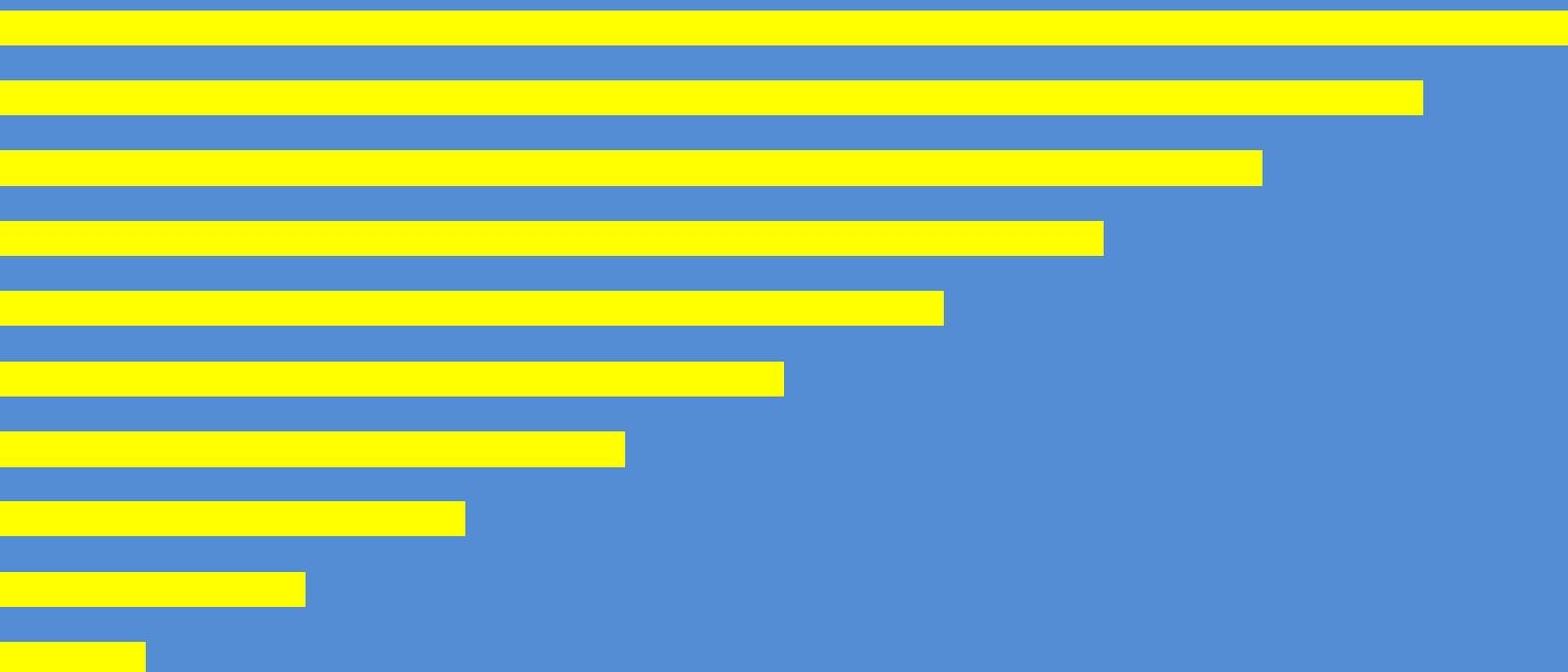


Epilepsy and the Workplace: A guide for workers and employers

An Overview

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This is a Guide only and does not constitute Legal Advice
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WITH THANKS TO

PETER FORD

AND

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What is epilepsy?

Epilepsy affects people of all ages, nationalities and social backgrounds and it is the world's most common disorder of the brain. Despite its prevalence in the community, epilepsy remains a poorly understood condition. Few people can tell you exactly what epilepsy is and most are often unaware that seizures can take many forms and need not involve convulsions or 'fits'.

Epilepsy is often referred to as a disorder of brain function that takes the form of recurring seizures. Our every thought, feeling or action is controlled by brain cells that communicate with each other through regular electrical impulses. A seizure occurs when sudden uncontrolled bursts of electrical activity disrupt this regular pattern. Communication between cells becomes scrambled and our thoughts, feelings or movements become momentarily confused or uncontrolled. While seizures can be frightening, in most instances they stop without intervention.

Once the seizure is over the person gradually regains control and re-orient themselves to their surroundings, generally without any ill-effects. The majority of people diagnosed with epilepsy will have their seizures controlled with medication within a year.

Research into surgery and other treatments is being extensively explored and it is expected that seizure control will be possible for others in the future.

The purpose of this guide

The ability to engage in employment allows people to lead fulfilled and independent lives. Participation in the workplace not only creates financial independence and security, it promotes social inclusion, self-esteem and individual productivity. Unfortunately, getting into and staying in the workforce is not always easy and for people with epilepsy barriers continue to make it difficult to obtain, and hold on to a job. Recent studies have suggested that only 30 per cent of adults with epilepsy are in full time employment, with an additional 17 per cent employed part-time.¹

One of these barriers is a lack of information and understanding. Surveys indicate that employers and co-workers have little understanding of epilepsy and express attitudes of anxiety towards epilepsy in the workplace.² Additionally, while most people with epilepsy have a good understanding of how to manage their own condition, they have significantly less understanding of the safety and legal issues relating to working with epilepsy.³

This guide aims to provide an easy to read introduction to the legal issues relating to epilepsy and employment. It includes information for workers with epilepsy and employers on their rights and responsibilities in the workplace. It also explains the legal options available for people with epilepsy who feel they have been unfairly treated in employment matters. The guide focuses on two main areas of the law – workplace and anti-discrimination law. It then briefly discusses the emerging field of human rights law and the rights relevant to the workplace. In most of these areas the laws discussed apply throughout all of Australia. However, state and territory laws often operate concurrently and these may create additional legal rights and responsibilities. Also these different areas of law often overlap and interact with each other.

