

# Employers' toolkit

Resources for building an inclusive workplace

**Anti-Discrimination Commission Queensland**

**2011**



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## Introduction

An inclusive workplace is one where the human rights principles of fairness, respect, equality and dignity are promoted and are part of the organisation's everyday goals and behaviour.

The material contained in this kit will assist you to set out your organisation's commitment to tackle discrimination and sexual harassment and promote equality and diversity in areas such as recruitment, training and management. These are important steps on the way to creating an inclusive workplace.

Having a policy on discrimination and sexual harassment shows your organisation's commitment to your workers, and your customers, clients or service users as well.

The sample policies provided in this kit are a guide only. You will have to tailor them to reflect your own workplace, organisational structure and industry.

There are benefits to creating an inclusive workplace where workers and clients are treated with dignity and respect, and where the talents and skills of different groups are valued. These include a happier, more productive and motivated workforce, with less absenteeism and staff turnover.

In Queensland, the *Anti-Discrimination Act 1991* protects people in their daily lives from discrimination, sexual harassment and associated objectionable conduct. As an employer you have a duty to provide a safe and discrimination free work environment. Your obligations under the Act also extend to your clients and customers, and mean that you must deliver goods and services in a non-discriminatory way.

For more information

Contact the Anti-Discrimination Commission Queensland on 1300 130 670 (state wide), TTY 1300 130 680 (state wide) or visit the website <http://www.adcq.qld.gov.au>

## Tools for creating a discrimination and harassment free workplace

- Checklist for creating a fair and inclusive workplace
- Checklist for developing and implementing a policy on discrimination and sexual harassment
- Sample policy on discrimination and sexual harassment
- Sample complaint and grievance procedure

## Checklist for creating a fair and inclusive workplace

### **Develop a strong and clear policy on discrimination and sexual harassment**

Include a statement about the organisation's commitment to best practice in relation to discrimination and sexual harassment at all stages of the employment relationship (recruitment, terms and conditions of work, training, promotion, retrenchment and dismissal).

### **Ensure CEO support for the policy on discrimination and sexual harassment**

- clear, unambiguous and visible support from CEO;
- CEO must lead by example;
- clear responsibilities delegated by CEO to managers.

### **Establish an effective internal complaints procedure**

- assurance that no victimisation will result from making a complaint;
- procedure is well documented, available and in accessible formats;
- staff who manage complaints are well trained;
- assistance in the form of language or Auslan interpreters as needed for parties to a complaint;
- process is confidential, independent and based on principles of natural justice;
- process has clear timelines;
- conflicts of interest are managed appropriately.

### **Establish a network of equity contact officers**

- equity contact officers have clear responsibility for providing information, not advice, to staff;
- equity contact officers understand their role in the organisation, risk minimisation, record keeping, conflicts of interest and confidentiality requirements;
- staff know who is in the network and what their role is;
- regular professional training for equity contact officers;
- equity contact officers model expected behaviours consistently;
- regular review of network to ensure suitability, training, and diversity as reflected in the workplace.

### **Train all levels of managers, supervisors and staff about rights and responsibilities in relation to discrimination and sexual harassment**

- anti-discrimination and sexual harassment training for all staff at induction and subsequent staff training;
- training appropriate to the level and type of work done;

- update training for staff e.g. every two to three years.
- ❑ **Ensure all managers and supervisors model appropriate behaviour**
  - need to be seen to 'walk the talk';
  - need to set the tone for the workplace culture;
  - clear consequences for managers and supervisors breaching the policy;
  - clear responsibilities for ensuring implementation of the policy.
- ❑ **Awareness raising, discussion and dissemination of policy on discrimination and sexual harassment**
  - all levels of employees are aware of the policy;
  - include the policy with induction material;
  - make policy available to staff (e.g. on the intranet, through email, paper copy in a common area and displaying notices in the workplace referring to the policy and where to get a copy);
  - make a copy of the Queensland Anti-Discrimination Act 1991 available to staff (e.g. through the intranet, as hard copy and mentioned on notice boards);
  - key performance indicators for managers and supervisors include anti-discrimination and sexual harassment responsibilities.
- ❑ **Accessibility audit**
  - ensure that the physical environment, and information and communications technology is accessible for people with impairments.
- ❑ **Identify potential hot spots for particular attention**

