Discrimination in Strata

The Australian Human Rights Commission is the body to whom a complaint is lodged if you feel that you may have been discriminated against.

Owners and occupiers can have very different ideas about what arrangements are appropriate for assisting those with special needs to access and use their lots and common property facilities, participate in scheme meetings and observe cultural traditions.

What is disability discrimination?

Disability discrimination is when a person with a disability is treated less favourably than a person without the disability in the same or similar circumstances.

For example, it would be ‘direct disability discrimination’ if a nightclub or restaurant refused a person entry because they are blind and have a guide dog.

It is also disability discrimination when there is a rule or policy that is the same for everyone but has an unfair effect on people with a particular disability.

This is called ‘indirect discrimination’.

For example, it may be indirect disability discrimination if the only way to enter a public building is by a set of stairs because people with disabilities who use wheelchairs would be unable to enter the building.

How can I be protected from disability discrimination?

The Disability Discrimination Act makes it against the law to treat you unfairly because of your disability.

You are also covered if you had a disability in the past, may develop a disability in the future or if people think you have a disability.

People who are relatives, friends and carers of people with a disability are also protected by the Disability Discrimination Act.

How is disability defined?

The definition of 'disability’ used in the Act is broad.

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It includes physical, intellectual, psychiatric, sensory, neurological and learning disabilities. It also includes physical disfigurement and the presence in the body of disease-causing organisms, such as the HIV virus.

Making a complaint to the Commission

If you do not believe that you can resolve the situation yourself, or you do not feel comfortable doing this, you can make a complaint to the Australian Human Rights Commission. You can also have someone such as a solicitor, advocate or trade union representative make a complaint on your behalf.

It does not cost anything to make a complaint to the Commission.

Your complaint needs to be put in writing.

What will happen with my complaint?

When the Commission receives a complaint about something that is covered by the Disability Discrimination Act, the President of the Commission can investigate the complaint and try to resolve it by conciliation.

The Commission is not a court and cannot determine that discrimination has happened. The Commission's role is to get both sides of the story and help those involved resolve the complaint.

Commission staff may contact you to get further information about your complaint.

Generally, the Commission will tell the person or organisation the complaint is against (the respondent) about your complaint and give them a copy of the complaint. The Commission may ask the respondent for specific information or a detailed response to your complaint.

Where appropriate, the Commission will invite you to participate in conciliation. Conciliation is an informal process that allows you and the respondent to talk about the issues and try to find a way to resolve the complaint.

If your complaint is not resolved or it is discontinued for another reason, you can take your complaint to the Federal Court of Australia or the Federal Circuit Court.

Discrimination within Strata

Generally, these laws have limited application and only prohibit conduct if certain things can be established. In particular:

- That the action related to a specified characteristic of the aggrieved person, e.g. gender, race, sexuality, disability or illness status, marital or domestic status or carer's responsibilities.

- That the aggrieved person experienced discriminatory conduct. This can be direct, e.g. exclusion of a particular group or indirect, e.g. imposition of a requirement which in theory applies to everyone, but actually operates against particular groups. Also, some related conduct is prohibited, e.g. vilification, victimisation, harassment and sexual harassment.

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- That the conduct occurred in a specified context. This depends on the characteristic and conduct involved and varies widely. For example, many of these rules are limited to an employment context, while others apply to broader areas of public life, e.g. supply of goods and services, education, accommodation and participation in registered clubs.

- That no defence is available. These also vary widely, e.g. in some contexts a requirement may not apply if compliance would involve "unjustifiable hardship" or if a restriction is "reasonable in all the circumstances".

The NSW Anti-Discrimination Act 1977 ("ADA") does not contain a provision expressly requiring an owners corporation to modify common property to facility disability access. This contrasts with the position in Victoria, where Section 56 of the Equal Opportunity Act 2010 requires an owners corporation to do so, subject to certain conditions, including that the lot owner bear the cost.

Pets

Pets are currently an issue which arises in many strata plans with respect to the reasonableness of the by-laws to include or exclude them. If the pet is actually a guide dog or genuine companion animal, then it will be significantly more difficult to exclude the owner's animal.

The ADA does contain a more general provision, Section 49M, which prohibits discrimination against a person on the ground of disability by refusing to provide goods or services or by the terms on which he or she provides those goods or services. There are some qualifications, especially where compliance would cause unjustifiable hardship to the supplier.

Access to accommodation

NSW & Victorian cases suggest that an owners corporation is providing services, that the means of accessing the lot and common property facilities are one of the terms on which those services are provided and that generally the need to modify common property to facilitate disability access will not involve unjustifiable hardship. Consequently, it seems that owners corporations may need to make such modifications and at their own cost.

Where these modifications relate to the provision of handrails or disability ramps, this would probably be seen as reasonable but whether or not that will extend to a new lift extension may well depend on the relative need and the concept of unjustifiable hardship.

Hulena v Owner's Corporation Strata Plan 13672 [2010] NSWADTAP 27

Owners Corporation OC1-POS539033E v Black [2018] VSC 337

Adjustment for meetings

One of the most common disputes that we see involves requests for special measures to facilitate access to or participation at meetings for the benefit of persons with special needs, e.g. ground floor venues for meetings, provision of documents in large font format and steno-captioning at meetings. The key issues here are:

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- Whether the owners corporation or strata managing is required to take such measures. Are they doing one of the things to which the law applies, e.g. providing accommodation or goods and services?
- If yes, would compliance involve "unjustifiable hardship"? This would depend on the relative need, proportion of persons benefitted and cost. If no, whether it should be done anyway, in the interests of scheme harmony and inclusion. Again, this would depend on the relative need, proportion of persons benefitted and cost.

Other cases have involved an owners' claim of discrimination based upon a disability and that strata schemes refusal to construct a lift extension and a disability relating to pesticide intolerance against the strata schemes need to exterminate vermin. We are happy to advise you further upon your own particular circumstances.

Key takeaways

- Disability discrimination occurs when individuals with disabilities are treated less favourably than those without.
- The Disability Discrimination Act protects individuals with disabilities and those associated with them.
- Complaints about discrimination can be lodged with the Australian Human Rights Commission at no cost.
- The Commission facilitates conciliation to resolve complaints but does not have the authority to determine discrimination.
- Discrimination laws in strata settings require specific characteristics to be established for a complaint to be valid.

****The information contained in this article is general information only and not legal advice. The currency, accuracy and completeness of this article (and its contents) should be checked by obtaining independent legal advice before you take any action or otherwise rely upon its contents in any way.*

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