While this manual focuses on legal rights and remedies, this is not to suggest these are the only paths available to workers and employers dealing with epilepsy in the workplace. However, an understanding of legal rights and responsibilities encourages a more informed and fair workplace.

¹ K Brown, 'The Hidden Stigmas of Chronic Illness' (2007) *Centre for Citizenship and Human Rights*, Occasional paper No 79.

² C Harden, A Kossay, S Vera and B Nikolov, 'Reactions to Epilepsy in the Workplace' (2004) 45 *Epilepsia* 1134.

³ M Coker, S Bhargava, M Fitzgerald and C Doherty, 'What do People with Epilepsy Know About Their Condition?' (2010) *Seizure* 1.

Finally, this guide is not legal advice. Please see the further references section at the end of the paper for information for some places to go if you are facing legal problems in the workplace.

The Big Question: Do employees have to disclose their epilepsy?

There is no law that requires a worker to tell their employers or co-workers about their epilepsy. The decision of when and how to disclose a medical condition is often a very personal one. It involves balancing considerations of safety, privacy, honesty and the potential for unfair treatment. Disclosing epilepsy at an early stage increases the risk that a person will not be considered 'fit' for a job, but disclosing much later or never at all can cause great personal stress and increase the risk of seizures.

Some specific positions will require a worker to disclose their medical conditions. Some jobs require workers to undertake a health and fitness check before they commence work, or to fill out medical history forms. These are normally jobs where it is a genuine requirement of the work that the employee be physically fit. These medical forms are legal documents and must be filled out to the best of a worker's knowledge. In these circumstances, a failure to disclose epilepsy can be a legitimate reason for dismissal.

If a worker does choose to voluntarily disclose their epilepsy the employer is legally required to keep that information confidential and not disclose that information to anyone else without the worker's express permission. However, with the agreement of the worker, it is often good policy to ensure that direct supervisors are aware of any safety issues or extra accommodations a worker with epilepsy may require. Although a person's health is a private issue if people in the workplace are comfortable and aware of someone's epilepsy the risks posed by any unexpected seizures are decreased.

Workplace Law

Introduction

Workplace law is used in this guide as a broad term to describe the laws that regulate behaviour in the workplace. It primarily applies only to people who are already employed and can include rights and obligations relating to leave entitlements, wages, employment security and health and safety standards. This section of the guide firstly looks to the rights and obligations contained in the *Fair Work Act 2009* (FWA). For the purposes of this guide the relevant parts of the FWA relate to the right to flexible working agreements and limitations on dismissing workers or taking other ‘adverse action’. The second part of this section looks at occupational health and safety (OHS) laws. These are laws designed to create a safe work environment, and prevent injuries in the workplace. At the moment there are no occupational health and safety laws that apply nationally. The ACT *Work Safety Act 2008* is discussed as an example of OHS laws and the obligations they put on workers and employers.

The Fair Work Act (FWA)

The FWA came into force at the start of 2010, creating a new set of laws governing workplace relations. The FWA creates positive and negative protections in the workplace. That is, it outlines certain actions that employers cannot do to employees, and in certain circumstances, creates obligations for employers to take particular steps to improve working conditions.

Unfair dismissal and adverse actions

One of the most important of these ‘negative’ rights found in the FWA is the protection against unfair dismissal. This means a worker cannot be dismissed from their job in circumstances that are harsh, unjust or unreasonable.⁴ Under the FWA, dismissal is defined to include where a person feels forced to resign, as well as where someone is fired. Although it can be hard to pinpoint exactly what ‘harsh, unjust or unreasonable’ means,⁵ the FWA sets out certain

⁴ *Fair Work Act 2009* (Cth) section 385

⁵ See e.g. *Bostik (Australia) Pty Ltd v Gorgevski* (No 1) (1992) 36 FCR 20

considerations that indicate whether or not a dismissal was fair or just.⁶ If an employer is unable to point to a real, valid reason why a worker should be fired, if they gave very short notice of the dismissal or didn't give the worker a chance to respond to accusations made against them, it would be more likely that the worker was unfairly fired. This can be a very important protection for people with epilepsy. It means that if a worker is dismissed for reasons relating to their epilepsy, or misconceptions of it, and they are given no chance to discuss it further, it would be likely to be deemed unfair dismissal.

It means that if they are fired for reasons relating to their epilepsy, and not the standard of their work, it will be unfair under the FWA and therefore unlawful.

In addition to a general protection against unfair dismissal, the FWA provides for some more specific reasons that employees cannot be fired. A key protection is that an employee cannot be fired because of a temporary absence from work caused by injury or illness.⁷ This means a worker cannot be fired for a few days off work because of an unexpected seizure or problems with medication. However, it is important to remember that a doctor's certificate or other medical evidence must be produced, otherwise the employer can lawfully dismiss the worker.⁸

Unfortunately, not all workers are protected against unfair dismissal. A person working for a business that employs less than 15 people will not be protected against unfair dismissal until they have been working there for at least a year. For all other businesses workers will be protected after six months of employment.⁹ Also, a worker will not be protected against unfair dismissal if they earn above a high-income threshold.¹⁰ This is currently about \$110, 000 per year.¹¹

If a worker believes they have been unfairly dismissed they can apply to the Fair Work Australia Tribunal. They can seek to get their job back, or receive

⁶. *Fair Work Act 2009* (Cth) section 387

⁷. *Fair Work Act 2009* (Cth) section 352.

