



LGBTIQ Domestic & Family Violence and Employment

This fact sheet is for lesbian, gay, bisexual, trans*, intersex and queer (LGBTIQ) people who are experiencing or have experienced domestic or family violence. It provides information about your rights as an employee.

Your employment rights will be determined by whether or not you are an employee in the national workplace relations system. You are covered by this system if you are employed in the NSW private sector or by a constitutional corporation. You are not covered if you are employed in the NSW public sector or by local government.

If you are experiencing or have experienced domestic or family violence, you should speak to someone at work that you feel comfortable with. Letting your employer know is a good idea so they can make sure you are safe at work.

FLEXIBLE WORKING ARRANGEMENTS

If you are experiencing domestic or family violence and need flexibility in your working arrangements, you may be able to request changes to these arrangements under the *Fair Work Act 2009* (Cth). For example, you may ask for changes to your hours, work patterns, or your work location.

If you feel comfortable, you may wish to first speak informally with your employer about your situation and need for flexible working arrangements. Your employer may be happy to make some changes without you needing to make a formal request.

How do I make a formal request?

To make a formal request, you must be covered by the national system and have been working for your employer for at least the last 12 months on a full time or part-time basis. The request should be made in writing and set out the details of, and reasons for the changes sought. If you need help in writing your request, you can seek support from the Inner City Legal Centre's Safe Relationships Project (see 'For More Information' section below).

Your employer is required to give you a written response within 21 days, granting or refusing (partially or fully) the request, and giving reasons for any refusal. An employer may only refuse your request on 'reasonable business grounds'.

If your request is refused and you do not believe your employer had reasonable business grounds, you may be able to go to the Fair Work Commission for assistance (depending on your employment contract/other written agreement). The Commission can hold a conference between you and your employer, and make non-binding recommendations. If you feel your employer has discriminated against you in refusing your request, you should read the information below on discrimination.

Domestic Violence Leave

The Fair Work Commission has introduced unpaid domestic violence leave in all modern awards in Australia. Unpaid domestic violence leave is intended to be used by people experiencing domestic violence to take time off to deal with the impacts of domestic violence. This applies to all employees, including full time, part time and casual employees under modern awards.

Employees can take up to five days off per year. This leave does not accumulate from year to year. You will need to notify your employer that you intend to take leave. If your employer asks for evidence of domestic violence, a document issued by the police, a court, a family violence support service, or a statutory declaration will be sufficient.

It is illegal for your employer to take adverse action against you because you ask the Fair Work Commission for assistance. If you experience adverse action, seek advice from your union (if you are a member) or from the Fair Work Ombudsman on 13 13 94.

DISCRIMINATION

There are a number of actions that may be open to you if you feel that your employer has treated you less favourably because of your gender, sexuality and/or your domestic (relationship) status. For example, your employer may have granted leave to a married woman experiencing domestic or family violence, but refused your request after you experienced domestic or family violence in your LGBTIQ relationship.

National Workplace Relations System

Under the *Fair Work Act*, an employer cannot take 'adverse action' against an employee because of their gender, sexuality and/or domestic status. This is called direct discrimination. Adverse actions include firing an employee, not giving them legal entitlements (e.g., pay



or leave), changing their job to their disadvantage, or treating them differently to other employees.

An employer also cannot engage in indirect discrimination. This is where a work requirement, condition or practice seems the same for all staff, but actually disadvantages certain people. To be discrimination, the requirement must also be unreasonable. For example, if your workplace has a policy that only wives experiencing domestic or family violence are entitled to flexible work arrangements, this may be indirect discrimination against gay men and trans* men employees and employees in different types of domestic relationships.

If you feel that your employer has discriminated against you due to your gender, sexuality and/or domestic status, you can make a complaint to the Fair Work Ombudsman:

1. Fill in and lodge a complaint form, located on the Ombudsman website. The Ombudsman can help you resolve complaints about incidents that occurred up to 6 years ago.
2. The Ombudsman may then investigate your complaint and conduct a mediation session with you and your employer.
3. If your complaint cannot be resolved, you can take your own legal action in a small claims court.

Federal Law

The *Sex Discrimination Act 1984* (Cth) makes it against the law for an employer to treat you unfairly because of your gender, sexual orientation or relationship status. This includes direct and indirect discrimination.

Direct discrimination occurs when a person is treated less favourably than another person because of their sex, gender identity, intersex status, sexual orientation, marital or relationship status, pregnancy or potential pregnancy, breastfeeding or family responsibilities.

Indirect discrimination occurs when employers or service providers create conditions, requirements or practices that appear to affect people equally, but disadvantage some people because of their sex, relationship status, pregnancy or potential pregnancy. Unreasonable conditions can be considered unlawful discrimination.

If you feel that your employer has discriminated against you due to your gender, sexuality and/or relationship status, you can make a complaint to the Australian Human Rights Commission (the AHRC):

1. Fill in and lodge a complaint form, located on the AHRC website. The Commission may terminate a complaint if the conduct complained of occurred more than 6 months ago. There is no cost involved in making a discrimination complaint.
2. The AHRC may then investigate your complaint and try to resolve it by conciliation. This is an informal process that encourages you and your employer to find a way to sort out the issues. The AHRC is impartial, but it is not a court and it

cannot determine whether or not discrimination has happened.

3. If your complaint is not resolved, you may go to the Federal Circuit Court or Federal Court to determine whether or not there was unlawful discrimination.

New South Wales Law

If your employer is covered by NSW law, the *Anti-Discrimination Act 1977* (NSW) generally makes it unlawful for them to discriminate against you on the basis of your gender, sexuality and/or domestic status. This includes direct and indirect discrimination.

