Australian Postal Corporation (2003) EOC 93-287

To decide 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 do what is required?
- 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?

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.

The DDA imposes a duty 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.

An adjustment is reasonable if it does not impose an "unjustifiable hardship" on the person making that adjustment. See the section on unjustifiable hardship for more information.

Some adjustments that could be reasonable are:

- Allowing you to work flexible hours because of your psychiatric disability;
- Provision of textbooks in an alternative format;
- Being given extra time to do an assessment or exam;

- Staff members at a government agency reading forms to a person who has dyslexia;
- 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.

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

It is **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 its effect is to disadvantage people with a disability and is not reasonable.

Unjustifiable Hardship

Unjustifiable hardship is where it is too hard not to discriminate, or the costs of making an adjustment, outweigh its benefit to you and others. Whether something is an unjustifiable hardship will depend

CASE STUDY 5 – Failing to make reasonable adjustments

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 6– 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 could see KH cleaning her catheter. KH felt 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 finally considered the costs and said it was a sum the council could afford.

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

on the circumstances of each case. The relevant factors that need to be taken into account include:

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

5. OTHER THINGS THAT ARE UNLAWFUL DISCRIMINATION

Disability Standards

The DDA gives the Federal Government the power to set disability standards which say what a service 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, Disability Standards for Education and Disability Standards for Access to Premises. Complaints about breaches of the standards are also made to the AHRC.

For more information, please contact NSW Disability Discrimination Legal Centre. We have developed a separate booklet on the Education Standards which we can provide to you if you have been discriminated against in education.

Discriminatory Questions and Requests for Information

Under the DDA, 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 the 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 require the information to assist you, for example, to provide reasonable adjustments.

In employment, the information about your disability can lawfully be requested if it is necessary for deciding whether you need reasonable adjustments, or to determine whether you can do the 'inherent requirements' of your job.

CASE STUDY 7 – Did they know about your 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 it was caused by a psychological disability.

The Court found that no one on the committee knew Mr Tate had a psychological disability. The Court said that it could not, therefore, say the club discriminated against him on the ground of his psychological disability.

Tate v Rafin (2001) EOC 93-125

Inherent requirements are:

The essential elements or tasks of your job.

Often employers ask applicants and employees to complete health questionnaires or assessments that may 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 appoint or promote someone because they disclose a disability, unless it can be shown that the disability limits their ability to meet the inherent requirements of the position. We discuss inherent requirements in more detail in section 6.

It's your choice to disclose.

You should be able to tell people about your disability without being afraid of being discriminated against, but it is up to you to choose to disclose it.

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

- They can meet the inherent requirements of the position without having to disclose their disability; or
- Their disability may be in remission and therefore not considered relevant to the position; or
- They may not consider their condition as a disability; or
- Disability information may not be requested on any questionnaire or in an interview.

You don't have to tell anyone that you have a disability. However, if they did not know about your disability, it is more difficult to show that it was a reason you were treated less favourably.

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

Harassment

Harassment is:

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

Harassment on the grounds of disability is unlawful under the DDA, but only if it happens in:

- Employment – for example by a colleague or supervisor;
- Education – by a staff member; 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.

If someone harasses you in a situation not covered by either the DDA or ADA, such as a stranger on the street, disability discrimination laws will not help. If you feel unsafe because of harassment, inform 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 the ADA and DDA to victimise a person because they have complained under anti-discrimination law. It is also a crime under the DDA punishable by up to 6 months imprisonment.

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. But even if this happened – and usually it doesn't – you can complain about it and ask for the victimisation to be stopped.

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.

CASE STUDY 8 – Harassment

A man with multiple sclerosis was harassed at work by his team leader. The team leader criticized 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 some unrelated animosity between the man and his team leader.

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

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 the ADA is it unlawful to vilify a person because they are infected with HIV/AIDS or because people think that they are infected with HIV/AIDS. Vilification laws apply to everyone – not just in the areas of life that usually apply to disability discrimination laws.

Other kinds of disability are not included in vilification.

CASE STUDY 9 – Vilification

Shortly after moving into his apartment, R was abused by a man and a woman 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 the Department of Housing office and to his doctor. He was still abused and threatened 2 or 3 times a week.

The Tribunal found that the man and the woman 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] NSWEOT

Aiding and Abetting

It is also unlawful for a person to cause, instruct, induce, aid or permit another person to commit an unlawful act of disability discrimination. It is unlawful under both the ADA and the DDA.

When you are making a complaint, you can sometimes make it against two different people – the person/organisation that discriminated against you, and the person that caused, instructed, induced, aided or permitted it to happen.

CASE STUDY 10 – Permitting unlawful discrimination

A local cinema lodged a council application to redevelop its premises. Its proposal did not provide for wheelchair access, which is unlawful under the DDA.

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 used a wheelchair. 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) EOC 93-089.

6. EXEMPTIONS AND DEFENCES

Exemptions

Some discrimination is lawful. It is lawful, for example, to treat people with disability more favourably than others in order to meet their needs.

Discrimination in the following situations is lawful:

Court orders – complying with a decision of a commission, court or tribunal;

Insurance and superannuation – when the insurer reasonably relies on appropriate actuarial or statistical information;

Visa applications and other migration matters - decisions that are permitted or required by immigration law are exempt from the DDA. However, not all decisions are exempt. Where a decision-maker does not have to follow a particular course but exercises a discretion, this is something that can be complained about. Also, immigration processes should be accessible to people with a disability. For example, if you couldn't read the forms provided to you because of your disability this is something that you could make a complaint about.