⁸. *Fair Work Regulation 2009* (Cth) regulation 3.01

⁹. *Fair Work Act 2009* (Cth) section 382

¹⁰. *Fair Work Act 2009* (Cth) section 382

¹¹. Note also that an employee will not be protected from unfair dismissal if they are not covered by an award or an enterprise agreement. Almost all industries have awards that govern pay levels and working conditions. For more information go to www.fwa.gov.au .

compensation for the loss of the job.¹² Importantly, an application to the Tribunal must be made within 14 days after being dismissed.¹³

In addition to the unfair dismissal protections, the FWA also protects workers from other ‘adverse actions’. Under the FWA, an adverse action can include demoting an employee, refusing to employ a person or discriminating against a worker.¹⁴ The FWA makes it unlawful for an employer to take adverse action against an employee for exercising their rights in the workplace.¹⁵ Examples of these rights include negotiating workplace agreements, engaging in union activities and making a complaint against an employer. This means an employer cannot disadvantage a worker because they have complained about discrimination or made a complaint to the Fair Work Australia Tribunal. This is a very important protection to remember when considering if taking formal action is the best option.

Terms of employment

Nearly all workers’ employment is governed by a legal document that sets out the terms of employment. For some workers this may take the form of an award – a general set of conditions that apply to all workers with the same positions, such as waitresses or boilermakers. Alternatively, other workers may have their workplace entitlements set by enterprise agreements – agreements that have been negotiated for that particular workplace or company. Both awards and enterprise agreements must be approved by Fair Work Australia and must meet the standards set out in the FWA.

It is unlawful for an award or enterprise agreement to contain terms that are discriminatory.¹⁶ This means the terms in the agreement cannot disadvantage a worker because of characteristics such as age, sex, religion and or disability. As discussed in more detail in the Discrimination Law section, epilepsy will almost always be considered a disability for legal purposes. This does not mean a person with epilepsy is any less capable than other workers, but it does make it unlawful for a person to be disadvantaged in the workplace because of their epilepsy. For examples of the kind of conduct that is discriminatory see the Discrimination Law section.

¹². *Fair Work Act 2009* (Cth) section 390

¹³. *Fair Work Act 2009* (Cth) section 390. For more information about applying to the Tribunal go to the Fair Work website www.fwa.gov.au.

¹⁴. *Fair Work Act 2009* (Cth) section 342

¹⁵. *Fair Work Act 2009* (Cth) section 340

¹⁶. *Fair Work Act 2009* (Cth) section 194

As well as preventing certain terms in awards and enterprise agreements, the FWA requires them to include a ‘flexibility term’.¹⁷ A flexibility term allows a worker and their employer to agree on non-standard working conditions where the worker has a genuine need.¹⁸ The ability to negotiate working conditions such as working hours can be a really effective way to manage a worker’s epilepsy and reduce workplace stress associated with epilepsy.

The ‘individual flexibility arrangement’ that is negotiated will always be different, depending on the nature of the workplace, the needs of the worker and the capacities of the employer. However, the negotiated arrangement must put the worker in a better position than if the standard award or agreement applied to them.¹⁹ Some examples of flexibility arrangements that may be useful for people with epilepsy include:

- Consistent work shifts rather than changing rosters. This can help prevent the risk of seizures on the job as a lack of sleep can be a seizure trigger.
- Different starting and finishing times. This can make it easier for people with epilepsy who cannot drive to get to work on public transport.
- Flexible starting times. This can allow people who have nocturnal seizures to catch up on sleep before starting work.

Again, if a worker feels that the terms of their employment do not include the protections of the FWA they should make an application to Fair Work Australia.

Occupational health and safety

Occupational health and safety laws are vital to ensuring the safety and wellbeing of all people within the workplace. They place an obligation on both employers and workers to protect health and safety and manage associated risks. OHS laws work best when workers and employers have a full understanding of the actual nature of the risks and dangers involved. However, a misunderstanding of the risks related to epilepsy can often unnecessarily exclude and isolate workers.

As mentioned, there are currently no national OHS laws. Rather each state and territory has its own OHS legislation. In addition, the Commonwealth *Occupational Health and Safety Act* (1991) applies to all Commonwealth public

¹⁷. *Fair Work Act 2009* (Cth) section 144

¹⁸. *Fair Work Act 2009* (Cth) section 144

¹⁹. *Work Safety Act 2008* (ACT) section 144

service organisations. As an example of the obligations found in OHS laws, the ACT *Work Safety Act 2008* (WSA) will be discussed in detail. While the laws of other states and territories do take different approaches in their wording and exact nature of the legal duties they impose, the core ideas of taking action to protect health and safety and managing risk in the workplace are common to all of the Acts. The WSA takes a broad definition of worker to include contractors, volunteers and work experience interns as well as employees.²⁰

The WSA contains two key obligations for workplace safety. First, an employer, or anyone in control of a workplace, must ensure work safety by managing risk.²¹ This means that an employer must take all reasonable steps to identify the risk and try to minimise the effect of all the things that could lead to physical or psychological injury in the workplace.²²

The WSA also imposes a duty on workers. The WSA places an obligation on workers not to expose themselves, or other people at the workplace, to safety hazards.²³ This means workers are obliged to cooperate with reasonable instructions, use the safety equipment provided and report any risk of injury or illness the worker has identified.²⁴ It also means taking responsibility for your own safety in the workplace.

The core idea behind both of these obligations is the concept of reasonableness. There will always be some risks that cannot be eliminated, and some workplaces will always be more dangerous than others. Deciding what is reasonable in a situation involves balancing a lot of factors, including how dangerous and how necessary an activity is and what controls can be put in place. For people with epilepsy the key risk to workplace safety is uncontrolled or breakthrough seizures. However, just how serious this risk is and what are reasonable actions to manage it must always be considered in all the circumstances.

