

Face Equality International (FEI) Research Project

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Australia

No.	Question		Answer
1.	<p>a. Do people with facial disfigurements (marks, scars, etc.) have any legal protection against discrimination?</p> <p>b. Which law relates or mentions the legal protections?</p>	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	<p>Yes. There is legal protection for people with facial disfigurements enshrined under Australian law.</p> <p>The Federal Disability Discrimination Act 1992 (Cth) (“DDA”) ¹ provides protection for individuals against discrimination based on disability. The definition of “disability” under the DDA is broadly drafted, and includes a mix of impairments, diseases and disorders, including “disfigurement of a part of the person’s body”. This would include people with facial disfigurements.</p> <p>In order to bring a claim under the DDA, the claimant must identify the relevant disability with some precision, and identify how the alleged discrimination is based on that particular disability.</p> <p>Additionally, Australia's Disability Standards for Education and Disability Standards for Accessible Public Transport² provide specific guidelines to ensure accessibility and inclusion for individuals with disabilities, including those with facial disfigurements. These legal protections aim to promote equality, dignity, and respect for individuals with facial disfigurements and ensure they have the same opportunities and rights as everyone else. While the Disability Standards for Education and the Disability Standards for Accessible Public Transport do not specifically mention facial disfigurements, they encompass a broad range of disabilities and conditions, including those that may result in facial disfigurements. The standards are designed to ensure accessibility and inclusion for all individuals with disabilities, regardless of the specific nature of their condition.</p> <p>Other legal protections in relation to healthcare, education or employment under Australian law are:</p> <p>1. Education:</p>

¹ DDA. <https://www.legislation.gov.au/C2004A04426/latest/text> (accessed 21 April 2024).

² Disability Standards for Education and Disability Standards for Accessible Public Transport. <https://www.infrastructure.gov.au/infrastructure-transport-vehicles/transport-accessibility/transport-disability-standards>

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			<ul style="list-style-type: none"> • Disability Standards for Education³: Standards set out requirements for ensuring that students with disabilities, including those with facial disfigurements, have equal access to education. They cover areas such as enrollment, participation, curriculum delivery, and support services. <p>2. Employment:</p> <ul style="list-style-type: none"> • Fair Work Act 2009⁴: This federal legislation governs workplace relations in Australia and includes provisions prohibiting discrimination on various grounds, including disability, in employment. It requires employers to make reasonable adjustments to accommodate the needs of employees with disabilities, including those with facial disfigurements. • Disability Employment Services (DES)⁵: DES is a government program that provides support and assistance to people with disabilities, including job seekers with facial disfigurements, to find and maintain employment. • National Disability Insurance Scheme (NDIS): This scheme, enacted through the National Disability Insurance Scheme Act 2013⁶, provides support and services to people with permanent and significant disabilities, helping them live more independently and participate fully in social and economic life.
2.	<p>a. What is this country's legal definition of disability?</p> <p>b. When do people with a facial disfigurement fit within that definition?</p> <p>c. How does being excluded from that definition affect the protection of their rights?</p>	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	<p>a. The Australian Federal Parliament enacted the DDA in 1992. It protects individuals from discrimination on the basis of their disability.</p> <p>The DDA has three objectives, which in summary are: (i) to eliminate 'as far as possible' discrimination on the ground of disability, (ii) to ensure 'as far as practicable' equality before the law for people with disabilities, and (iii) to promote community acceptance of the rights of people with disabilities.⁷</p> <p>A "disability" is defined under section 4(1) of the DDA as "<i>in relation to a person...</i>":</p> <p>(a) total or partial loss of the person's bodily or mental functions; or</p> <p>(b) total or partial loss of a part of the body; or</p> <p>(c) the presence in the body of organisms causing disease or illness; or</p>

³ Disability Standards for Education. <https://www.education.gov.au/disability-standards-education-2005>

⁴ Fair Work Act 2009. <https://www.legislation.gov.au/C2009A00028/2021-09-11/text>

⁵ Disability Employment Services. <https://www.dss.gov.au/our-responsibilities/disability-and-carers/programmes-services/disability-employment-services>

⁶ National Disability Insurance Scheme Act 2013. <https://www.legislation.gov.au/C2013A00020/latest/text>

⁷ Section 3, DDA.

