Recognizing Direct and Indirect Discrimination

I. Direct Discrimination

Most people understand **direct discrimination**. Direct discrimination occurs if a person treats (or proposes to treat) someone else less favorably than they would another person in comparable circumstances, because of a particular ***attribute.*** This occurs when factors unrelated to merit, ability or potential of a person or group are used as an explicit reason for excluding or otherwise discriminating against them.

Specifically, we can recognize direct discrimination when an employee or prospective employee, or student or prospective student, is treated less favorably because of their *race, color, tribe, sex, religion, political opinion or affiliation, national extraction, nationality, social origin, marital status, HIV status or disability* (compared with someone who doesn't have that attribute). This tends to be obvious, pretty straightforward discrimination, in most cases. For example,

- A student with a disability is ignored when seeking service at a lunch counter and is asked to leave because he is taking up too much space due to his wheel chair.
- A female job applicant with the best qualifications and experience does not get an interview, but a male job applicant with less qualifications and experience does. Or if she is already in a job, she is overlooked for promotion, whilst her less qualified and experienced male colleague is promoted ahead of her.
- A professional staff member is not recommended for a professional development course as she is told that "*it won't be much use to you as you're pregnant and will leave soon.*"
- A supervisor refuses to support a student's application for a PhD because she is pregnant.
- A staff member is refused entry to a training course because s/he is considered too old.
- A candidate is asked at a job interview whether she has children. When she tells the interviewer that she have four children, she makes a remark about the candidate's needing a lot of time off work if they're sick, and says she won't be suitable for the position.
- A candidate answers a job advertisement for a receptionist. He is told over the phone that because he's a man, he'd be wasting his time.
- When a woman advises her employer that she is pregnant, she is moved to a lower-paying job out of the public view, because clients 'don't want to look at people in her condition'.

Constance Newman
IntraHealth International
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- A worker is not selected for a promotion at work. The supervisor tells the worker that while he thinks the worker could do the job, 'you'll be retiring soon, so we're looking for someone who'll be here for a while'.

Direct discrimination is a barrier to equal access and opportunity, and can also involve less favourable ***treatment,*** which includes harassment or bullying. In direct discrimination, an employer cannot argue that it was not their intention to discriminate as the law typically considers the end ***effect***.

II. Indirect Discrimination

Most unfair treatment is clear, for instance, not getting a job because a person is told they are too old, or not being able to rent a flat because you and your partner aren't married, but sometimes it is less obvious. Sometimes, a policy, provision, criterion, regulation, condition, procedure, rule or practice seems fair and neutral because it applies to everyone, but can only be complied with by a higher proportion of people without the attribute or personal characteristic. A closer look will show that some people are being treated unfairly. For example,

- All tutorial classes and tutor consultation times for a subject are held after 5pm. While this requirement applies equally to all students, it may have a disproportionate impact on, for example, students with family responsibilities. The requirement may therefore amount to indirect discrimination.

- Short-listed applicants for a job are all invited to attend an interview that is held on the 3rd floor of a building with no lift. Applicants with a disability that affects their ability to use stairs would be disproportionately affected. This situation may give rise to indirect discrimination.

- An employer might have a policy of not letting staff work part-time. This policy could impact unfairly on people who have children and can't work full-time.

- All information about workplace health and safety at a job site is printed in English. Those whose first language isn't English may be at risk.

- Providing an employment benefit such as a « head of household » allowance, when legislation or policy defines heads of households as men

- A mature age student with young children enrolls in a course that has three core units and three optional units, and finds there are three alternative streams for the core units, set out on the timetable listed in the school catalogue. The student organises child-care to fit in with Stream A as outlined in the catalogue, but at the beginning of the semester, is informed that she has been allocated to Stream B, which conflicts with the child-care arrangements.

- A student wants to commence a course that can only be undertaken on a full-time basis. The student has primary carer responsibility for her elderly parents and her caregiving responsibilities make full-time study difficult. The faculty denies a request to undertake the course part-time, arguing that this would not be possible as the course is only provided every second year, and that the course has been designed so that the practical and theoretical elements are inter-related and need to be completed at the same time.

These are instances of indirect discrimination, a less obvious form of discrimination. Indirect discrimination has occurred when practices that are fair in form and intention are discriminatory in **impact and outcome**. Indirect discrimination occurs where the **effect** of certain requirements, conditions or practices imposed by an employer or education/training provider has an adverse impact disproportionately on one group or other. In summary, the question is always whether the condition is likely to have a proportionately different, discriminatory or worse impact on a particular class/group of persons.

Why is indirect discrimination an issue?

There are many reasons why indirect discrimination is an issue for an educational or employment institution. For example, an Australian university found that the majority of complaints received by its Equal Opportunity Unit involved indirect discrimination. Also, indirect discrimination is less well understood and more difficult to recognize as it is often imbedded in the culture of "the way we do things here." Finally, indirect discrimination affects student participation and staff recruitment and may be a barrier to progress and achievement.

Discrimination against women

The term "gender" or sex discrimination is usually applied to discrimination against women where women have a comparative socio-economic disadvantage relative to men. Here is an example of a definition of terms from guidance on Australia's sex discrimination act:

"Direct and indirect discrimination against women

(1) In any circumstances relevant for the purposes of any provision of this Act, other than a provision to which subsection (2) applies, a person discriminates against a woman if -

(a) on the ground of her sex he treats her less favorably than he treats or would treat a man, or

(b) he applies to her a requirement or condition which he applies or would apply equally to a man but -

(i) which is such that the proportion of women who can comply with it is considerably smaller than the proportion of men who can comply with it, and

(ii) which he cannot show to be justifiable irrespective of the sex of the person to whom it is applied, and

(iii) which is to her detriment because she cannot comply with it.

Indirect **discrimination against women** generally occurs when a rule or condition, which is applied equally to everyone, can be met by a considerably smaller proportion of women, the rule puts women at a disadvantage, the rule cannot be justified on other grounds or is not reasonable in the circumstances.

Summary: The costs of any kind of discrimination can be considerable. Discrimination can affect staff and student performance, commitment and retention, and has a negative impact on the school's reputation as an employer and educator of choice.

References

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2. Anti-Discrimination Commission Queensland. *Direct and Indirect Discrimination.* January 2007.

3. Australian Workplace Lawyers. *Direct and Indirect Discrimination*. N.d.

4. Equal Opportunity Unit, Human Resources, University of Melbourne. *Discrimination: Who Can I Talk To?* March 2009. http://www.hr.unimelb.edu.au/strategic/equity-diversity.

Constance Newman
IntraHealth International
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