In thinking about what kind of action is needed to safely manage epilepsy in the workplace, the first crucial step is to establish the nature of a person's seizures and if they are under control. As noted, for some people with epilepsy, seizures may not take the form of convulsions or fits, but can vary from 'spacing out' or

²⁰. *Work Safety Act 2008* (ACT) section 9

²¹. *Work Safety Act 2008* (ACT) section 21

²². A Quick Guide to the ACT's New Work Safety Act 2008, ACT Work Safety Commissioner, 2009 http://www.worksafety.act.gov.au/about-new-legislation#Guidance_Material

²³. *Work Safety Act 2008* (ACT) section 27

²⁴. *Work Safety Act 2008* (ACT) section 27(2)

unconsciously wandering. Approximately 70% of people with epilepsy achieve seizure control with medication and other workers with epilepsy may experience 'auras' or warnings before a seizure occurs. This gives people a chance to remove themselves from dangerous situations. All these factors significantly reduce the safety risks associated with seizures.

Other crucial considerations include:

- The nature of the work: is it at height, at extreme temperatures or using dangerous machinery?
- The use of protective equipment: will gloves or helmets minimise risk?
- Alternative working conditions: can the job be done somewhere else, or at a different pace?
- Sharing work responsibilities: it is reasonable to use a buddy system?

The case study below provides a good example of how workers and employees should be thinking about epilepsy-related workplace safety risks. Although this case was decided in relation to discrimination law, it still illustrates important considerations for OHS laws.

Butcher v The Key King [2000] ACTDT 2

In this case, Mr Butcher was employed as a retail assistant in a chain of stores that provided key cutting, engraving and shoe repair services. His job involved using dangerous machinery, capable of cutting through human flesh, in a confined area. At the time Mr Butcher was employed he had been diagnosed with epilepsy for about five years, and he had suffered about 10 to 15 seizures in this time. The seizures generally lasted for about one to five minutes and Mr Butcher was able to identify when he was about to have an episode.

After about a year of employment, Mr Butcher had a seizure at work. Concerned about health and safety obligations, the employer asked Mr Butcher to provide medical evidence about the stability of his condition. The doctor who provided this information believed that it was not a safety risk for Mr Butcher to work around machinery as he always got warning of when a seizure was about to occur and was able to move himself into a safe position. The doctor also recommended appropriate first aid methods to be employed if Mr Butcher suffered another seizure at work.

In the next six months Mr Butcher suffered two more seizures at work. Days after this final seizure, his employment was terminated for health and safety reasons. There was, however, no suggestion that Mr Butcher would cause injury to other workers. Mr Butcher claimed the decision to fire him was discriminatory and made an application to the ACT Discrimination Tribunal.²⁵ The Tribunal was quick to note that terminating employment in the name of health and safety was undermining the obligation of protecting the safety of that person at work. It also found that because Mr Butcher could tell when a seizure was going to happen he ‘posed no greater danger to himself than would be the case if he did not suffer the impairment’. Therefore, there were no legitimate OHS reasons for firing Mr Butcher, or otherwise disadvantaging him. Looking to discrimination law, the Tribunal then found Mr Butcher had been discriminated against and he was awarded damages.

While each case will always be different, this demonstrates that employers must think seriously about the actual risks a seizure on the job may pose. The ability to know when a seizure is coming, to move to a safe place or otherwise control episodes, significantly reduces any risks associated with seizures. This can mean the protections needed in the workplace are not significant.

Discrimination Law

Introduction

The *Disability Discrimination Act* (DDA) provides protection against discrimination and unfair treatment for people with disabilities. The aim of the DDA is to eliminate, as far as possible, discrimination on the grounds of disability, to ensure people with disabilities have the same rights to equality before the law as the rest of the community, and to promote recognition and acceptance of the fundamental rights of people with disabilities.²⁶ The DDA operates throughout all of Australia, although all states and territories have their own laws and complaints systems that operate concurrently. Commonwealth employees in the AC are covered by the DDA (Federal Act). ACT Government and private sector employees can avail themselves of both the DDA and the ACT Discrimination Act. The ACT Discrimination Act follows a different

²⁵. This is now part of the ACT Civil and Administrative Appeals Tribunal (ACAT).

²⁶. *Disability Discrimination Act 1991* (Cth) section 3

structure to the DDA, applying general discrimination on all grounds, such as sex and age. However, it uses the same legal tests and principles as the DDA that are discussed below. The relevant legislation in other states and territories include the Anti-Discrimination Acts of New South Wales, Northern Territory, Queensland and Tasmania and the Equal Opportunity Acts of Victoria, South Australia and Western Australia. While all these Acts protect against discrimination in the workplace, they use different language and slightly different legal tests may apply.

The DDA makes it unlawful for employers to discriminate against people because of their disability. It also places obligations on employers to make reasonable adjustments to the working environment or practices to accommodate the needs of people with disabilities. As well as adding to a culture of anti-discrimination, the DDA creates a complaint-based mechanism, where persons who believe they have been unfairly treated may seek remedies including compensation and re-instatement. The meanings of ‘disability’ and ‘discrimination’, the obligations of employers and the remedies available under the DDA will be explored in more detail below.