Potential hotspots may include workplaces or work units:

  - where issues have arisen in the past;
  - where some workers of a particular sex, age, religion, race or who have an impairment are working with a larger different group;
  - where workers are returning after injury, illness or significant time off on leave e.g. parental leave;
  - where there is significant workplace change;
  - where staff turnover or absenteeism is high;
  - where other complaints from staff are occurring;
  - where a new manager or supervisor is appointed who is not yet familiar with the workplace policies, culture and staff expectations.
- ❑ **Monitor compliance with policy on discrimination and sexual harassment**
  - monitor any hot spots identified;
  - record and analyse staff complaint statistics and suggestions;
  - record and analyse customer complaints and suggestions;
  - conduct and analyse staff exit interviews;

- analyse staff turnover and leave.



## Checklist for developing and implementing a policy on discrimination and sexual harassment

### **State that the policy applies to all workers in their dealings with each other and with clients or customers**

- workers who are full-time, part-time, casual, permanent and temporary;
- contract or commission workers;
- work experience, vocational placement and volunteer workers.

### **Make a strong statement of the organisation's attitude to discrimination and sexual harassment**

The statement may include:

- Discrimination on any of the grounds listed in state and federal legislation is against the law, as is sexual harassment, vilification and the seeking of unnecessary information on which discrimination might be based.
- Senior management are committed to ensuring that the work environment is free from discrimination and sexual harassment.
- Discrimination and sexual harassment will not be tolerated.
- Disciplinary action will be taken against any employee (or agent) who breaches the policy.

### **Outline of the organisation's objectives regarding discrimination and sexual harassment**

This demonstrates commitment to a comprehensive strategy for addressing discrimination and harassment. Employers may wish to say that their organisation aims to:

- create a work environment which is free from discrimination and harassment and where all members of staff are treated with dignity, courtesy and respect ;
- implement training and awareness raising strategies to ensure that all employees know their rights and responsibilities;
- provide an effective complaints procedure based on the principles of natural justice;
- treat all complaints in a sensitive, fair, timely and confidential manner;
- guarantee protection from any victimisation;
- encourage the reporting of behaviour which breaches the discrimination and sexual harassment policy;
- promote appropriate standards of conduct at all times.

### **Give clearly worded definitions of discrimination and sexual harassment**

A definition of discrimination may say:

**Discrimination** occurs when a person is treated less favourably because of their:

- race, (including colour, descent or ancestry, nationality, national or ethnic origin);

- age (whether young or older);
- impairment (including biological, functional, learning, physical, sensory, mobility, cognitive, psychological, psychiatric impairment or the presence of an organism capable of causing disease);
- religious belief or activity;
- sex or gender identity;
- relationship status (including being married, single, divorced, separated, de facto or in a same sex relationship);
- sexuality;
- pregnancy, breastfeeding, parental status (including being or not being a parent, guardian, foster parent, adoptive parent, or step parent);
- family responsibilities (including the responsibility to care for and support a dependant child or immediate family member);
- lawful sexual activity as a sex worker;
- trade union activity;
- political belief or activity;
- association with someone else who is identified because of one of the above attributes.

While discrimination in the workplace and in connection with work is the focus of this policy, discrimination in connection with the supply of goods and services to clients and customers should also be mentioned.

Expand on the definition in a way that is easy to understand by including explanations such as:

- **Direct discrimination** occurs when a person, or a group of people, is singled out for worse treatment, compared to others in similar circumstances, because they have one or more of the attributes listed above.
- **Indirect discrimination** occurs when one rule applies to all, but in fact disadvantages a person or group of people because they are unable (or less able) to comply with the rule because they have an attribute listed above.