Public health – 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 the DDA;

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 DDA. However, if Centrelink exercises a discretion and you think that this constitutes discrimination on the grounds of disability, you can complain about this decision. If you were not able to access Centrelink processes because of your disability you can also complain about this.

Special Exemptions – other exemptions can be granted for up to ten years under the ADA or five years under the DDA and may be extended;

Other laws – under the ADA, where another law makes it impossible to avoid discrimination, the discrimination may not be unlawful.

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 raise this defence against your complaint of disability discrimination by claiming that you couldn't fulfill the 'inherent requirements' or essential tasks of your job.

> 'Inherent requirements' are:
>
> Essential elements or tasks of your job.

When you apply for a job, the employer should tell you what the inherent requirements of the job are. 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.

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;

- It is an 'inherent requirement' of a taxi driver's job to have a driver's license, but not that they have perfect vision.

To do the job, you might need some adjustments to be made. If these will not cause unjustifiable hardship for the employer, the employer may not discriminate against you because you need those adjustments.

Case Study 11 shows an example where someone could not fulfill the 'inherent requirements' of their job. (Please note that after this case went to Court, the law was changed and employment in combat duties became exempt from disability discrimination law.)

CASE STUDY 11 – Inherent requirements of the job

Before enlisting in the army, X knew that he would be tested for HIV, Hepatitis B and Hepatitis C and that he would be discharged if he tested positive. After enlistment, X started training but he tested positive to HIV and was discharged. He complained that this was disability discrimination.

X could do all the physical requirements of the job, but the question was whether there were other non-physical 'inherent requirements' of the job that he could not do if he was HIV positive.

The Court said that the 'inherent requirements' of a soldier's job go beyond physical capacity to perform the tasks or skills of a soldier. The ability to do the job without endangering the safety of others is an 'inherent requirement' of any employment. X's case was referred back to the original decision maker to decide whether or not he could perform the 'inherent requirements' of the job, including the non-physical 'inherent requirements'.

X v Commonwealth of Australia (1999) 200 CLR 177.

PART TWO: ACTING AGAINST DISCRIMINATION

This section talks about what you can do if you have, or someone close to you has, been discriminated against. Making a disability discrimination complaint is a key way that you can try to fix the problem for yourself and others affected. However, there are also other options available to you; like writing a letter. We will discuss these options in this section.

Part Two also talks about the different steps that can happen in making a disability discrimination complaint. If you make a complaint, not all the steps will happen to you. We have included all the steps so that everyone reading this booklet will know what their next step is.

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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 the problem.

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 a disability in the future. This will be discussed further below.

Limitation Dates

Like most laws, the *Disability Discrimination Act* (DDA) and the *Anti-Discrimination Act* (ADA) have limitation dates. For more information, see Part One.

> You should make a complaint about disability discriminationwithin **12 months** of the discrimination occurring.

Other alternatives

However, a disability discrimination complaint is only one way to solve your particular problem and may not always be the best starting point.

You should also consider:

Legal action under other laws – such as industrial relations law, 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 is discriminating against you.

Independent dispute-resolution body – such as the NSW Ombudsman.

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 and feel you have been treated badly you might be able to complain to the Real Estate Institute of NSW.

Private mediator - for example through your local Community Justice Centre.

Talking about the problem

Generally, the first step should be to complain directly to the person or organisation that you believe is discriminating against you.

You could:

- Call and ask for a meeting or
- Write a letter about what's happened and how you would like it fixed.

Sometimes, it is possible to fix a problem 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, such as any reasons they give you for their actions, agreements you reach or promises they make, who else was present, as well as 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 or by 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. Try not to respond rudely if someone is rude to you.

Take your time. Never write or say anything while you are angry or upset. Calm down and think carefully about what you want to say. It is a good idea to ask someone else to look over a letter before you send it.

Bring a support person. If you are nervous about a meeting, think about asking someone, maybe

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 it 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 firm's 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.

a friend or family member, to come with you for support. A list of advocacy organisations can also be accessed at:

http://mail.da.org.au/publications/publications/da/NSW-ACT_Disability_Advocacy_Services_2008.pdf

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 an internal complaint system available to you? A large organisation, for example, might have a Human Resources Department that will hear complaints against management or a school 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.

Not everyone is as responsive and supportive as Danielle's boss in Case Study 12. Sometimes, you might not want to speak to your employer or they might be the same people who are discriminating against you. In these cases, you might like to think about a formal complaint without first talking with the organisation or person involved.

Thinking about a formal complaint

Being prepared – the emotional impact of making a complaint

Making a complaint can be time-consuming and a drain on your emotions. Some cases can be 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 also be stressful for you, your family and friends.

On the other hand, finding a resolution to your situation is also incredibly satisfying and may make a major difference to your life and the life of others.

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

There are many options in the complaints' process but one thing that is not optional is where you start. You cannot go straight to a court or tribunal. You first have to complain to the Australian Human Rights Commission (AHRC) or Anti-Discrimination Board (ADB). These are government organisations that help sort out your complaint. A formal complaint to the AHRC or ADB can help both parties to talk about the issues and try to come to a resolution without the need for a court or tribunal. **You should keep in mind that the ADB and AHRC do not have the power to determine whether or not you have been unlawfully discriminated against or to order the other party to do something to address the discrimination – that is for a court or tribunal to decide.** It is up to you whether, after making a complaint and going to conciliation, you want to proceed to a hearing at a court or tribunal.

2. PREPARING A COMPLAINT

Which Law Should I Use – *Anti-Discrimination Act 1977* (NSW) or *Disability Discrimination Act 1992* (Federal)?