It is also important to note that the DDA extends protection to a broad range of employment arrangements. As well as applying to full-time workers, it protects casual and part-time employees and independent contractors.²⁷ The ACT Discrimination Act also extends protection to people working in partnerships or as commission agents.²⁸

Defining disability

The DDA offers protection against discrimination for people with disability. It is important to remember not all people with epilepsy will consider themselves as disabled or affected by a disability. In fact, the language of ‘disability’ can often encourage stereotyped and misinformed attitudes towards people with epilepsy and other conditions. A reluctance to be identified as ‘disabled’ can mean that many people with epilepsy may not feel they are protected by, or want to rely on, disability discrimination laws. However, the DDA uses a broad definition of disability to give important protections to many people who may not consider themselves ‘disabled’.

²⁷. *Disability Discrimination Act 1991* (Cth) section 4

²⁸. *Disability Discrimination Act 1991* (Cth) sections 12 and 14

The Act does not specifically refer to epilepsy, but uses a general and broad definition of disability which includes:

- total or partial loss of a person's bodily or mental functions
- the presence in the body of organisms causing, or capable of causing, disease or illness
- the malfunction, malformation or disfigurement of part of a person's body
- a disorder that results in a person learning differently from people without the disorder
- a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment that results in disturbed behaviour.²⁹

The list refers to disorders or conditions that currently exist, have previously existed, or may exist in the future. This can include a genetic predisposition to a certain condition, such as epilepsy.

The definition also includes a disorder or condition that is attributed to a person. That means the definition of disability includes conditions that other people perceive a person to have, even if this is not the case. If a person has received unfair treatment based on an employer's or co-worker's assumption that they suffer from an illness, this will be treated as a disability for the purposes of the DDA even if the person does not have the illness. In the case of epilepsy, if an employer mistakenly assumes a worker suffers from uncontrolled seizures, the seizures will be treated as a disability even if the worker has not actually had one for years.

When considering if a person's physical or mental state can be regarded as a disability for the purposes the DDA, the associated symptoms and secondary effects of the condition must also be considered. This can include the affect of medication and symptoms that change from time to time.³⁰

Given this broad and flexible definition, almost all forms of epilepsy are likely to be considered a disability under the DDA, and past cases have accepted this.³¹

²⁹. *Disability Discrimination Act 1991* (Cth) section 4

³⁰. *Purvis v State of NSW* (2003) 217 CLR 92.

³¹. *Rawcliffe v Northern Sydney Central Coast Area Health Service* [2007] FMCA 931, *Stevens v Queensland Police Service* [1998] QADT 6

Defining discrimination

The DDA makes it unlawful for an employer to discriminate against a person because of their disability in relation to offers of employment, terms and conditions in the workplace, opportunities for promotion and dismissal. To make clear exactly what kind of behaviour is unlawful, the DDA defines two types of discrimination: direct and indirect. Direct discrimination is where a person is treated less favourably because of their disability.³² This includes the more clear-cut examples of discrimination such as failing to offer someone a position, excluding a person from workplace activities or giving someone less rostered shifts because of a person's epilepsy.

The definition of direct discrimination also imposes direct obligations on employers to make reasonable adjustments to accommodate a worker's disability. If the worker is treated less favourably because of the failure to accommodate, it will be discrimination.³³ An example of the kind of situation this is meant to cover may be where a person works in a carer position with responsibility, such as a nurse, but has recently had problems with uncontrolled seizures. Under direct discrimination it would be unlawful to prevent this person from working in a position of responsibility where reasonable adjustments, such as ensuring they are rostered on with at least one other person, could easily be made to minimise the risk.

There are limits to what kind of adjustments an employer is required to make. First, they must be reasonable – they must fit with the nature of the work, the resources of the employer and the requirements of other workers. Also, an employer is only required to make reasonable adjustments to accommodate a person's disability where this would not cause unjustifiable hardship. Factors such as the detriment the employee suffers without the adjustments, the size of the business and the nature of the adjustment will be considered in determining whether not making adjustments would cause an employer hardship.

The DDA also recognises discrimination is not always clear cut or always targeted at an individual. Rather, certain workplaces may have requirements or conditions in place that make it harder for people with epilepsy to gain employment or be eligible for transfers or promotion. This is known as indirect discrimination. Under the DDA it is unlawful for an employer to make

³². *Disability Discrimination Act 1991* (Cth) section 5

³³. *Disability Discrimination Act 1991* (Cth) section 5(2)

compulsory certain requirements or conditions, that a person with disability cannot comply with because of their disability.³⁴ That is, it is indirect discrimination where treating all workers identically results in unfairness to people who have different needs to other workers.

Again, what is a discriminatory condition is subject to whether the requirement is reasonable. An example of this is where an employer makes it a condition of operating certain machinery that a worker is not taking any medication. This requirement would be discriminatory as it prevents a whole range of people with medical conditions performing certain types of work. However, if the machinery was dangerous, the employer does have to think about health and safety considerations. So if concentration and attention is needed to operate the machinery safely, it would be a reasonable requirement that no person can use the machine who is taking medication that makes them drowsy or affects their concentration.

When thinking about whether an act does amount to discrimination, it is important to think about the genuine requirements of the job. It will not be discrimination if an employer prevents a person performing certain work if their disability means that they cannot perform the key requirements of the job. Courts have held that a genuine requirement for a job is not just limited to the physical or mental capacity to perform a certain task, but it also includes being able to work in a way that does not pose any health and safety risks for other workers.³⁵

For example, if a person was prohibited from driving because of their seizures, it would not be discrimination to prevent them from working as a courier or taxi driver. However, for jobs where driving is a small component, employers should think very carefully about whether the ability to drive is a genuine requirement or whether alternatives such as taxis or public transport can be effectively used.

To put some of this law into perspective, the case study below looks at a real example of discrimination in the workplace.

