



LGBTIQ+ DISCRIMINATION

Being treated unfairly can have a big impact on your life and it can be hard to know what to do about it.

This factsheet is about discrimination in Western Australia and what you can do if you have been treated unfairly. It also answers frequently asked questions about discrimination for the LGBTIQ+ community.

What is discrimination?

Discrimination means being treated unfairly or less favourably than other people. However not all unfair treatment is discrimination that is against the law.

Discrimination can happen in two ways:

- Direct – where someone treats someone less favourably than they would treat anyone else under the same or similar circumstances, or
- Indirect – where a law, policy or practice seems to apply to everyone equally, but which actually affects a large number of people of a particular race, sex or other group because they cannot comply with it.

Are there laws about discrimination in Western Australia?

In WA, discrimination is covered by state (WA) laws, federal (Australian) laws, and international (human rights) laws.

Each of these areas of laws cover certain types of unfair treatment (called “grounds” or “characteristics”) in certain circumstances (called “areas”).

For discrimination to be against the law, it needs to:

- fall under one, or more, of the “grounds” covered by discrimination law, and
- be in one of the “areas” covered by discrimination law, and
- not fall under an exception or exemption.

Discrimination is a complex area of law. We cannot guarantee that what you have experienced will be covered by the law.

The law also changes over time, so it's very important to get legal advice about whether discrimination law will cover your problem.

What types of unfair treatment are covered by discrimination laws?

Unfair treatment that is against the law are called 'grounds' or 'characteristics'.

The grounds of discrimination covered by state laws and federal laws are similar, but not exactly the same.

Sometimes the way a ground is defined will mean that

your

situation is covered by federal laws but not state laws, or vice versa. Sometimes these differences can be tricky to work out.

Some examples of grounds of discrimination are age,

race,

what state you live in, sex, gender identity, intersex status, sexual orientation, and family responsibilities.

What areas of life are covered by discrimination laws?

For discrimination to be against the law, it also has to have happened in an area of life that is covered by discrimination law. Discrimination is not against the law everywhere.

Discrimination is only against the law when it happens in an area of public activity. Private relationships with family, friends or flat mates are not areas of public activity.

The areas of discrimination covered by state laws and federal laws are similar, but not exactly the same.

Sometimes the way an area is defined will mean that your situation is covered by federal laws but not state laws, or vice versa. Sometimes these differences can be tricky to work out.

Some examples of areas of discrimination are employment, education, accommodation, clubs and associations, goods and services, accessing public places or facilities, sport, and land.

What are the exceptions and exemptions to discrimination?

Not all unfair treatment is discrimination that is against the law. Sometimes there is a legal exception or exemption that might apply. For example, some parts of discrimination law do not apply to some organisations or situations.

Exceptions in discrimination law can be complex. They

can

also change over time, so it's very important to get legal advice about whether discrimination law will cover your problem.



Does the law protect someone who identifies as LGBTIQ+ from discrimination?

Yes, discrimination laws have protections for the LGBTIQ+ community.

In Australia, most discrimination protections are found in the *Equal Opportunity Act 1984* (WA) (state law) and the *Sex Discrimination Act 1984* (Cth) (federal law).

The federal laws protect people from being discriminated against because of their sex, sexual orientation, gender identity or intersex status.

The state laws protect people from being discriminated against because of their sexual orientation, and also protect a gender reassigned person from being discriminated against because of their gender history.

For more information on gender reassignment see our LGBTIQ+ Changing Gender & Health Rights factsheet.

While discrimination laws contain protections for the LGBTIQ+ community, it is a complex area of law. There are exceptions and exemptions that apply under both state and federal laws, which means that not all unfair treatment will be against the law.

Some exceptions apply to religious bodies, registered charitable organisations and organisations set up solely for the purpose of one sex or people with a particular relationship status. Whether an exception applies also depends on what area of life the unfair treatment occurred in.

Under international law, there are various human rights everyone is entitled to. These laws include protection against discrimination because of sexual orientation and gender identity. However, like the laws in Australia, there are some exceptions where different treatment is allowed.

For more information on international human rights laws see LGBTIQ+ International Human Rights Laws factsheet.

FREQUENTLY ASKED QUESTIONS

Can my school expel me for being queer?

It depends on the type of school you attend.

Under federal law, a private school established for religious purposes may be able to discriminate against you and expel you. However, under WA state law the exemption against discrimination for religious bodies is worded differently so even a private religious school may not be able to expel you for being queer. We encourage you to get legal advice if your school is a religious school.

If you attend a public or independent school that was not created for a religious purpose, both state and federal discrimination laws prohibit your school from expelling you for being queer.

Can my school force me to use a changeroom, toilet or wear a uniform of a gender that I don't identify as?

It depends on the type of school that you attend.

If you attend a public or other non-religious school, you should be able to use a changeroom, toilet, or wear a uniform that affirms your gender identity. If your public or non-religious school does not let you, they may be in breach of state and federal discrimination laws.

If you attend a private religious school, your school may be able to require you to use a changeroom, toilet, or wear a uniform of a gender you don't identify with. There are some differences between state and federal law about discrimination in an education setting. We encourage you to get legal advice if your school is a religious school.

