



How can the test for direct discrimination be simplified?

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Introduction

The current test for direct 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, known as the 'comparator test', should be replaced with a different test known as the 'detriment test'. The detriment test will make the legal system fairer for people with a disability who have experienced direct discrimination.

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

What is direct discrimination and the comparator test?

Direct discrimination occurs when someone treats a person less favourably because of their disability, in comparison to how they would treat someone who does not have disability in similar circumstances.

The test for direct discrimination in the *Disability Discrimination Act* is commonly referred to as the '**comparator test**': for someone to prove they have been discriminated against because of their disability, they must show that they were treated less favourably because of their disability when compared to someone in



similar circumstances who does not have disability. This person without disability is referred to as 'the comparator'.

Using the comparator test in disability discrimination matters is complicated. Often, there is not a real person to use as 'the comparator'. When this happens, the Court will make up a hypothetical person and scenario to imagine how the party accused of discrimination might have treated this hypothetical person, and then assess if this hypothetical person would have been treated more favourably than the person with disability.

This is an unreliable way of deciding whether someone has been discriminated against. It makes it much more difficult for people with disability to know if they will be successful at Court because they do not know exactly how the Court will create the comparator. This means a case might not be successful in Court, even if it is clear that the person with disability has been treated unfavourably because of their disability.

If the person with disability is able to prove that they were treated less favourably than the comparator, they must also then prove that the reason was because of their disability. The legal term for this is the **burden of proof** or **onus of proof**. Often a person with disability will not have enough information to be able to prove **why** the person treated them less favourably. This makes it much harder for the person who has been discriminated against to meet the burden of proof and be successful in their discrimination claim.



What is the *Purvis* decision and why has it made it harder to prove direct discrimination?

Purvis v State of NSW (Department of Education) (Purvis)

In 2003, the High Court made an important decision on the comparator test in a case called *Purvis*. The *Purvis* case was about a school student with a vision impairment and intellectual disability. The student had instances at school of behaving violently towards others and was expelled. His family said his behaviour was because of the discriminatory treatment the student was experiencing at school.

The Court made a hypothetical comparator of a student without disability who was also behaving violently towards themselves and others. This meant that the court allowed manifestations of the student's disability to be treated as part of the comparator. As a result, the comparison became between two people who are exhibiting the same behaviours, but only one of them is because of disability. The Court decided that the school did not discriminate because it would have expelled a student without disability if that hypothetical student displayed the same behaviours.

This approach ignores the basis or cause of the behaviour for the person with disability and treats manifestations of disability as though they are something that could be removed or taken off. The result is a very narrow test for direct discrimination that prohibits discrimination on the basis of disability itself, but not on the basis of manifestations of a disability that may be perceived as socially undesirable.

Once the High Court makes a decision on how the law is to be applied, all other courts in Australia have to follow that decision. This means all courts have to apply the comparator test in the same way in all disability discrimination matters. When the court makes a hypothetical comparator, it creates a comparator who behaved the same way as the person with disability, regardless of whether the person's behaviour was actually part of their disability or not.

The *Purvis* case has negative consequences for many people who have disability that affects the way they behave. Together, the comparator test and the *Purvis* case make it much more difficult for people with disability to be successful in proving a direct discrimination claim.



How can the test for direct discrimination be simplified?

A better test is the '**detriment test**'. The 'detriment test' is already included in the Disability Discrimination Act as one part of the test for direct discrimination. The 'detriment test' simply requires the person with disability to show that they were treated unfavourably by another person because of their disability. Removing the comparator test would mean that the decision in the Purvis case would no longer apply to people making a claim in court about direct discrimination.

Both Victoria and the Australian Capital Territory (ACT) have state anti-discrimination laws that already use the detriment test for disability discrimination cases. This is helpful as it shows how the test operates in real life cases. In Victoria and ACT, the detriment test has had positive outcomes, making cases simpler and making it easier for people who have experienced discrimination to prove their case.

The Disability Royal Commission also recommended changing the **burden of proof** in direct discrimination claims, once a complainant has shown that there is a connection between their disability and the unfavourable treatment they received. This would mean that the person accused of discrimination must prove that they treated the person with disability unfavourably for another reason, not because of their disability. Changing the burden of proof would remove unnecessary legal barriers to people with disability being successful in making discrimination claims.

Recommendations made by the Commission

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

Recommendations

- The Disability Discrimination Act should be amended to replace the 'comparator test' with a 'detriment test'.
- The Disability Discrimination Act should be amended to shift the burden of proof for establishing that less favourable treatment was because of a person's disability to respondents, once a prima facie case is established.

See also Free & Equal Reforms 17 and 30 and DRC Recommendation 4.23.