³⁴. *Disability Discrimination Act 1991* (Cth) section 6

³⁵. *X v Commonwealth* (1999) 200 CLR 117

Rawcliffe v Northern Sydney Central Coast Area Health Service [2007]
FMCA 931

In this case Mr Rawcliffe was a nurse working in the psychiatric ward of a hospital. It was accepted that Mr Rawcliffe had post-traumatic epilepsy, and at the time of the claimed discrimination he had recently had a seizure and his medication was causing sleep difficulties. The hospital management and Mr Rawcliffe's supervisors were at all times aware of his medical condition and current symptoms. Mr Rawcliffe made a complaint to the Australian Human Rights Commission, claiming he had been discriminated against in the workplace on at least two separate occasions, the stress of which caused him to resign. This was not resolved at the Commission level and was taken to the Federal Magistrates Court.

The court examined two claims of discrimination. The first involved the structure of Mr Rawcliffe's work roster, requiring him to work a day shift in between two night shifts. Because of sleep difficulties caused by his new epilepsy medication, Mr Rawcliffe had requested regular shifts that would allow him to maintain a sleeping routine. The Court accepted Mr Rawcliffe's request for regular shifts was reasonable and that having to comply with switching from day to night shifts would cause Mr Rawcliffe serious disadvantage. This meant that Mr Rawcliffe has been indirectly discriminated against because the hospital imposed working conditions that, because of his epilepsy, he was not able to comply with and which were not reasonable in the circumstances.

The second claim of discrimination involved a requirement to attend workplace counselling because of behaviour in a training session. Mr Rawcliffe did not receive notice of the counselling session until a day or two before he was required to attend, while another colleague who was required to attend was given 14 days notice. Mr Rawcliffe claimed the lack of notice was discriminatory because it caused him more stress than a person in his position without epilepsy. The Court found that the difference in notice times was because of the different times the two nurses would be in the hospital. It was not direct discrimination because Mr Rawcliffe was not treated less favourably because of his epilepsy. It was not indirect discrimination because Mr Rawcliffe could in fact comply with the short notice, and there was no evidence he would

have been disadvantaged if he had asked to re-arrange the time of the counselling session.

Throughout the decision, the Court also emphasised that where an employer is aware of a worker's epilepsy, there is a proactive obligation on the employer to take reasonable steps to accommodate that worker's needs. As discussed above, the legislation now makes it clear that employers must make 'reasonable adjustments' to accommodate workers with disability.

The Complaints Process - The Commonwealth AHRC and the ACT Human Rights Commission

If a worker believes they have been discriminated against because of their epilepsy, they can make a complaint to the Australian Human Rights Commission (AHRC) or the ACT Human Rights Commission. There are advantages and disadvantages to both systems, and legal advice should be considered before choosing one or the other. Alternatively, both organisations can be contacted to discuss complaints options.

The Australian Human Rights Commission

Complaints to the Sydney-based AHRC will be referred to the President of the AHRC. The President may terminate the complaint if it was lodged more than 12 months after any discriminatory conduct has taken place, or if it appears to be trivial or have no real merit to it.³⁶

If the complaint is not terminated it will be referred to a conciliation conference.³⁷ A conciliation conference is a negotiation session between the worker and their employer, where the complaint of discrimination is discussed in an attempt to resolve the issue. A person from the AHRC will run the conference to try to make sure that both the worker and employer are able to fairly and equally express their views on the matter. The AHRC will not make a decision about whether discrimination did, or did not, occur and will remain impartial throughout the conference. The conference is held in private and is meant to function as an informal way of settling a dispute before it becomes a formal legal issue. Because it is informal, a range of remedies are available for the worker who believes they have been discriminated against. These range

³⁶. *Australian Human Rights Commission Act 1986* (Cth) section 46PH

³⁷. *Australian Human Rights Commission Act 1986* (Cth) section 46PF

from an apology, to being reinstated to a job or given new, improved working conditions.

Even though the conference is intended to be informal, it can still be a difficult process for both the worker and employer to go through. It involves having to sit and talk to the person you are in a dispute with and the conference will only work if both parties want to genuinely listen to each other and try find a solution.

If no adequate resolution is reached at conciliation stage, the matter can be referred to another Tribunal, such as the Fair Work Australia Tribunal, or it can be terminated.³⁸ If it is terminated, any person affected by the complaint has the right to lodge an application to the Federal Court or the Federal Magistrates Court. An appeal before a Federal Court is a much more formal matter. There are application fees involved, legal representatives may be required, which also increases costs, and unsuccessful parties may be ordered to pay the costs of the other party. At this stage the complaint will be a public matter. The stress and costs of legal proceedings are likely to be important considerations in determining how far a worker wants to take their complaint, and how far an employer wants to defend their actions.

The court will look at the discrimination complaint according to the legal provisions of the DDA. It will make a binding order determining if discrimination has or has not occurred. If discrimination is found, the court may award compensation payments.

The ACT Human Rights Commission

Workers in the ACT, who are not employed by Commonwealth departments, can also make complaints of discrimination to the ACT Human Rights Commission (ACT HRC). The complaint will be handled by the ACT Human Rights and Discrimination Commissioner.

The ACT Human Rights Commission operates a similar conciliation-based model to the AHRC, but if conciliation fails at the ACT HRC, the complainant has the option to go to the lower-cost ACT Tribunal as opposed to the potentially more expensive Federal Court or Magistrate Court. The ACT Human Rights Commission is part of ACT Government and is located in Civic.

³⁸. *Australian Human Rights Commission Act 1986* (Cth) section 46PH

The ACT *Discrimination Act 1991* covers more attributes than those available at the Commonwealth level, and also includes the ground of disability. Arguably, the right to the equality provision of the ACT Human Rights Act broadens the definition of discrimination under the ACT Discrimination Act because s.30 of the HRA requires that all ACT laws are interpreted consistently with human rights.