There are some differences between state and federal law about discrimination in an education setting. We encourage you to get legal advice if you attend a private religious school.

Can my teacher say something negative about queer people, or include class content that is homophobic or transphobic?

It depends on what type of school you attend and what exactly was said.

Under federal law, a private school established for religious purposes may be able to include content that is homophobic or transphobic. However, under WA state law the exemption against discrimination for religious bodies is worded differently so even a private religious school may not be able to say something negative about queer people. We encourage you to get legal advice if your school is a religious school.

If you attend a public or independent school that was not created for a religious purpose, both state and federal discrimination laws prohibit your school from including content that is homophobic or transphobic.

If what was said could be considered a 'threat to injure, endanger or harm any person', then you may be able to make a complaint to the police. The police will then investigate whether a criminal offence has been committed.

Can a religious school fire a teacher or staff member for being queer?

Yes, under both state and federal law private religious schools can discriminate against employees in order to:

- conform to the doctrines, tenets or beliefs of that religion, or
- to avoid injury to the sensitivities of people who follow that religion.



Can my employer legally ask me about my gender history or the gender history of my partner?

It depends on why your employer is asking the question and whether your employer falls into an exemption category.

If your employer is asking the question to discriminate against you then this would be against the law, unless your employer falls into an exemption category.

Exceptions in discrimination law can be complex. They can also change over time, so it's very important to get legal advice about whether discrimination law will cover your problem.

Can a religious organisation refuse to hire me because I am queer?

An organisation can only legally refuse to hire you because you are queer if they fall under an exemption under state or federal discrimination laws.

Not all religious organisations fall under an exemption. Exceptions in discrimination law can be complex and technical. They can also change over time, so it's very important to get legal advice about whether discrimination law will cover your problem.

Can my employer legally ask me for my birth certificate or passport?

Your employer must make sure it employs people who are allowed to work in Australia and identification is a common way to check this.

Many employers ask for 100 points of identification, which includes at least one primary identification like a birth certificate, passport or driver's licence. It's usually

up to you what identification you provide to make up your 100 points.

Your employer may be able to ask for specific identification. However, if your employer asks for a specific type of identification but they don't ask for the same identification from a person who is the same or not materially different from you, then this may be discrimination.

If my employer sees me on a dating application for people of diverse sexual orientation (like Grindr or Her) can they use this against me at work?

It depends on where you work. Some organisations can legally discriminate against people because of their sexual orientation. For example, some religious organisations.

Other organisations cannot use your sexual orientation against you because it would breach state and federal discrimination laws.

Can workplaces force you to come out?

Under state and federal laws, a workplace cannot impose a condition on people that disproportionately affects people based on their sexuality or gender history. A condition requiring you to come out would likely be discriminatory.

Also, your workplace cannot ask you for information about your sexual orientation if their intention is to discriminate against you (unless they are exempt). In WA, this protection also applies to gender history if you have a "gender recognition certificate". For more information on gender reassignment see LGBTIQ+ Changing Gender and Health Rights.

I work in childcare, can my employer fire me if they find out I am queer?

If your employer fires you because you are queer, this could be discrimination that is against the law. It will depend if your employer falls within one of the discrimination exemptions.

Generally, childcare providers do not fall under one of the exemptions under the *Equal Opportunity Act 1984 (WA)* (state law) or the *Sex Discrimination Act 1984 (Cth)* (federal law).

However, there may be an exemption if the childcare provider is a religious organisation or if it relates to residential care of children (like a boarding house).



Can a homelessness support service reject me if I am transgender?

It depends on the type of homelessness support service.

If it is a religious organisation, it may be able to legally exclude you based on your sex, sexual orientation or gender identity.

If it is a registered charitable organisation or not-for-profit that provides:

- accommodation for people of one sex, or
 - accommodation solely for people of a particular marital or relationship status,

then it may be able to legally exclude you based on your sex, sexual orientation or gender identity.

If it is a religious organisation, it may be able to exclude you based on your sex, sexual orientation or gender identity.

What rights do transgender people have regarding bathrooms? Can security remove me from a bathroom because I'm transgender?

It depends on where the bathroom is located.

If the bathroom is in a public institution like a shop or restaurant, you must be permitted to use the facilities of your choice. Refusing to make bathroom facilities available to you because you are transgender is against the law.

Public (or non-religious private) schools must also let you use the bathroom facilities of your choice. If a school requires you to use the toilet or bathroom of the gender you were assigned at birth, this would breach state and federal discrimination laws.

However, religious schools may be able to discriminate against you and force you to use a particular bathroom. We encourage you to get legal advice if your school is a religious school.

I have been discriminated against. What can I do?

There are many ways you can deal with discrimination.

Getting legal advice early is important because more than one law may apply to you and there are time limits for taking formal action. Many problems can also be sorted out quickly and informally with some early action.