Give examples of behaviour which could be discrimination, both direct discrimination and indirect discrimination.

A **definition of sexual harassment** may say:

Unwelcome sexual conduct either with the intention of offending, humiliating or intimidating the other person, or in circumstances where a *reasonable* person would expect that it would give offence.

Give examples of what could be sexual harassment. This includes:

uninvited touching or other physical contact; staring or leering at a person or at parts of their body; smutty jokes or comments; talking about your sex life or asking about another person's sex life; sexual jokes; sexual propositions; the display of offensive material; offensive phone calls or transmission of offensive sexual material by email, SMS or other social media; or other behaviour which creates a sexually hostile work environment.

❑ **Set out where unlawful discrimination and sexual harassment can occur**

The policy should state that a person may be discriminated against or sexually harassed by a supervisor or manager, co-worker, contractor, service provider, client or customer.

The policy may also state that discrimination and sexual harassment is not just unlawful during work hours or in the workplace itself, but in any work-related context including conferences, work functions, office parties and business or field trips and includes interactions with clients and customers.

❑ **State that a worker must not discriminate against or sexually harass a customer or client**

A worker may be personally liable if a complaint of discrimination is brought against them. The organisation may also be vicariously liable for the actions of its workers.

❑ **Explain who has responsibility for ensuring discrimination and sexual harassment do not occur**

A statement that everyone has a responsibility to prevent discrimination and sexual harassment in the workplace.

- Emphasise the primary role of managers and supervisors in ensuring staff and clients are not discriminated against or sexually harassed in the workplace or in connection with the person's employment. This may include that managers and supervisors have a responsibility to:
  - monitor the work environment to ensure that acceptable standards of conduct are observed at all times;
  - model appropriate behaviour themselves;
  - promote the organisation's policy on discrimination and sexual harassment in their work area;
  - treat all complaints seriously and take immediate action to investigate and resolve the matter;
  - refer a complaint to another officer if they do not feel that they are the best person to deal with the case (for example, if there is a conflict of interest or if the complaint is complex or serious).
- Emphasise the responsibility of every employee not to participate in discriminatory or sexually harassing behaviour within the workplace, noting that all staff have a responsibility to:
  - comply with the organisation's policy on discrimination and sexual harassment;
  - offer support to anyone who is being discriminated against or sexually harassed and let them know where they can get information and advice;
  - maintain complete confidentiality if they provide information during the investigation of a complaint.

❑ **Set out the likely consequences of discriminating against or sexually harassing someone**

- Establish a range of outcomes, such as disciplinary action (demotion, transfer, suspension, probation or dismissal), official warning to be noted on personnel file, a formal apology, counselling.

## ❑ Provide information about where to get help if discrimination or sexual harassment occur

Disseminate information to all levels of the organisation, using staff notice boards, common areas, email, intranets and staff meetings. Verbal communication of information for staff with cognitive impairments, low literacy or English language skills is of particular importance.

- Provide names and contact details of equity contact officers or nominated person/s trained to assist in the formal or informal resolution of complaints.
- Provide information about formal support mechanisms within the organisation e.g. employee counselling or support services, leave entitlements, the right to make a worker's compensation claim.
- Translate information into appropriate languages for staff from culturally and linguistically diverse communities.

## ❑ Explain how the complaints procedure operates and options for complaining

- State that victimising a person because they have made a complaint, or are involved in a complaint is unlawful and will not be tolerated.
- Give assurance that all complaints will be handled confidentially, promptly and impartially, and the principles of natural justice applied.
- Recommendations from investigations of complaints will be implemented.
- Different ways of resolving complaints should be offered, including:
  - **self help:** The person who has been discriminated against or harassed may want to deal with the situation themselves after seeking information (e.g. from the equity contact officer, trade union, ADCQ or manager). This might include talking with the person responsible for the discrimination or harassment (To be used only if the person feels confident enough to do so.)
  - **making an internal complaint:** talking with the person's manager (or another manager if more appropriate) and telling them about the concerns. Depending on the nature of the information disclosed, the manager may take a range of actions which might include: immediate action; suggesting options for resolving the complaint; and offering to speak with the person being complained about. If these methods do not resolve the issue or the complaint is serious or complex, an investigation may need to be made. This will involve an investigation, the collection of evidence and witness statements, and making findings and recommendations to be implemented.
  - **external complaints agency:** making a complaint to an external organisation such as the Anti-Discrimination Commission Queensland or the Australian Human Rights Commission. Complaints to the Anti-Discrimination Commission Queensland must be made within one year of the events complained of, unless there is a good reason for the delay