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			<p>(d) the presence in the body of organisms capable of causing disease or illness; or (e) the malfunction, malformation or disfigurement of a part of the person's body; or (f) a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or (g) a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour;</p> <p>and includes a disability that:</p> <p>(h) presently exists; or (i) previously existed but no longer exists; or (j) may exist in the future (including because of a genetic predisposition to that disability); or (k) is imputed to a person.</p> <p>To avoid doubt, a disability that is otherwise covered by this definition includes behaviour that is a symptom or manifestation of the disability." (emphasis added)</p> <p>As noted above, the DDA is a federal act, and applies in all Australian states and territories. State and territory anti-disability discrimination legislation provide specific additional rights and obligations that are applied at the state and territory level.⁸</p> <p>Australia also ratified the UN Convention on the Rights of Persons with Disability (UNCPRD) in 2008, and the Optional Protocol in 2009.⁹ However, the Australian Human Rights Commission ("AHRC"), which has statutory power under the Australian Human Rights Commission Act 1986 (Cth) ("AHRC Act") to promote and protect 'human rights', which include rights and freedoms declared in any relevant international instrument, including the UNCPRD, has noted in its 2015¹⁰ and 2019¹¹ submissions to the UN Committee on the Rights of Persons with Disabilities that Australia continues to have limited legislative protection of human rights and fundamental freedoms</p>

⁸ See for example: Anti-Discrimination Act, 1977 (New South Wales); Anti-Discrimination Act, 1991 (Queensland) and Equal Opportunity Act, 1984 (South Australia).

⁹ UN Treaty Body Database, Ratification Status for CPRD - Convention on the Rights of Persons with Disabilities. https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CRPD&Lang=en (accessed 29 April 2024)

¹⁰ Australian Human Rights Commission, Submission under the Universal Periodic Review Process: Australia's Second Universal Periodic Review, April 2015, p.8. <https://humanrights.gov.au/our-work/legal/submission/australias-second-universal-periodic-review> (accessed 29 April 2024)

¹¹ Australian Human Rights Commission, Submission to the Committee on the Rights of Persons with Disabilities, 25 July 2019, p. 5. <https://humanrights.gov.au/our-work/legal/submission/information-concerning-australias-compliance-convention-rights-persons> (accessed 29 April 2024)

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			<p>at a federal level, with many of Australia’s human rights obligations not directly incorporated into Australian law.</p> <p>b. The definition of “disability” under the DDA reflects a social or environmental model of disability, rather than a medical or deficit model¹², and does not require any assessment of the type, severity, or permanency of the disability, or how or when it developed, or the nature of a disability. It also covers people possessing a palliative or therapeutic device, and people accompanied by a guide dog or other trained assistance animal, or accompanied by an interpreter, reader, assistant or carer.¹³ The broad definition is intended to help “<i>avoid genuine complaints of discrimination falling at the first hurdle—determining whether or not the person concerned is covered by the DDA</i>”, and “<i>focus attention on the discriminatory action rather than the person concerned</i>”¹⁴.</p> <p>The question of whether a person suffers from a disability within the meaning of the DDA is a question of fact. In some instances, a conclusion that a person suffers from a disability may be founded upon matters that are readily observable or commonly understood, for example, the total or partial loss of an ordinarily visible part of a person’s body. Similarly, a finding that there exists a malfunction of a part of a person’s body may in some cases be based on the evidence of the person as to their health, perceptions or personal experiences. Different considerations arise when the fact to be proven is a loss of function or other condition affecting the mind, and expert evidence may be required to prove these facts.</p> <p>The decision of the Australian Full Federal Court held in <i>Qantas Airways Ltd v Gama</i>¹⁵ highlights the need to identify the relevant disability with some precision and identify how the alleged discrimination is based on that particular disability in order to bring a claim under the DDA. In <i>Gama</i>, the court decided that the complainant’s disability discrimination claim, which was made jointly with a race discrimination claim, could not succeed as the complainant had not identified: (i) the relevant disability, and (ii) the way in which the remarks constituted less favourable treatment because of the disability.</p> <p><u>Application to people with a facial disfigurement</u></p>

¹² Australian Government Productivity Commission, Review of the Disability Discrimination Act 1992 – Inquiry report, 14 July 2004, p. 298. <https://www.pc.gov.au/inquiries/completed/disability-discrimination/report> (accessed 29 April 2024)

¹³ Section 4(7)-(9), DDA.

¹⁴ *supra* .