What to think about before taking action

The first thing to think about is what you want to happen. Once you know what you want, it's much easier to work out the best way to get it. Other things to think about are:

- Do you feel comfortable and confident enough to try to sort the problem out yourself?
- Do you have anyone who can help you?
 - Can you deal with the stress and time it might take if you take legal action?
- How urgent is the situation?
 - Are you likely to have an ongoing relationship with the person who has treated you badly?
 - Does the person who has treated you badly have a boss you can talk to?
- Can you make a complaint directly to the organisation or person you are complaining about?

It is often a good idea to get some help when you're deciding what to do. Legal Aid WA, a community legal centre, union (for work-related issues) or other community organisations might also be able to give you advice and help.

Informal ways you can deal with discrimination

Sometimes, you might get a quick and easy solution by raising the issue directly with the person or organisation you are having the problem with.

In some situations, this may not be the right option for you. You might find the person or organisation intimidating or threatening, or just not feel comfortable talking to them about the problem.

Another option is to write a letter to the person or organisation. In the letter you should explain what the problem is, tell them how their behaviour has affected you and what you would like them to do to fix the problem. This will only work if you write a calm letter, not one that has abusive words in it. A community worker or lawyer might be able to help you with this.

If you don't want to approach the person who has treated you badly or if you've tried it and it didn't work, maybe you could talk to their boss or someone more senior than them.



How can I take formal action about the discrimination?

It is best to get legal advice before taking formal action and lodging a complaint. Discrimination is a complex area of law and you may have more than one option.

The law also changes over time and who you should contact will depend on what happened to you and where it happened.

Formal grievance procedures / industry processes

Many organisations have formal grievance or complaint procedures. It's often a good idea to try these first if they're available.

Some professions and industries also have special organisations that you can complain to about people who work in that profession or industry. For example, there may be an ombudsman who you can speak with about what you experienced.

Legal action

If you don't want to go through a formal complaint procedure or relevant professional industry complaint process (or you have tried it and it didn't work), you might want to try a legal action.

There are deadlines for taking legal action, so it is important to get legal advice as soon as possible about what time limits apply to you.

State or federal?

Generally, to take action under the law, you will need to lodge a complaint with a federal or state anti-discrimination body. You cannot make a complaint to both so you will need to choose which one you will go through.

The WA anti-discrimination body is the WA Equal Opportunity Commission. Depending on the outcome of your complaint, you may be able to apply to the State Administrative Tribunal.

The federal anti-discrimination body is the Australian Human Rights Commission. Depending on the outcome of your complaint, you may be able to apply to the Federal Court or the Federal Circuit Court of Australia.

International

You may also be able to take action under international human rights laws. You can only do this after you have exhausted your options in Australia.

For more information about international human rights laws, see our LGBTIQ+ International Human Rights Laws factsheet.

Where else might I be able to make a complaint?

If the discrimination occurred at work, you might be able to make a complaint to the Australian Fair Work Commission. If you are in a union, they may be able to help you with this.

If a health professional discriminated against you (or if you think they have breached their professional obligations) you might be able to make a complaint to the:

- WA Health and Disability Services Complaints Office, or
- Australian Health Practitioner Regulation Agency.

Generally, to take action under the law, you will need to lodge a complaint with a federal or state anti-discrimination body. You cannot make a complaint to both so you will need to choose which one you will go through.

How long do I have to take formal action about the discrimination?

There are deadlines for taking legal action.

Some deadlines (called "time limits") are as short as 21 days from the date of the discrimination so it is important to get legal advice as soon as you can about the best option for you.

You generally have 12 months from the date of the discrimination to make your complaint to the WA Equal Opportunity Commission.

You generally have 6 months from the date of the discrimination to make a complaint to the Australian Human Rights Commission.

Extensions of time are sometimes possible.

Discuss your situation with the commission you are lodging your complaint with.



Where can I get more information, support or help?

Western Australia

Youth Pride Network – www.youthpridenetwork.net

Freedom Centre – (08) 9228 0354 www.freedom.org.au

Qlife – 1800 184 527 www.qlife.org.au

Legal Aid WA – 1300 650 579 www.legalaid.wa.gov.au

Community Legal WA – www.communitylegalwa.org.au

Law Access – www.lawaccess.org.au

Equal Opportunity Commission – (08) 9216 3900
www.eoc.wa.gov.au

Health and Disability Services Complaints Office –
1 300 419 495 www.ahpra.gov.au

Australia

Australian Human Rights Commission – 1300 656 419
www.hreoc.gov.au

Australian Health Practitioner Regulation Agency –
1300 656 419 www.hreoc.gov.au

International

OutRight Action International –
www.outrightinternational.org

ILGA World – The International Lesbian, Gay, Bisexual,
Trans and Intersex Association – www.ilga.org

United Nations – www.un.org

United Nations Human Rights Committee –
www.ohchr.org

This factsheet contains information only. It is not legal advice. If you have a legal problem, you should speak to a lawyer. Legal Aid WA aims to provide accurate information but does not accept responsibility if it is not. You are welcome to copy, use and share the information from our website, including our resources and publications, if you are doing so for non-commercial or non-profit purposes. You must make it clear the content was created by Legal Aid WA.

CMS #4670921 | Last reviewed 18 January 2021