## Sample policy

### Policy on discrimination and sexual harassment

(Company name) is committed to creating a work environment which is free from discrimination and sexual harassment and where all members of staff are treated with dignity, courtesy and respect. We have developed a policy on discrimination and sexual harassment, provide regular staff training on discrimination and sexual harassment, and have procedures for complaints.

#### Application of this policy

This policy applies to all staff:

- full time, part time, casual, permanent or temporary;
- contract or commission workers;
- volunteers, vocational and work experience placements.

It applies to staff in all their work-related dealings with each other, and with customers, contacts or clients.

It applies to staff while in the workplace or off site, at work-related functions (including social functions and celebrations), while on trips and attending conferences.

#### Discrimination and equal opportunity

(Company Name) is an equal opportunity employer. At all stages of the employment relationship (recruitment and selection, terms and conditions of work, training and professional development opportunities, promotion and transfer, retirement, retrenchment and termination) staff will be treated on their merits and valued according to how well they perform their duties.

(Company Name) believes that all staff should be able to work in an environment free from discrimination, victimisation, sexual harassment, vilification and the seeking of unnecessary information on which discrimination might be based. We consider these behaviours unacceptable and they will not be tolerated.

#### Responsibility of staff

All staff contribute to the creation of a discrimination free and inclusive workplace and a healthy workplace culture.

**Managers** have a particular obligation to model appropriate behaviour; promote this policy; treat all complaints seriously and attend to them promptly; monitor the work environment and seek expert help for complex or serious matters.

**All staff** have the responsibility to comply with this policy; report incidents to their managers and not to participate in discriminatory or harassing behaviour.

#### Consequences of breach of the policy

Staff who make a complaint of discrimination or sexual harassment will not suffer any victimisation by (Company name) for making the complaint. This also applies to staff who agree to be a witness in a complaint or have a complaint made against them.

**Disciplinary action** will be taken by (Company name) against any staff member found to have breached this policy. Action will be appropriate to the breach and may include: an official

warning and note on the person's personnel file; a formal apology; counselling; demotion, transfer, suspension; or dismissal for very serious matters.

## Anti-discrimination legislation

Under the Queensland *Anti-Discrimination Act 1991* (the Act) discrimination, victimisation, sexual harassment, vilification and seeking unnecessary information on which discrimination might be based are illegal.

Discrimination on the following grounds is against the law:

- race, (including colour, descent or ancestry, nationality, national or ethnic origin);
- age (whether young or older);
- impairment (including biological, functional, learning, physical, sensory, mobility, cognitive, psychological, psychiatric impairment or the presence of an organism capable of causing disease);
- religious belief or activity;
- sex or gender identity;
- relationship status (including being married, single, divorced, separated, de facto or in a same sex relationship);
- sexuality;
- pregnancy, breastfeeding, parental status (including being or not being a parent, guardian, foster parent, adoptive parent, or step parent);
- family responsibilities (including the responsibility to care for and support a dependant child or immediate family member);
- lawful sexual activity as a sex worker;
- trade union activity;
- political belief or activity;
- association with someone else who is identified because of one of the above attributes.

Other behaviour that is against the law includes:

- seeking unnecessary information on which discrimination might be based;
- victimisation because a person has made a complaint, agreed to be a witness or has had a complaint made against them;
- sexual harassment is prohibited under both state legislation and the federal Sex Discrimination Act 1984;
- vilification on the basis of a person's race, religion, gender identity or sexuality.
- Federal anti-discrimination legislation also prohibits discrimination on the basis of criminal record, medical record or social origin.