¹⁵ *Qantas Airways Ltd v Gama* (2008) 167 FCR 537; [2008] FCAFC 69

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			<p>Sub-paragraph (e) of the definition of “disability” under the DDA (highlighted above) covers disfigurement of a part of a person’s body. “Disfigurement” is not defined in the DDA, and our desktop review has not revealed any judicial interpretations of the term; however, the term is likely to cover people with all types of facial disfigurements (marks, scars, etc.).</p> <p>c. N/A. People with a facial disfigurement are included in the definition of a person with a “disability”.</p>
3.	<p>Are there aspects of disability and/or disfigurement law that ensure a legal right to healthcare, education or employment?</p>	<p><input checked="" type="checkbox"/> Yes <input type="checkbox"/> No</p>	<p>Yes, several laws and policies protect the rights of individuals with disabilities (including disfigurements) in such fields.</p> <p>As referenced above, the DDA prohibits discrimination on the grounds of disability in several areas, including, among others, employment and education. In particular, under the DDA (article 15):</p> <p><i>(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:</i></p> <p><i>(a) in the arrangements made for the purpose of determining who should be offered employment; or</i> <i>(b) in determining who should be offered employment; or</i> <i>(c) in the terms or conditions on which employment is offered.</i></p> <p><i>(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:</i></p> <p><i>(a) in the terms or conditions of employment that the employer affords the employee; or</i> <i>(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</i> <i>(c) by dismissing the employee; or</i> <i>(d) by subjecting the employee to any other detriment.</i></p> <p>The DDA also contains provisions rendering it unlawful to discriminate against a person on the ground of their disability in agency, contract work or partnership agreements, as well as by an employment agency.</p> <p>Regarding education, the DDA (article 22) states that:</p> <p><i>(1) It is unlawful for an educational authority to discriminate against a person on the ground of the person’s disability:</i></p> <p><i>(a) by refusing or failing to accept the person’s application for admission as a student; or</i></p>

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			<p>(b) in the terms or conditions on which it is prepared to admit the person as a student.</p> <p>(2) It is unlawful for an educational authority to discriminate against a student on the ground of the student's disability:</p> <p>(a) by denying the student access, or limiting the student's access, to any benefit provided by the educational authority; or</p> <p>(b) by expelling the student; or</p> <p>(c) by subjecting the student to any other detriment.</p> <p>(2A) It is unlawful for an education provider to discriminate against a person on the ground of the person's disability:</p> <p>(a) by developing curricula or training courses having a content that will either exclude the person from participation, or subject the person to any other detriment; or</p> <p>(b) by accrediting curricula or training courses having such a content.</p> <p>(3) This section does not render it unlawful to discriminate against a person on the ground of the person's disability in respect of admission to an educational institution established wholly or primarily for students who have a particular disability where the person does not have that particular disability.</p> <p>The DDA was further developed in the field of education by the Disability Standards for Education 2005¹⁶. These standards, formulated by the Attorney-General, specify how education and training are to be made accessible to students with disabilities in regards to enrolment, participation, curriculum development, accreditation and delivery, student support services, and elimination of harassment and victimization. Education providers are required to ensure that students with facial disfigurement (among other disabilities) are not treated less favorably than other students and that they are not subject to harassment or victimization because of their disability. Education providers are also encouraged to work collaboratively with students, their families and relevant professionals to develop individualized support plans that address the specific needs of students with disabilities, including facial disfigurements. Finally, the standards emphasize the importance of training staff and raising awareness within the school community about different disabilities, including facial disfigurement.</p> <p>In the field of healthcare, the National Disability Insurance Scheme ("NDIS") is a scheme designed to provide support and services to people with permanent and significant disabilities. The NDIS provides funding to people with disability and connects them with services in their community¹⁷. People with facial disfigurements may qualify for assistance under the NDIS depending on the impact of the condition on their daily functioning and quality of life. While the scheme does not specifically</p>

¹⁶ <https://www.legislation.gov.au/F2005L00767/asmade/text>

¹⁷ <https://www.ndis.gov.au/understanding/what-ndis>

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		<p>list facial disfigurement as a qualifying condition, individuals with facial disfigurements may be eligible for support if their condition meets the criteria for substantially reduced functional capacity in one of the following areas: mobility, communication, social interaction, self-management, learning and self-care (see article 24 National Disability Insurance Scheme Act 2013)¹⁸. Support depends on the individual's needs, but may include therapeutic supports including behaviour support, personal care¹⁹, social and community participation²⁰ and capacity building (such as skill development programs, education and training, or support to access employment opportunities)²¹.</p> <p>Individuals with facial disfigurements who are considering applying for support through the NDIS must undergo a comprehensive assessment to determine their eligibility and the types of support that may be beneficial for their individual circumstances²². Advocacy organizations and support services may provide assistance in navigating the NDIS application process and accessing appropriate supports. Some examples of these organizations are People with Disability Australia (PWDA)²³, Disability Advocacy Network Australia (DANA)²⁴, and Advocacy for Inclusion (AFI)²⁵.</p>
4.	<p>a. How effective are the legal protections? Please describe evidence available of the effect of the legal protections.</p> <p>b. What are deficiencies or areas for improvement in these legal protection measures as they apply and affect people with facial disfigurement?</p>	<p>Given that facial disfigurement is folded into general disability rights and laws, it is very difficult, if not impossible, to get data on facial disfigurement only.</p> <p>a. Effectiveness of the legal protections:</p> <p>This is, unfortunately, unclear. The Australian Human Rights Commission has a complaint mechanism²⁶ and publishes settlements, court decisions and commission decision under: https://humanrights.gov.au/our-work/disability-rights/disability-complaint-outcomes. However, this is not specific to facial disfigurement and we were, in fact, unable to identify through our desktop research a case of facial disfigurement in the Conciliation Register²⁷.</p>