Both the *Anti-Discrimination Act 1977* (NSW) (ADA) and the *Disability Discrimination Act 1992* (Cth) (DDA) aim to stop discrimination. However, while you can complain under both laws, the AHRC may decline your complaint if you have already lodged a complaint with the ADB about the same matter.

If, after reading the information in this booklet, you don't know whether you should complain under the ADA or the DDA, then the NSW Disability Discrimination Legal Centre (DDLC), community legal centres or a private lawyer can help. See the contact details at the end of this booklet for places in New South Wales where you can get **free advice** and receive help with disability discrimination law.

CASE STUDY 13 – ADA or DDA?

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 the NSW Disability Discrimination Legal Centre. 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 ADA and DDA apply?

Dane is in a similar position to Leanne in Case Study 13. He also has a vision impairment that makes reading very difficult. His school also refuses to provide him with class handouts in a large font. Dane, however, goes to a public school.

Dane calls the NSW Disability Discrimination Legal Centre. They tell him that both the *Anti-Discrimination Act* and *Disability Discrimination Act* apply to public schools. Dane 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 DDA also has the 'Education Standards', which are standards that list things a school should do in order not to discriminate against students with disability. One of these is to provide students with materials in different formats, so students can properly participate in class. Dane decides to make a complaint to AHRC under the *Disability Discrimination Act.*

Some things to think about are:

- Whether the conduct is covered by the ADA or DDA (see Part One);
- Whether there are exemptions which apply under one Act but not the other;
- What outcomes you want;
- At later levels of the legal process, a DDA complaint can be filed in a court whereas an

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 DDA and asked for a Court order to stop the council dismissing him before the complaint was resolved. The Court agreed to his request.

Beck v Leichhardt Municipal Council [2002] FMCA 331

ADA complaint can be referred to a tribunal. If you think pursuing the complaint beyond conciliation is 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 DDA or the ADA. We discuss this further at Section 7.

There are also rules about whether making complaints under other types of laws (such as under industrial relations law) 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.

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 different costs involved in the court or tribunal process.

Timing

Some complaints may take a long time to reach a conclusion. Most take between 3 and 6 months before they get to a conciliation meeting. If the complaint goes to a court or a tribunal, it can take more than 12 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.

Who can complain?

Under the DDA and ADA you can complain of disability discrimination if you:

- Have a disability and believe you have been unlawfully discriminated against because of your disability; or
- 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
- 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. There are strict rules, however, so you should get legal advice before you lodge the complaint.

How do I submit a complaint?

Complaints must be in writing and sent to either the ADB or the AHRC. Both have standard complaint forms which may help, 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 may be able to get assistance to put your complaint in writing from either the ADB or AHRC.

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

The ADB and AHRC will also accept complaints in other formats, including:

- letters
- audio format
- braille
- fax or
- email.

Keep a copy of your complaint.

What should be in the complaint?

The more information you include the better. It will help the ADB or AHRC to act quickly. Set out your complaint clearly. 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 the exact time, date and location things happened.
- 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. This list is called

CASE STUDY 16 – Making a complaint to 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. 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. She included lots of detail about
- when it happened
- what happened
- where it happened
- who was involved
- the effect the discrimination had on her
- relevant documents that might help explain what happened – such as letters from the school and her replies and medical certificates
- lots of detail on the steps she had taken to try to sort out the problem herself – such as phone calls and letters to the school about her concerns
- how she thought the matter could be resolved. Jane asked for the test to be given in Braille so she could be fairly assessed on her ability to meet the requirements of the job.

'possible outcomes', and is talked about in section 5.

- 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. Stick to the facts.
- Make sure you are complaining against the right organisation. If you want to complain about something an individual did as an employee, make sure you also include details of their employer because in most cases their employer will be the one who is liable. 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 (payslips, diary notes, medical reports).

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 legislation and that it is given to the most appropriate organisation.

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.

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

3. WHAT HAPPENS AFTER YOU MAKE A COMPLAINT?

Complaints may be accepted, or they may be rejected

The ADB or AHRC will either accept, or reject your complaint. If your complaint is in writing and specifies how you have been discriminated against, when this occurred and who you are complaining about, it will probably be accepted.

Investigating

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 usually 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 are also likely to contact you for more information about your complaint. In some cases, there has simply been a misunderstanding that can be easily solved through this informal process.

The AHRC can also terminate your complaint at this stage if:

- The complaint was made more than 12 months after the act of discrimination and there are no good reasons why there were delays in lodging it;
- The complaint has already been dealt with in another way;
- The ADB or AHRC thinks that there is a better way to deal with it - for example, by using workers' compensation law;
- There is nothing in the complaint which shows that discrimination has occurred or they think the complaint was made only to frustrate the other person or organisation.

The ADB can also terminate your complaint at this stage if:

- The thing you are complaining about does not amount to discrimination or any other problem covered by the ADA;
- The complaint was made more than 12 months after the act of discrimination and there are no good reasons why there were delays in lodging it;
- (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 AHRC must give written reasons for rejecting your complaint. You may still be able to complain to a court (within 60 days for DDA complaints and within 28 days for ADA complaints), but we recommended you contact a lawyer before you make a decision.

Once the investigation is finished, the ADB and AHRC will probably ask the parties to come to a conciliation conference.