## What is discrimination?

**Direct discrimination** occurs when a person (or a group of people) is singled out for worse treatment, compared to others in similar circumstances, because of one or more of the attributes listed above. Direct discrimination may involve:

- making offensive 'jokes' about another worker's racial or ethnic background, sex, sexuality, age or impairment;

- expressing negative stereotypes about particular groups or using stereotypes as a basis for decisions about work e.g. 'Women with young children shouldn't work.' or 'Older workers can't learn new skills.'
- using selection processes based on irrelevant attributes such as age, race or impairment rather than on skills really needed for the job.

**Indirect discrimination** occurs when one rule applies to all, but in fact disadvantages a person (or group of people) because they are unable, or less able to comply with the rule because they have an attribute listed above. The fact that the disadvantage was not intended is not an excuse. For example:

- Requiring everyone to be available for all shifts might be unfair to a person with responsibilities to care for children or an elderly parent.
- Only hiring people who have never had a back injury or a workers compensation claim might rule out an employee whose health has returned and can do the job well.
- Not considering the provision of some reasonable adjustments would disadvantage a person with an impairment who may be able to perform the essential parts of the job in a different way.

## What is sexual harassment?

Sexual harassment is any form of unwelcome sexual attention that might offend, humiliate or intimidate the other person and may be experienced by women or men. It includes uninvited touching or physical contact; leering at a person or at parts of their body; talking about your sex life or asking about another person's sex life; sexual jokes or propositions; sexually offensive communications (phone, email, SMS or other social media.)

Sexual harassment is against the law wherever and whenever it occurs. **(Company name)** will not tolerate sexual harassment in the workplace or in any work-related context such as conferences, work functions and business trips. Sexual harassment has nothing to do with mutual attraction. Such friendships are a private matter.

Sexual harassment does not have to be repeated or continuous to be against the law. Some actions or remarks are so offensive that they constitute sexual harassment in themselves, even if they are not repeated. Other single incidents, such as an unwanted invitation or compliment, may not be sexual harassment. Some forms of sexual harassment, such as assault, physical molestation, stalking, sexual assault and indecent exposure, are also criminal offences.

The person being harassed does not need to say that the behaviour is unwelcome. Many people find it difficult to speak up. All employees are responsible for their own behaviour. If you think the behaviour may offend, then don't do it.

## Vicarious liability

Under the Act the person who discriminates against, victimises, sexually harasses, vilifies or asks for unnecessary information can be liable for the illegal behaviour as well as their employer, **(Company name)**, unless **(Company name)** can show we have taken reasonable steps to prevent it.

**(Company name)** provides all staff with brochures and information about discrimination and sexual harassment at induction, and conducts regular awareness training.

Managers must ensure that all staff are treated fairly and are not subject to any of the behaviours mentioned in this policy. They must also ensure that people who make complaints, or who are witnesses, are not victimised in any way.

## What to do if you are discriminated against, sexually harassed, vilified or asked for unnecessary information.

Don't ignore discrimination, sexual harassment, vilification or requests for unnecessary information, thinking it will go away - often it just gets worse. Choose the action you feel most comfortable with. You can follow more than one action at the same time.

### Support and counselling

(**Company name**) provides confidential assistance to staff in the form of wellbeing support and professional counselling and encourages staff to seek help. Phone (.....)

For information on leave entitlements or WorkCover claims phone (**usually HR .....**)

### Get more information before deciding what to do:

1. Contact one of the following people in (**Company name**) who have been nominated to give information:  
Name:  
Position:  
Location:  
Contact details (telephone, email):  
  
Name:  
Position:  
Location:  
Contact details (telephone, email):
2. Contact your trade union for advice.
3. Call the Anti-Discrimination Commission Queensland on 1300 130 670 or TTY 1300 130 680 for information about your rights and responsibilities.

### Self help

If you feel confident and want to deal with the situation yourself, you can use self help techniques. However, it is not necessary that you try to resolve the complaint this way.