If you feel that you have been discriminated against, you can make a complaint to the Anti-Discrimination Board of NSW (ADB):

1. You will need to fill in and lodge a complaint form, located on the ADB website. The Board may decline a complaint if the conduct complained of occurred over 12 months ago. There is no cost involved in making a complaint.
2. The ADB may investigate your complaint and try to resolve it by conciliation, assisting you and your employer to reach a private settlement. A settlement could include an apology, financial compensation, getting your job back, and/or changes to your working arrangements.
3. If a settlement cannot be agreed upon, you may go to the Equal Opportunity Division of the Administrative Decisions Tribunal to determine whether or not there was unlawful discrimination.

BULLYING

If you are a national system employee, you are covered by anti-bullying laws introduced into the *Fair Work Act* in 2014. Under these laws, bullying is when someone repeatedly behaves unreasonably towards another person or group at work and that behaviour causes a risk to health and safety. The behaviour does not need to be related to a characteristic of the person or group, such as their sexuality. It might involve aggressive or intimidating conduct, belittling or humiliating comments, teasing or practical jokes, or the displaying of offensive material.

If you are a volunteer or worker, and if you think you are being bullied at work, you can make an application to the Fair Work Commission:

1. Fill out an application form available on the Commission website. There are no time limits for making an application, however you must still be working for the business where the bullying took place. An application fee may apply.
2. The Commission may conduct an informal mediation to help you and the people involved agree on a way of resolving the problem.
3. If there is no agreed upon resolution, a formal hearing or conference can be held.

At a hearing or conference, if the Commission finds that you are being bullied at work and there is a risk that it will continue, it can make any orders to prevent further



bullying. This may involve requiring an individual or individuals to stop specified behaviours, regular monitoring of behaviour by an employer, and/or the provision of additional support and training to workers. Orders are binding, and anyone who does not comply can receive a substantial penalty. The Commission cannot issue fines or order compensation for bullying.

UNFAIR DISMISSAL

Under the *Fair Work Act*, an employer cannot dismiss you because of your sexuality and/or domestic status. You also cannot be dismissed because of a temporary absence from work due to illness or injury. These laws apply regardless of whether or not you are a national system employee.

If you believe you have been dismissed due to your sexuality, domestic status or a temporary absence, you can make an application to the Fair Work Commission:

1. You will need to lodge an application form, located on the Commission website. You must submit your application within 21 days of the dismissal taking effect. There is an application fee (that may be waived).
2. The Commission may hold a private conference with you and your employer.
3. If no agreement is reached, both you and your employer can consent to the Commission arbitrating the dispute. The Commission can then make a number of binding orders, including orders for your reinstatement, compensation, and/or the payment of any remuneration lost.
4. If your employer does not consent to arbitration, you may take your dispute to court.

National Workplace Relations System

If you are a national system employee, you may also have an unfair dismissal claim if you believe you were dismissed in circumstances that were harsh, unjust or unreasonable. You must have been employed for a minimum of six months (or one year where your employer has fewer than 15 employees). If you were earning more than \$158,500 a year and were not covered by an award or enterprise agreement, you are not eligible to make an unfair dismissal application.

If you believe you were unfairly dismissed:

1. You should lodge an application for unfair dismissal using the form located on the Fair Work Commission website. Your application must be lodged within 21 days of the dismissal taking effect.
2. The Commission may arrange informal conciliation, assisting you and your employer to come to an agreement. The conciliation is about making a deal rather than proving one side is right or wrong.
3. If no agreement is reached, a conference or formal hearing may be held.

The Commission may order your reinstatement or the payment of compensation if satisfied at a hearing or conference that you were unfairly dismissed. The Commission will take into account a range of factors, including whether there was a valid reason for your dismissal relating to your capacity or conduct, and whether you were notified of that reason and given an opportunity to respond.



FOR MORE INFORMATION

Fair Work Commission

Bullying:

www.fwc.gov.au/disputes-at-work/anti-bullying

Unfair dismissal:

www.fwc.gov.au/termination-of-employment/unfair-dismissal

General protections:

www.fwc.gov.au/termination-employment/general-protections-dismissal?pagename=dismissals

Fair Work Ombudsman

T: 13 13 94

Termination of employment:

www.fairwork.gov.au/tools-and-resources/factsheets/minimum-workplace-entitlements/ending-employment

Australian Human Rights Commission

T: 1300 656 419

Complaints under the Sex Discrimination Act:

www.humanrights.gov.au/complaints/complaint-guides/making-complaint/complaints-under-sex-discrimination-act

Anti-Discrimination Board of NSW

T: (02) 9268 554

Homosexual discrimination:

www.antidiscrimination.nsw.gov.au/anti-discrimination-nsw/discrimination/types-of-discrimination/homosexual-discrimination.html

Marital or domestic status discrimination:

www.antidiscrimination.nsw.gov.au/anti-discrimination-nsw/discrimination/types-of-discrimination/marital-or-domestic-status-discrimination.html

The Safe Relationships Project (SRP) -

Inner City Legal Centre

The SRP is a state-wide domestic and family violence court support and legal advice service for LGBTIQ people.

www.iclc.org.au/safe-relationships-project/

T: (02) 9332 1966 or 1800 244 481

E: iclc@iclc.org.au

This information is current to 24 August 2021 and reflects the law in New South Wales. It is general information and is no substitute for legal advice tailored to your particular circumstances. For assistance, contact the ICLC on (02) 9332 1966