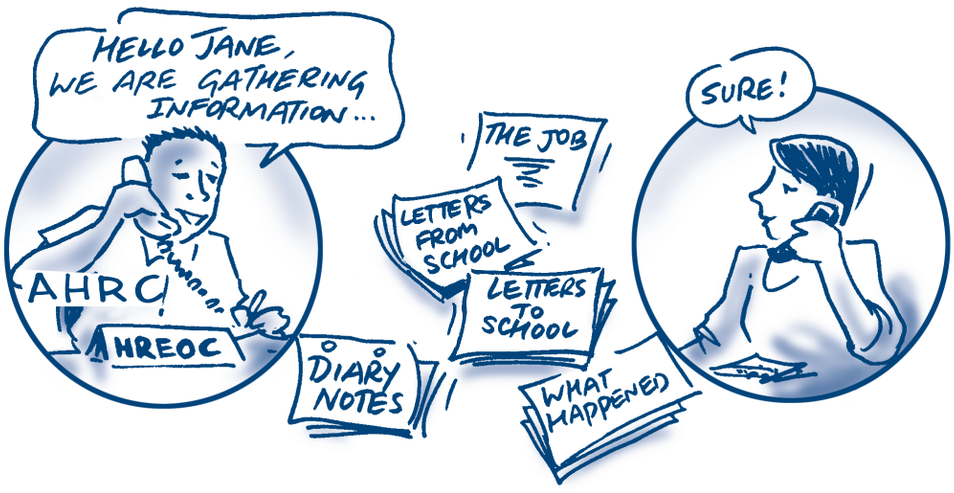
CASE STUDY 17 – Investigation of a complaint

This case study continues with Jane's complaint from Case Study 16. Jane has a vision impairment and missed out on a job as a teacher when she could not complete a literacy test that was not in Braille. She made a complaint to AHRC.

An AHRC staff member then contacted Jane 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 twenty one 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 response 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 meeting or be terminated. Based on the evidence provided by Jane, and the school's response, the AHRC felt that there may have been discrimination and that there should be a conciliation conference. At the conciliation conference, the school apologised to Jane and organised another exam for her in Braille.



CASE STUDY 18 – Having your say at conciliation

George has a stutter. He made a complaint against 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 conciliator 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.

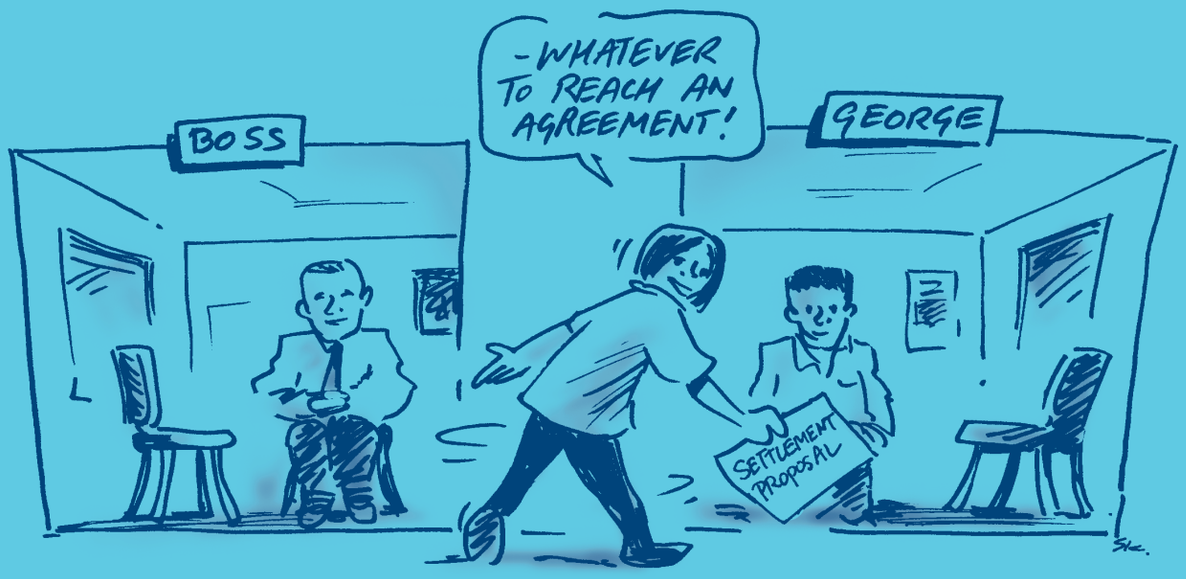
George was still worried about seeing his boss. The conciliator talked separately to George and his boss, and it was agreed that the meeting could be a 'shuttle' meeting. In a shuttle meeting, each party sits in a separate room and the conciliator goes back and forth between them to tell each party how the other one feels.

This meant that George did not have to meet his boss face-to-face. Instead, the conciliator would pass on everything that he wanted to communicate.

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 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.



4. GOING TO A CONCILIATION CONFERENCE

What is it?

A conciliation conference is:

A meeting between you and the person or organisation you have complained about to try to resolve the complaint. The conference is facilitated by a conciliation officer from either the AHRC or ADB.

If the complaint cannot be resolved informally, the ADB or AHRC may organise a conciliation conference. The aim is to resolve the problem without it having to go to a court or tribunal.

Everything that happens at the 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. 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.** They are there to help the parties negotiate and reach a settlement.

Conciliation meetings are not as formal as a court or tribunal. Usually, everyone sits around a table and discusses the problem.

However, conciliation conferences are flexible. If you are uncomfortable, you can ask for a range of things to make the experience easier, including taking a support person or asking not to be in the same room as the other party. You could also ask for the conciliation conference to be over the phone. Generally, the AHRC or ADB will only hold a conciliation conference if they believe that the parties will be willing to discuss the complaint and will be open to resolving it. The AHRC and 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, raise it with the conciliator.