Once a complaint is lodged with the ACT Human Rights Commission, the complainant is barred from lodging a complaint with the Australian Human Rights Commission.

The case of *Butcher v Key King* discussed above was decided under the ACT Discrimination Act.

The ACT HRC also includes the Health Services Commissioner, Disability and Community Services Commissioner and the Children and Youth People Commissioner. These Commissioners can take complaints regarding:

- a health service in the ACT, including about inadequate treatment or accessing health records;
- a service for people with disability and their carers;
- a service for children and young people and their carers;
- a service for older people and their carers.

Human Rights Acts

Human rights are the rights inherent to all human beings; rights that promote the dignity and fundamental equality of all humanity. There is currently no national human rights framework in Australia. However, both the ACT and Victoria have legislation aimed at promoting and protecting human rights. The Victorian *Charter of Human Rights and Responsibilities* (Charter) and the ACT *Human Rights Act* (HRA) both contain a list of human rights that all laws in Victoria and the ACT must not be inconsistent with. One of the rights most relevant to fairness in the workplace is the right to equality before the law and freedom from discrimination. This reinforces the underlying theme of all the workplace protections discussed above: people with epilepsy have the exact same rights in the workplace as everyone else. The HRA also protects a person's right to

privacy. This again emphasises the importance of an employer handling medical information confidentially.

While the Charter and HRA are important tools for promoting human rights values, they provide limited protection for people who believe that their rights have been infringed. However, the Charter and HRA place a positive duty on all Victorian or ACT Government departments to act consistently with human rights.³⁹ In the ACT, an employee of a government department who believes their human rights have been breached may bring an action against the employer in the ACT Supreme Court.⁴⁰ In Victoria, legal action for breach of human rights may only be taken as part of another court action.⁴¹ That is, a department cannot be taken to court for breach of human rights alone. From a practical perspective, it may be far easier to demonstrate the specific provisions of the FWA or DDA have been breached than to argue that an employer has infringed your right to equality.

As discussed above, however, the right to equality under the ACT HRA may arguably broaden the definition of disability under the ACT Discrimination Act.

³⁹. *Human Rights Act 2004* (ACT) Section 40B, *Charter of Human Rights and Responsibilities Act 2006* (Vic) section 38

⁴⁰. *Human Rights Act 2004* (ACT) section 40C

⁴¹. *Charter of Human Rights and Responsibilities Act 2006* (Vic) section 39

Further references

If you feel your workplace rights have been infringed, or for more information on how to create an epilepsy-friendly workplace the following ACT-based organisations may be of assistance:

Epilepsy Association ACT Inc.
<http://www.epilepsyact.org.au>

ACT Disability, Aged and Carer Advocacy Service (ADACAS)
<http://www.adacas.org.au>

Welfare Rights and Legal Centre
<http://www.welfarerightsact.org>

ACT Work Safety Commissioner
<http://www.worksafety.act.gov.au>

ACT Human Rights Commission
<http://www.hrc.act.gov.au>

Discrimination Legal Service
Ph 6247 2018

The following websites also provide useful information:

Australian Human Rights Commission
<http://hreoc.gov.au>

Fair Work Australia
<http://www.fwa.gov.au>

Epilepsy Australia and affiliates
www.epilepsyaustralia.net

Epilepsy ACT
www.epilepsyact.org.au/

Epilepsy Association of Tasmania
www.epilepsytasmania.org.au

Epilepsy Centre SA/NT
www.epilepsycentre.org.au

Epilepsy Foundation of Victoria
www.epinet.org.au

Epilepsy Queensland
www.epilepsyqueensland.com.au

Independent Epilepsy Organisations

Epilepsy Action Australia
<http://www.epilepsy.org.au/>

Appendix

For easy reference, the key legal provisions discussed in this manual are extracted below. For the full text of the legislation and cases cited please go to <http://www.austlii.edu.au>.

Fair Work Act 2009 (Cth)

Section 352: Temporary absence--illness or injury

An employer must not dismiss an employee because the employee is temporarily absent from work because of illness or injury of a kind prescribed by the regulations.

Section 385: What is an unfair dismissal

A person has been *unfairly dismissed* if FWA is satisfied that:

- (a) the person has been dismissed; and
- (b) the dismissal was harsh, unjust or unreasonable; and
- (c) the dismissal was not consistent with the Small Business Fair Dismissal Code; and
- (d) the dismissal was not a case of genuine redundancy.

Section 387: Criteria for considering harshness etc.

In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, FWA must take into account:

- (a) whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees); and
- (b) whether the person was notified of that reason; and
- (c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and
- (d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and
- (e) if the dismissal related to unsatisfactory performance by the person--whether the person had been warned about that unsatisfactory performance before the dismissal; and
- (f) the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- (g) the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- (h) any other matters that FWA considers relevant.

Work Safety Act 2008 (ACT)

Section 21: Duty—safe conduct of business or undertaking

- (1) This section applies to a person conducting a business or undertaking.
- (2) The person has a duty to ensure work safety by managing risk.
- (3) Without limiting subsection (2), the person's duty includes—
 - (a) providing and maintaining a safe workplace and safe systems of work; and
 - (b) providing and maintaining plant that is safe and without risk to the work safety of workers and other people at the business or undertaking; and
 - (c) ensuring that plant is operated only by workers and other people at the business or undertaking who are qualified to operate the plant; and

- (d) ensuring the safe use, handling, storage and transport of substances; and
- (e) providing adequate facilities for the work safety of workers and other people at the business or undertaking; and
- (f) monitoring the work safety of workers at the business or undertaking, and the conditions at the workplace, to ensure that work-related illness and injury are prevented; and
- (g) keeping the information and records relating to work safety required under this Act, including incident reports and training records, in relation to the business or undertaking; and
- (h) providing appropriate information, instruction, training or supervision to workers and other people at the business or undertaking to allow work to be carried out safely; and
- (i) consulting workers at the business or undertaking on matters that directly affect their work safety; and
- (j) any other duty prescribed by regulation.

