



# How can the test for indirect discrimination be improved?

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## Introduction

The current test for indirect discrimination in the *Disability Discrimination Act 1992* (Cth) (**Disability Discrimination Act**) is too complex and makes it difficult for people who have been discriminated against to be successful in Court. The current test should be replaced to make the law fairer, simpler, and more accessible.

**This explainer will tell you more about the current test for indirect discrimination and how it needs to change.**

## What is indirect discrimination?

Indirect discrimination occurs when:

- someone puts a requirement or condition in place that applies to everyone, and
- because of their disability, the person does not or is not able to comply, and
- the requirement or condition disadvantages the person because of their disability, and
- it is unreasonable in all of the circumstances.

An example of indirect discrimination is when there are stairs to enter a building or there is a requirement to have a driver's licence to work in a job where alternative transports are also available to get to different sites.



It is also indirect discrimination when someone refuses or neglects to make a change to a rule or condition that would enable a person with disability to comply with it. These changes that enable a person with disability to participate on an equal basis with others are known as **reasonable adjustments**.

The purpose of reasonable adjustments is to make sure that people with disability have an equal playing field.

## What is the current test for indirect discrimination?

When someone complains of indirect discrimination, they must prove certain legal tests to be successful.

The current test for indirect discrimination in the Disability Discrimination Act requires 3 elements:

- a person is required to comply with a requirement or condition,
- because of the disability, the person does not or would not comply, or is not able to or would not be able to comply, with the requirement or condition, and
- the requirement or condition disadvantages people with disability.

If the person making the complaint proves these elements, then the duty holder must prove that the rule or requirement was reasonable. This is called the **reasonableness test**.

There are issues with the reasonableness test. Deciding what is reasonable is vague and has led to different judges reaching different conclusions on what is considered to be reasonable. As a result, it is hard for people with disability who are making an indirect discrimination complaint in court to know whether they will be successful.

## What is the unjustifiable hardship defence?

The Disability Discrimination Act currently includes a defence for duty holders on the basis that avoiding the discrimination would cause them unjustifiable hardship. This is called the **unjustifiable hardship defence**.

To decide whether avoiding discrimination would cause unjustifiable hardship, all relevant circumstances must be taken into account, including those listed in the Disability Discrimination Act, such as the positive or negative impacts on anyone



involved, the cost of making the adjustment and the financial circumstances of the person relying on the defence.

Duty holders can rely on this defence in indirect discrimination complaints even if the rule or condition in question is found to be unreasonable. In practice, this means that there are multiple defences and exceptions that duty holders can rely on in Court.

## How can the test for indirect discrimination be improved?

The tests for indirect discrimination can be improved by removing the need for people to be unable to comply with the rule or requirement and replacing the reasonableness test with a 'legitimate and proportionate' test. These changes will make the laws simpler and more effective for people with disability.

### Removing the 'unable to comply' requirement

The Commission recommends removing the requirement for a person with disability to be unable to comply with the rule or condition from the test for indirect discrimination. The indirect discrimination test should only look at whether a person would experience a disadvantage by complying with a rule or condition as a result of their disability, regardless of whether the person with disability can comply with a rule or condition. This approach focuses on how a person with disability would be impacted by a rule or requirement.

This will also help to make discrimination law more consistent on a federal level, as the test will match the test for indirect discrimination in the *Sex Discrimination Act 1984* (Cth) and the *Age Discrimination Act 2004* (Cth). This simplified test is already in place in other discrimination laws in Tasmania and Victoria.

### Changing the 'reasonableness test'

The reasonableness test should be replaced with a different test called the **legitimate and proportionate test**. This test would require duty holders to prove that the rule or condition was put in place for a legitimate purpose, and that the rule or condition was proportionate to the purpose. In other words, the duty holder must prove that they need the rule or condition in place for a legitimate reason and that there are no less discriminatory alternatives for them to use.



This test has been successfully used in discrimination laws in countries overseas, such as the United Kingdom. Using the legitimate and proportionate test gives more guidance to duty holders and to judges on what they must consider when making a decision, which gives more certainty to people with disability who make a complaint in court.

## Recommendations made by the Commission

The text below provides a summary of the Commission's recommendations on indirect discrimination to the Attorney-General's Review of the Disability Discrimination Act.

### Recommendations

- The definition of indirect discrimination in the Disability Discrimination Act should be amended to remove the requirement that a person 'does not comply or is not able to comply'.
- The Disability Discrimination Act should be amended to replace the 'reasonableness' defence for indirect discrimination with a 'legitimate and proportionate' test.

*See also Free & Equal Reform 32 and DRC Recommendation 4.24.*