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 ok. 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

CASE STUDY 19 – Deciding who can come to conciliation

John is going to attend a conciliation conference at the 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 NSW DDLC 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.

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 2 weeks before the conciliation meeting.

Preparing for conciliation

Essential things to remember in preparing for the conciliation conference are:

Be mentally prepared. Always remember that 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.

Bring all relevant information and documents. You may need to refer to them.

You might like to bring:

- A list of issues written down to make sure that you raise them during the meeting;
- Your diary - to remind you of important dates and events;
- Documents which help to explain why you are asking for certain things in your proposal. 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 may need to bring medical certificates, reports, or recommendations from specialists.

Research for your settlement proposal. It is important to know your options and what you can ask for. It is also a good idea to get some legal advice at this stage to find out what a reasonable settlement in your case would be. We discuss settlement proposal later in this section on page 2 - 13.

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 do it if she was allowed to be trained and tested one-on-one. She asks her boss, who refuses to provide the one-on-one training. Tara's boss then dismisses her for not doing the training. She files a complaint with AHRC that goes to conciliation.

At the conciliation meeting, 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, she decided to ring some trainers and ask about their courses. She found out that many did offer one-on-one courses but they cost a little more to do. She was very sorry that she didn't know this at the time of the conciliation meeting because it might have helped her to reach agreement with her boss.

The conciliation day

The conciliation will usually begin with the conciliator talking to each party separately. They will then bring everyone together in one room and discuss the rules of 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 how you have been impacted by the discrimination and what effect it has had on you. 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.

Then 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 the proposals. See Section 5 for information on settlement proposals.

5. POSSIBLE OUTCOMES

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

> A settlement proposal is:
>
> A list that you make of the specific outcomes that you would like from the other party, to address the problem.

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

Another person may be able to see a solution that meets the needs of both parties. Or both parties might agree that they cannot get everything they want and will 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.

You can be creative and flexible about what you would like.

Some things that people ask for are:

- An apology;
- Adjustments – for example, in the workplace or school;
- Changes to policies or practices;
- Disability awareness or anti-discrimination/ harassment training for the person or organisation that treated them badly;
- Financial compensation;
- Written reference or getting your job back;
- Counselling paid for by the other side.

We talk about some of these below.

CASE STUDY 21 – An apology

Sage has a mild repetitive strain injury in her left hand. She asked her employer – The Roses are Red Flower Shop – to give her modified scissors and pruning equipment. They refused. Sage felt really upset that her employer did not want to help her disability and so she made a complaint to the ADB.

Sage'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.

Sage also asked for an apology. After some negotiations about the wording, her employer apologised in writing. Sage 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.

An Apology or Statement of Regret

Often, people 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 for them to apologise to you.

Adjustments

People often ask for specific adjustments for their disability, as part of their complaint, such as changes to a workplace to allow access to all areas by wheelchair or more time in an exam to accommodate chronic fatigue.

CASE STUDY 22– Getting reasonable adjustments

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

Matthew's parents asked the school to provide these adjustments but the school refused. Matthew's parents lodged a complaint to the AHRC on his behalf.

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

Changes to policies or practices

Many people who have experienced discrimination want systems, policies and practices to change so that other people don't need to go through what they have.

When you make a complaint, you can ask an organisation or government department to change its policy and practices. This is an outcome that can help other people with disability in the future.

CASE STUDY 23 – Change the System

Mary 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 re-consider the decision, they refused. Mary complained to AHRC.

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

After a lot of talking, Mary 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. Mary was happy with this outcome.

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.

CASE STUDY 24 – 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 ADB.

Mickey wanted the staff to understand that his disability is physical and does not affect his thinking. At the conciliation meeting staff and management agreed to have disability awareness training twice a year. This was a great victory for Mickey; 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.

Financial compensation

You can also ask for compensation at conciliation. Compensation might be for lost wages, 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. You won't become a millionaire by making a complaint, no matter how big or well known the other party is.

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.

6. REACHING AGREEMENT– OFFERS OF SETTLEMENT

Often you will reach an agreement at, or shortly after, the conciliation conference. 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. If you are not happy with the offer, you can ask them to change it, or you could write down

CASE STUDY 25 – Financial compensation

Sasyun 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 AHRC.

Because it was such a big company, Sasyun decided to ask for a large amount of compensation. His first settlement proposal was $20,000. 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.

Sasyun saw that his expectations were unrealistic and after some negotiation agreed that $1,746 was acceptable. This was the amount he would have earned in a month if he'd got the job.

what you would be prepared to settle for and give your proposal to the other party. Generally speaking, the person who has brought the complaint will be asked to make an offer of settlement first.

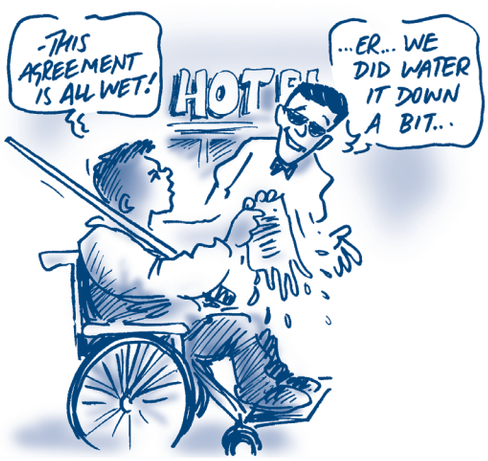
A Settlement Agreement (or Deed) is:

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 not take the complaint to a court or tribunal.