Section 27: Duties—worker

- (1) A worker has a duty not to expose the worker, and other people who may be affected by the worker's work, to work safety risks because of the worker's work.
- (2) Without limiting subsection (1), the worker's duty includes—
 - (a) cooperating with a person conducting the business or undertaking for which the worker works, or a person in control of the worker's workplace, to allow the person to comply with the person's duties under this Act; and
 - (b) complying with instructions given by a person conducting the business or undertaking for which the worker works, or a person in control of the worker's workplace, in relation to work safety; and
 - (c) properly using equipment supplied for work safety at the workplace; and
 - (d) reporting any risk, illness and injury, connected with work, that the worker is aware of.

Disability Discrimination Act 1992 (Cth)

Section 5. Direct disability discrimination

- (1) For the purposes of this Act, a person (the *discriminator*) *discriminates* against another person (the *aggrieved person*) on the ground of a disability of the aggrieved person if, because of the disability, the discriminator treats, or proposes to treat, the aggrieved person less favourably than the discriminator would treat a person without the disability in circumstances that are not materially different.
- (2) For the purposes of this Act, a person (the *discriminator*) also *discriminates* against another person (the *aggrieved person*) on the ground of a disability of the aggrieved person if:
 - (a) the discriminator does not make, or proposes not to make, reasonable adjustments for the person; and
 - (b) the failure to make the reasonable adjustments has, or would have, the effect that the aggrieved person is, because of the disability, treated less favourably than a person without the disability would be treated in circumstances that are not materially different.
- (3) For the purposes of this section, circumstances are not *materially different* because of the fact that, because of the disability, the aggrieved person requires adjustments.

Section 6. Indirect disability discrimination

- (1) For the purposes of this Act, a person (the *discriminator*) *discriminates* against another person (the *aggrieved person*) on the ground of a disability of the aggrieved person if:
 - (a) the discriminator requires, or proposes to require, the aggrieved person to comply with a requirement or condition; and
 - (b) because of the disability, the aggrieved person does not or would not comply, or is not able or would not be able to comply, with the requirement or condition; and
 - (c) the requirement or condition has, or is likely to have, the effect of disadvantaging persons with the disability.
- (2) For the purposes of this Act, a person (the *discriminator*) also *discriminates* against another person (the *aggrieved person*) on the ground of a disability of the aggrieved person if:
 - (a) the discriminator requires, or proposes to require, the aggrieved person to comply with a requirement or condition; and
 - (b) because of the disability, the aggrieved person would comply, or would be able to comply, with the requirement or condition only if the discriminator made reasonable adjustments for the person, but the discriminator does not do so or proposes not to do so; and
 - (c) the failure to make reasonable adjustments has, or is likely to have, the effect of disadvantaging persons with the disability.
- (3) Subsection (1) or (2) does not apply if the requirement or condition is reasonable, having regard to the circumstances of the case.
- (4) For the purposes of subsection (3), the burden of proving that the requirement or condition is reasonable, having regard to the circumstances of the case, lies on the person who requires, or proposes to require, the person with the disability to comply with the requirement or condition.

Section 15. Discrimination in employment

- (1) It is unlawful for an employer or a person acting or purporting to act on behalf of an employer to discriminate against a person on the ground of the other person's disability:
 - (a) in the arrangements made for the purpose of determining who should be offered employment; or
 - (b) in determining who should be offered employment; or
 - (c) in the terms or conditions on which employment is offered.
- (2) It is unlawful for an employer or a person acting or purporting to act on behalf of an employer to discriminate against an employee on the ground of the employee's disability:
 - (a) in the terms or conditions of employment that the employer affords the employee; or
 - (b) by denying the employee access, or limiting the employee's access, to opportunities for promotion, transfer or training, or to any other benefits associated with employment; or
 - (c) by dismissing the employee; or
 - (d) by subjecting the employee to any other detriment.
- (3) Neither paragraph (1)(a) nor (b) renders it unlawful for a person to discriminate against another person, on the ground of the other person's disability, in connection with employment to perform domestic duties on the premises on which the first-mentioned person resides.

ACT *Discrimination Act 1991*

8 What constitutes discrimination

- (1) For this Act, a person *discriminates* against another person if—
 - (a) the person treats or proposes to treat the other person unfavourably because the other person has an attribute referred to in section 7; or
 - (b) the person imposes or proposes to impose a condition or requirement that has, or is likely to have, the effect of disadvantaging people because they have an attribute referred to in section 7.
- (2) Subsection (1) (b) does not apply to a condition or requirement that is reasonable in the circumstances.

7 Grounds

- (1) This Act applies to discrimination on the ground of any of the following attributes:
 - (a) sex;
 - (b) sexuality;
 - (c) gender identity;
 - (d) relationship status;
 - (e) status as a parent or carer;
 - (f) pregnancy;
 - (g) breastfeeding;
 - (h) race;
 - (i) religious or political conviction;
 - (j) disability;
 - (k) industrial activity;
 - (l) age;
 - (m) profession, trade, occupation or calling;
 - (n) association (whether as a relative or otherwise) with a person identified by reference to an attribute referred to in another paragraph of this subsection;
 - (o) spent conviction within the meaning of the *Spent Convictions Act 2000*.