¹⁸ National Disability Insurance Scheme Act 2013. <https://www.legislation.gov.au/C2013A00020/latest/text>

¹⁹ <https://www.ndis.gov.au/understanding/supports-funded-ndis>

²⁰ <https://www.ndis.gov.au/community/community-participation>

²¹ <https://www.ndis.gov.au/about-us/research-and-evaluation/home-and-living-supports/using-capacity-building-supports-help-make-individualised-living-reality>

²² <https://www.ndis.gov.au/about-us/publications/booklets-and-factsheets#applying-to-the-ndis>

²³ <https://pwd.org.au/>

²⁴ <https://www.dana.org.au/>

²⁵ <https://www.advocacyforinclusion.org/>

²⁶ See <https://humanrights.gov.au/complaints/complaint-guides/complaints-under-disability-discrimination-act> for further background

²⁷ <https://humanrights.gov.au/complaints/conciliation-register>

No.	Question		Answer
	<p>c. What evidence exists to prove that the information and resources guaranteed by law are actually available to disabled persons?</p>		<p>Also, it is worth noting that the Australian Government came up with Australia’s Disability Strategy 2021-2031 to improve life for people with disability²⁸ in general. The focus areas are: Employment and financial security, Inclusive homes and communities; safety, rights and justice; personal and community support; Education and Learning; Health and Wellbeing; Community attitudes. The second annual report was released in Jan 2024 and gives an overview over the current state and the tracking (for these focus areas).²⁹</p> <p>Finally, the Australian Government publishes several Reports relating to People with disability in Australia. The latest update was in April 23, 2024.³⁰</p> <p>b. Deficiencies or areas for improvement:</p> <p>As indicated above, one of the key deficiencies is the lack of mention of facial disfigurement explicitly, which could lead to ambiguity and makes it impossible to flag deficiencies that are specific to people with facial disfigurements.</p> <p>In a review of the National Disability Strategy 2010-2020, the UNSW Sydney flagged the following gaps and suggested the following priorities – again, not limited to facial disfigurement, but disability in general³¹:</p> <ul style="list-style-type: none"> • Rights protection, especially access to legal services and information: People do not know about the fact that mechanisms exist for people with disability and families to challenge services on human rights grounds. • Economic security, specifically employment and education: Decline in economic security of people with disability and decline of employment of people with high support needs. • Advocacy: Insecurity of funding for advocacy services (including systemic advocacy, individual advocacy and self-advocacy). • Information accessibility: Availability of information in languages other than English and in alternative formats, including easy read, Auslan, and audio-description.

²⁸ Details about the Strategy can be found here: <https://www.aihw.gov.au/australias-disability-strategy/about/about-the-strategy> and a Summary Report under: <https://www.disabilitygateway.gov.au/document/3111>

²⁹ See <https://www.aihw.gov.au/reports/australias-disability-strategy/australias-disability-strategy-outcomes-framework/contents/about>

³⁰ <https://www.aihw.gov.au/reports/disability/people-with-disability-in-australia/contents/justice-and-safety/disability-discrimination>

³¹ See the Report under <https://www.unsw.edu.au/research/sprc/our-projects/review-national-disability-strategy-2010-2020> - p. 21-23.

No.	Question		Answer
			<ul style="list-style-type: none"> • Intersectional groups: People with disability from culturally and linguistically diverse and Indigenous backgrounds, women with disability, children with disability, LGBTI people with disability and other intersectional groups are not currently identified as groups with distinct or additional needs in the text of the Strategy c. Evidence that information and resources guaranteed by law are actually available? <p>See also response to (a). In addition, while both the reports of the 2010-2020 Strategy and the initial reports for the strategy 2021-2032 try to identify the gaps and see where further improvement is required, it is clear that a great deal of work has been done and the above mentioned complaints mechanism provides a good picture of this.</p>