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.

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, ideally, to talk about it with a lawyer.

A party can make an offer of settlement **at any time** during the complaint process. Always think carefully about the offer. Often a lawyer can help you work out whether the offer is beneficial to you or not.



CASE STUDY 26 – What did we actually agree to?

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 NSW DDLC and asked them to have a look at the deed.

NSW DDLC recommended that Francis not sign the deed. NSW DDLC 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, the conciliator will terminate the complaint (if it is an AHRC complaint) or will ask you if you wish for your complaint to be referred (if it is an ADB 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.

Referral means:

that the complaint will not be taken any further by the ADB and will be sent to the Administrative Decision Tribunal (ADT).

Parties can also ask for the complaint to be terminated earlier in 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.

Going to the ADT or a federal court

You must then decide whether to go on to the next available step – which is either a tribunal or a court. If your complaint was in the ADB, the next step is the Administrative Decisions Tribunal (ADT). If your complaint was in the AHRC, the next step will be either the Federal Magistrates Court or the Federal Court.

Proceeding beyond the conciliation level is a big decision, and will probably involve costs.

You **should seek legal advice** before making this decision.

If you think you may want to proceed to the next level, it is essential that all the events you want to complain about are in your complaint, as you will not be able to raise new events. If events are left out, or new incidents have occurred since you made the complaint, you may need to amend your complaint before it is terminated or referred.

The Anti Discrimination Board -> Administrative Decisions Tribunal

If the parties cannot agree at conciliation, the ADB will ask you whether you want to take the complaint to the ADT. If you do want to proceed to the ADT, here are some of the steps of what can happen next:

- You have **21 days** to write to the ADB to ask them to refer your complaint to the Administrative Decisions Tribunal (ADT). At the time of printing there was no fee for applying to the ADT 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 ADT they will send a President's Report to the ADT, with a copy of your complaint and the other party's reply. You will receive a letter from the ADT telling you to attend a Case Conference. The aim is to prepare the case for a hearing. 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 hearing is set.
- Sometimes, you will 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 hearing.
- If mediation fails it will go to a hearing.

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.

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

The Australian Human Rights Commission – Federal Court or Federal Magistrates Court

If the parties cannot agree at conciliation, here are some of the steps that could happen next:

- If conciliation fails, the President of the Commission will terminate the complaint.
- 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 receiving the document to apply for a hearing in court. You should generally apply to the Federal Magistrates 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 Magistrates Court's website. You need to 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 – these can be waived if you meet certain criteria.

The Court holds 'directions hearings' to prepare the case for the trial. 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.

Costs

Going to a court or tribunal is a serious step and often involves a lot of time, effort and stress. Even more importantly for many people, it can cost a lot of money. Costs can include not only the lawyer's fees, but also costs for getting documents and reports and paying for expert witnesses (like a doctor or specialist). Also, if you lose your case, you might have to pay the other side's legal costs. This could be many thousands of dollars. Alternatively, if you win, the other party may also be ordered to pay your legal costs – you should remember that an order for legal costs is unlikely to actually compensate you for all the money you have spent in bringing your 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 hearing?

Although a hearing in both the ADT and federal courts is like a court trial, a hearing in the Federal Magistrates Court or Federal Court is more formal than a hearing at the ADT. In both scenarios, 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

CASE STUDY 27
– Going further in the complaint process

Emma has a psychiatric and a mobility disability. She has an assistant dog, Wally, who helps with the effects of her disabilities. She was boarding the last bus for the day to get home, when the driver said she could not bring her dog on. She tried to explain that Wally was her assistant dog, but the bus driver began to get abusive and eventually closed the door on Emma. She felt humiliated in front of the other passengers and had to walk home, which took her over 3 hours.

Emma filed a complaint with AHRC. There was a conciliation meeting but the parties could not agree on a solution. The bus company said that they had disciplined the driver and they refused to do anything else.

Because they couldn't agree, the AHRC conciliator terminated the complaint. Emma was told that she had 60 days to proceed to the Federal Court or Federal Magistrates Court if she wanted to take the case further. She went to the Federal Court registry to talk about this and the staff there told her how to start the process. She realised that going to court is much more formal than conciliation and involves a lot more work. She also started to feel she would need a lawyer.

Emma called several private law firms to ask if they could help and how much they would cost. Many told her that they do not do disability discrimination law. Others said they might be able to help but when she asked them about the cost, she found that they were too expensive for her. Finally, one firm told her to call NSW Disability Discrimination Legal Centre (NSW DDLC).

Emma called the NSW DDLC and Mark, one of the volunteers, answered the phone. He took down Emma's details and told her he would call next week after talking to the solicitor. A week later, Mark called Emma and told her that the solicitor thought she had a strong case and that the NSW DDLC could help her with it. He also said that her case could help a lot of people in similar circumstances.

Soon after, Emma's solicitor at the NSW DDLC asked her for a list of documents, including:

- The complaint form, all letters from AHRC and letters from the bus company;
- Up-to-date medical certificates about her disability and its effects on her daily life;
- Certificates from her specialist, psychologist and carer as to how her assistant dog, Wally, helps with her disabilities;
- Any evidence Emma had about obedience training Wally had undertaken;
- Statements from Emma's friends and carers who could describe her emotional and physical state.

Emma found it hard to ask all these people for statements and to fill in the paper work. Sometimes, it seemed that every time she got some documents, her solicitor would ask for more. Once, when the NSW DDLC tried to give a document to the Court, the staff rejected it because it was not written in the right way. Emma quickly found out that the Court has a lot of rules that would have been really hard to follow without a solicitor to help. There were also deadlines to meet and fees to pay all along the way.