This option involves approaching the person responsible for the discriminatory or sexually harassing behaviour yourself. You should tell the person what you are unhappy about, why you are unhappy about it, and what you would like to happen. Taking a person with you for support may be helpful.

### Make an internal complaint

(**Company name**) has an obligation to treat all complaints of discrimination, victimisation, sexual harassment, vilification or seeking unnecessary information seriously. All complaints will be handled confidentially and impartially, investigated promptly and recommendations implemented.

1. The starting point to resolving a complaint is to talk with someone. This can be your manager (or another manager if more appropriate). Tell them what your concerns are; explain what has happened and how it has affected you.
2. The manager may take immediate action (e.g. removing offensive graffiti or posters).
3. The manager may provide a range of options. One approach is to centre on the resolution of the issue, without deciding fault. The manager may speak to the person you are making a complaint about, to see if the situation can be resolved simply.

4. Some matters are not resolved so easily, especially if the person being complained about denies or disputes the allegations, or the issues are complex. Your manager (or another manager if appropriate) may handle your complaint, or refer it to specialist human resource staff or engage an independent external agency. This option will involve an investigation, collecting evidence and witness statements, and making findings and recommendations which will be implemented by **(Company name.)**The following human resource staff are available to discuss these options:

Name:  
Position:  
Location:  
Contact details (telephone, email):

Name:  
Position:  
Location:  
Contact details (telephone, email):

### **Make an external complaint:**

1. You can complain to the Anti-Discrimination Commission Queensland (ADCQ). ADCQ has offices in Brisbane, Rockhampton, Townsville, and Cairns and contact details are phone 1300 130 670 (state wide) and TTY 1300 130 680 (state wide). They will send you a complaint form and explain the process to resolve your complaint. The ADCQ complaint resolution service is free. The Commission's website [www.adcq.qld.gov.au](http://www.adcq.qld.gov.au) has more information including the complaint form.

NOTE: A complaint to the Anti-Discrimination Commission must be made within **one** year of the incident, unless good reasons for any delay can be shown.

2. Call the Australian Human Rights Commission in Sydney on 1300 656 419 to make a complaint under federal anti-discrimination legislation.

### **Policy review**

All policies will be reviewed every two to three years, and distributed to staff. Should the need arise, the policies will be translated into appropriate languages.

**(Company name)** is committed to providing an environment which is safe for all staff. You will not be disadvantaged in your employment conditions or opportunities as a result of lodging a complaint.

Signed.....

Position: **(Chief Executive of Company)**

## Sample policy

### Complaints procedure

(Company name) has a commitment to create a work environment which is free from discrimination and harassment and where all members of staff are treated with dignity, courtesy and respect. (Company name) has an obligation to treat all complaints of discrimination, victimisation, sexual harassment, vilification or seeking unnecessary information on which discrimination might be based seriously. All complaints will be handled confidentially and impartially, investigated promptly and recommendations implemented.

### Complaints Procedure

The process for managing complaints is as follows:

- A complaint can be made to any manager, supervisor or human resources staff member in (Company name).
- The complaint does not have to be in writing.
- The complaint will be handled fairly and based on the principles of natural justice.  
*Natural justice* means the right to be given a fair hearing and the opportunity to present your case, and the right to have a decision made by an impartial decision maker.
- There will be no victimisation as a result of making a complaint or supplying information to an investigation or other person with a role in this procedure.
- The complaint will be handled confidentially. The person managing the complaint will be independent and impartial of the complaint and any other parties involved. This may be (for example a supervisor or senior staff member) or a person appointed from outside (Company name).
- All parties to a complaint have the option of nominating a support person to be present.
- All parties to a complaint who require an Auslan or language interpreter will be provided with a professional interpreter.
- The complaint will be dealt with as a matter of priority following these steps:
  - The person managing the complaint will discuss the issue with the complainant within (often 24 hours) of the complaint being made.
  - The person being complained about will be informed of the allegations against them. They will be given an opportunity to respond to the allegations.
  - Statements from witnesses and any other relevant evidence will be collected.
  - This part of the complaint process will be completed within (often 7 working days).
- A report documenting the investigation process, the evidence, findings and recommendations will be prepared and submitted to the appropriate decision maker.
- The (Senior Manager or another senior staff member) will decide what action will be taken, depending on the outcome of the investigation and any other relevant factors.
- Parties to the complaint will be advised about any action to be taken in relation to them. If the outcome is not acceptable to the parties, an appeal can be made within (often 3 working days) to (often the CEO or another very senior staff member) to review the complaint and outcome.
- The (Senior Manager or another senior staff member) will implement the recommended actions.