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, the other side can be ordered to do certain things (remedies). If you lose at the Court level the complaint will be dismissed and you will probably be ordered to pay the legal costs of the other side. At the ADT, 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 ADT process, such as by failing to attend at the ADT when requested or causing unnecessary delays.

Going to a Court or the 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 a disability that have made a really positive difference to the lives of many other people with a disability.

CASE STUDY 28

After a lot of work collecting information and evidence and giving it to the Court, Emma's solicitor asked her to meet a barrister. A barrister acts as your representative at Court. Usually, barristers are expensive but in Emma's case, the barrister agreed to help free of charge (also called 'pro bono'). For the barrister to get a good understanding of the case, Emma and her solicitor met with her several times.

Finally, the day came for Emma to go to Court. Her case was set to start in the morning. Even though her solicitor had warned her that this was just a Directions Hearing and would not be the only court day, Emma had assumed that most of the case would happen on this day and then the judge would make a decision.

When her name was finally called, Emma became very nervous. The barrister did all the talking for her, but she couldn't understand what the judge was asking. After a short time, everyone took out their diaries and wrote down more court days for months ahead. It was all over within 15 minutes! After they left the court, her solicitor reminded Emma that a Directions Hearing is just a chance to introduce the case to the court and to set down the date of the full court case. This was three months away!

In the meantime, the barrister wanted Emma to find doctors who would be willing to come to Court and talk about her disability and her assistance dog, Wally. This meant more appointments. The medical reports also cost a lot of money. She was even more upset when she found out that the doctors expected to be paid if they had to come to Court.

The three months passed quickly. As the court date got closer, Emma's solicitor decided that they would have to ask the court for more time. The case was delayed for another month.

Four months after the Directions Hearing, the case came to Court. Emma was a little bit less nervous than she had been before. But she was very nervous when she had to give evidence and answer questions from her barrister and the bus company's barrister in front of all the people in the courtroom.

What remedies do I want?

If the complaint gets to the Court or ADT, the range of outcomes, or remedies, is much more limited than at conciliation and it will be up to the Court or ADT 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, the court has the power to say whether you were 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 ADT 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 ADT 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. In some cases, damages have been as low as $500. In other cases, $50,000 has been awarded.

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.

Appealing to another Court

If you are not happy with the decision, 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 ADT 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.

CASE STUDY 29 – 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 work on his case. Solicitors are not allowed to run cases unless they think they have a reasonable chance of winning.

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 fees
- His 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.

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.

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.

As you can see, there are many different steps involved in making a disability discrimination complaint. You will not encounter all of these steps. At times, making a complaint is not easy. This booklet is not meant to scare you away from fighting for your rights, but it does try to make sure you know what to expect and what options are available along the way.

If you think that you might have a disability discrimination complaint, contact the organisations at the end of this booklet for free advice and assistance.

Finally, here is a case study based on a real-life example which went to court, showing that making a disability discrimination complaint can lead to a successful outcome.

CASE STUDY 30 – Finding a way to a successful outcome

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 also awarded Hal some financial compensation for hurt feelings and Hal's 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.*

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

NSW Disability Discrimination Legal Centre Inc.

We are a community legal service 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.

NSW Disability Discrimination Legal Centre
PO Box 989, Strawberry Hills, NSW 2012
Toll Free Phone: 1800 800 708 (NSW only)
Phone: (02) 9310 7722
Fax: (02) 9310 7788
Toll Free TTY: 1800 644 419 (NSW only)
TTY: (02) 9310 4320
Email: info@ddlcnsw.org.au
Website: www.ddlcnsw.org.au

Community Legal Centres

Community legal centres provide free legal advice and assistance. They can also refer you to the appropriate person for advice if you need specialist advice or assistance.

Combined Community Legal Centres Group (NSW) Inc.
Phone: (02) 9212 7333
Fax: (02) 9212 7332
Email: clcnsw@clc.net.au
Website: www.nswclc.org.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
Postal address: PO Box K847, Haymarket 1238
Website: www.legalaid.nsw.gov.au

National Association of Community Legal Centres

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

Website: http://www.naclc.org.au/
CLC Directory
http://www.naclc.org.au/topics/2093.html

Complaint bodies

The AHRC and the ADB can help you to write and put in (lodge) your complaint and their standard forms are good guides. They cannot give legal advice, but they will help you understand what to do, and make sure you follow the right procedure.

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

Australian Human Rights Commission

Level 8 Piccadilly Tower, 133 Castlereagh St, Sydney NSW 2000
Phone: 1300 656 419
Fax: (02) 9284 9611
TTY: 1800 620 241
Postal address: GPO Box 5218, Sydney, NSW 2001
Email: complaintsinfo@humanrights.gov.au
Website: www.humanrights.gov.au and www.humanrights.gov.au/complaints_information/ (for complaints information)

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.lawlink.nsw.gov.au/adb

Courts and tribunals

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

Administrative Decisions Tribunal

Level 15, 111 Elizabeth Street, Sydney NSW 2000
Phone: (02) 9223 4677
Fax: (02) 9233 3283
TTY: (02) 9235 2674
Email: ag_adt@agd.nsw.gov.au
Website: www.lawlink.nsw.gov.au/adt

Federal Magistrates Court

Law Courts Building Level 17, Queens Square, Sydney NSW 2000
Phone: (02) 9230 8567
Fax: (02) 9230 8295
Email: nswdr@fedcourt.gov.au
Website: www.fmc.gov.au

Federal Court

Law Courts Building Level 17, Queens Square, Sydney NSW 2000
Phone: (02) 9230 8567
Fax: (02) 9230 8535
Email: nswdr@fedcourt.gov.au
Website: www.fedcourt.gov.au

Government bodies relating to employment

Fair Work Australia

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

Fair Work Australia (National Office)
2nd Floor CML Building, 17-21 University Avenue, Canberra ACT 2600
Phone: (02) 6209 2400
Fax: (02) 6247 9774
Postal address: GPO Box 539, Canberra City, 2601
Email: canberra@fwa.gov.au
Website: www.fwa.gov.au

Fair Work Australia (NSW Office)
Level 8 Terrace Tower, 80 William Street, East Sydney NSW 2011
Phone: (02) 8374 6666
Fax: (02) 9380 6990
Email: sydney@fwa.gov.au

Fair Work Ombudsman

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

Fair Work Ombudsman Complaints Assessment Team
Reply Paid 2567, Adelaide SA 5001
Phone: 131 394
Website (with Live Chat): www.fwo.gov.au
Sydney
Level 5, 255 Elizabeth Street, Sydney NSW 2001
Newcastle
Level 1, Suite 2, 265 Wharf Road, Newcastle NSW 2300
Coffs Harbour
Level 1, 73 Albany Street, Coffs Harbour NSW 2450
Wagga Wagga
25-27 Thompson Street, Wagga Wagga NSW 2650
Orange
21-29 William Street, Orange NSW 2800

Department of Education, Employment and Workplace Relations (DEEWR)

DEEWR may be able to provide you information relevant to your rights and opportunities in the **workplace**. They have offices across Australia.

DEEWR (National Office)
16-18 Mort St, Canberra ACT 2600
Phone: 1300 363 079
TTY: 1800 554 609
Website: www.deewr.gov.au
Postal address: GPO Box 9880 Canberra ACT 2601

DEEWR (Sydney Office)
Level 8, 255 Elizabeth St, Sydney NSW 2000
Phone: 1-DEEWR (133 397)

NSW Office of Industrial Relations

The Office of Industrial Relation (NSW) can provide information about your rights at **work** in New South Wales.

McKell Building, 2-24 Rawson Place, Sydney NSW 2000
Phone: 131 628
Fax: (02) 9020 4700
TTY: 1800 555 677
Website: www.industrialrelations.nsw.gov.au

ABBREVIATIONS

ADA	Anti-Discrimination Act 1977 (NSW)
ADB	Anti-Discrimination Board of NSW
AHRC	Australian Human Rights Commission
ADT	Administrative Decisions Tribunal
DDA	Disability Discrimination Act 1992 (Cth)
DDLC	NSW Disability Discrimination Legal Centre Inc.
FC	Federal Court of Australia
FMC	Federal Magistrates Court of Australia

APPENDIX

Comparing the State and Federal Acts

In choosing which Act you should make your complaint under, you should take note of the differences between the laws, and ensure that what you are complaining about is covered by the appropriate law. If you are unsure, ask for legal advice.

<table>
<tr><th></th><th>Disability Discrimination Act 1992 (Commonwealth)</th><th>Anti-Discrimination Act 1977 (NSW)</th></tr>
<tr><td>Investigation and conciliation of complaints</td><td>Australian Human Rights Commission</td><td>Anti-Discrimination Board</td></tr>
<tr><td>Definition of disability</td><td>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.</td><td>NSW does not include addiction to prohibited drugs as a disability.</td></tr>
<tr><td>Areas of unlawful Discrimination</td><td colspan="2">The areas that are covered by both include:
• Employment and related areas
• Education
• Access to premises
• Goods, services (and facilities under the DDA)
• Accommodation</td></tr>
<tr><td></td><td>The Federal law covers:
• Land
• Clubs and incorporated associations
• Sport
• Commonwealth laws and programs
• Disability Standards
• Requests for information</td><td>The State law covers:
• Registered clubs
• Local government
• The State law does not include private schools
The State law does not cover discrimination in employment where the employer has less than 5 employees or is a private school.</td></tr>
<tr><td>Harassment</td><td>Harassment on the grounds of disability is unlawful in employment, education (by staff – not other students) and the provision of goods and services.</td><td>There is no specific reference to harassment.</td></tr>
</table>

	Disability Discrimination Act 1992 (Commonwealth)	*Anti-Discrimination Act 1977 (NSW)*
Victimisation	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 6 months imprisonment.	
Vilification	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.
Exemptions	The exemptions covered by both include: • Unjustifiable hardship • Inherent requirements of the job • Infectious disease if it is reasonably necessary to do so in order to protect public health	
	The Federal law covers: • Pensions, social security • Migration • Combat and peace-keeping • Special exemptions	The State law covers: • Compliance with other laws • Some voluntary bodies • Special exemptions
Complaints on behalf of more than one person	Representative actions possible.	Some provision for representative complaints is available for bodies who are recognised for the purpose of making complaints.
Time limits for complaints	Under both Federal and State law, the President may decline a complaint where the complaint is made more than 12 months after the discrimination occurred.	
Where can I appeal a conciliation decision?	Federal Court of Australia or Federal Magistrates Court ($50 to file an application) within 60 days.	Equal Opportunity Division of the Administrative Decisions Tribunal (no cost) within 21 days.
Compensation	No upper limit on compensation.	Compensation cannot exceed $100,000.
Legal costs	Losing side usually pays legal costs of winning side.	Each side usually pays its own costs unless specified otherwise by the Tribunal where there are exceptional circumstances.