- The (often the board, CEO or another very senior staff member) will monitor the outcomes of complaints and take appropriate action to prevent further complaints arising.
- A complaint can also be lodged with an external agency such as the Anti-Discrimination Commission Queensland, which has a one year time limit unless there is good reason for any delay.
- A complaint to an external agency will not prevent this Complaint Procedure from continuing where (often the Senior Manager or another senior staff member) decides that this is appropriate.
- (Company name) will review this procedure every two to three years.

Signed.....

Position: (Chief Executive of Company)

## **Tools for managing discrimination and sexual harassment complaints in the workplace**

- DOs and DON'Ts for managers who are responsible for managing complaints of discrimination or sexual harassment
- Tips for managing a person who makes a complaint of discrimination or sexual harassment
- Tips for managing a person accused of discrimination or sexual harassment
- Tips for managers on keeping records about complaints of discrimination or sexual harassment.

## DOs and DON'Ts for managers who are responsible for managing complaints of discrimination or sexual harassment

### DOs

- Talk to all parties about confidentiality and advise that they should not discuss the matter with co-workers.
- Be aware of your own biases and preconceived ideas about discrimination and sexual harassment.
- Listen carefully and acknowledge that the person making the complaint may be feeling distressed, angry or frightened.
- Advise the person making the complaint of their rights and inform them of available assistance, support, counselling etc.
- Explain the complaints procedure and provide support: try to find out what action they want to take.
- Offer to talk to the alleged discriminator/harasser privately if the person making the complaint wants the manager/supervisor's help in resolving the problem informally.
- If any of the people involved in the complaint has difficulties with English or a hearing impairment, arrange for a professional interpreter – even at the informal stage.
- Act quickly, preferably within 24 hours of the complaint coming to your attention.
- Ensure that you have been adequately trained to deal with complaints of discrimination sexual harassment.
- Check the organisation's policy on record keeping.
- Document the complaint and progress/outcome; keep records secure and confidential.
- Remain impartial and do not prejudge the situation.
- Advise that investigation of the complaint will only proceed with the consent of the person making the complaint. In cases where the consent is not given, it is advisable to take action in more general ways to ensure that unacceptable behaviour/practices do not occur. For example, re-circulate the organisation's discrimination and sexual harassment policy, display posters with an anti-discrimination message on notice boards, arrange awareness raising sessions etc. Continue to monitor the situation and maintain communication with the person making the complaint until the situation is resolved.
- Ensure the behaviour stops.
- If the person making the complaint decides to try to address the matter by themselves, follow up to ensure that it has been resolved.
- Consider the training/development needs of staff.

## DON'TS

- Let the behaviour continue.
- Breach confidentiality.
- Make any assumptions about the validity of the complaint before it has been investigated.
- Assume that the best option is to transfer the person making the complaint (transfers can be perceived as a punishment – creating the impression that the complainant is a 'problem' member of staff/couldn't handle their last position etc.)
- Leave the person making the complaint in a potentially dangerous or stressful situation.
- Tell the person making the complaint to ignore it; most cases get worse when ignored.
- Blame the person complaining; they should not feel guilty for complaining about harassment.
- Delay action – try to resolve the complaint quickly but carefully.
- Involve too many people; try to minimise the possibility of damaging rumours or gossip.
- Allow any person to be victimised or disadvantaged because a complaint has been made.

Adapted from: *Eliminating Sexual Harassment from the Workplace* - Human Rights and Equal Opportunity Commission, 1993

## Tips for managing a person who makes a complaint of discrimination or sexual harassment

Keep these factors in mind when assisting a person complaining about discrimination or sexual harassment. They:

- want the discrimination or sexual harassment to stop and for things to go back to normal;
- do not want to get a reputation as a trouble-maker;
- may fear retaliation in response to their complaint;
- may blame themselves;
- may be concerned about the loss of privacy if they pursue their complaint;
- may not want to lose control of the complaint;
- may feel they have no conclusive proof and will not be able to establish the truth;
- may only be interested in ensuring that the same thing won't happen to others;
- may be in distress, sometimes very serious distress;
- may not feel comfortable taking the complaint to the person assigned to the role;
- may have previously valued the friendship or support of the alleged discriminator/harasser and feel confused about the behaviour;
- may suggest that it is probably pointless to complain;
- may want someone to be with them in any discussions or interviews;
- may feel like leaving their job;
- may discuss 'putting up with' the problem;
- may be suffering stress related symptoms, either physical or psychological;
- may want disciplinary action taken against the person being complained about;
- may be uncertain about what they want to do;
- may want to learn how to deal directly with the discriminator/harasser.
- The complaint may have been building up over time and they may have been too afraid to discuss the situation.

## Suggested questions to ask the person making the complaint

- When and where did the incident/s happen?
- Who did it?
- What was said and done?
- What did you do? Have you spoken with the person? What was their response? Have you said anything to them?
- Has this happened before? How did you deal with it then?
- How are you feeling about the person?
- What is your work relationship with the alleged discriminator/harasser?
- In what way is this discrimination/harassment affecting your work?
- Did anyone else observe or hear it?
- Have you told anyone else about what happened?
- Did you keep any notes about what was going on? (In your diary, for example)
- Do you know what your options are?
- Do you need a support person or a counsellor?
- Do you need some time off or other assistance?
- Did you know we have a company policy on discrimination and sexual harassment?
- What would you like to do about it? How can this situation be resolved right now?
- Do you want to make a formal complaint?
- What would you like me to do?

Adapted from: *Eliminating Sexual Harassment from the Workplace* - Human Rights and Equal Opportunity Commission 1993

## Tips for managing a person accused of discrimination or sexual harassment

### Interviewing a person accused of discrimination or sexual harassment

#### What might happen?

When interviewing a person accused of discrimination or sexual harassment, the person managing the complaint may find that they:

- deny that it happened;
- are offended by the accusation;
- trivialise the complaint;
- are concerned about confidentiality;
- blame the complainant, not themselves;
- are unaware that there was a problem with their behaviour/actions;
- are afraid of disciplinary action;
- want things to go back to normal (the way they were before anyone complained);
- are upset that they have offended someone;
- are concerned about their reputation.

#### You may also hear statements like:

- 'It never happened.'
- 'They just can't take it.'
- 'I was just being friendly/nice – they took it the wrong way.'
- 'I was just joking.'
- 'But it's accepted in my culture.'
- 'Will I lose my job?'
- 'Their work performance is not up to scratch.'
- 'How can I make it up to them?'
- 'They encouraged it.'
- 'I'm really sorry. I didn't realise.'
- 'I treat him/her no differently from any of the others – and they don't mind – they take it in the spirit it's meant.'

### Defamation

If the issue of defamation is raised by the person accused of discrimination or sexual harassment, you could suggest that they obtain independent legal advice. Also assure them that your process will be conducted using principles of natural justice and that all parties must not breach confidentiality or discuss the matter with co-workers.

## Some points to note when interviewing a person accused of discrimination or harassment

- Conduct the interview in private.
- Inform the person accused of discrimination or sexual harassment of the allegations, giving as much detail as possible.
- Advise them about their rights to respond to the allegations.
- Give them the opportunity to respond.
- Listen to their story without interrupting.
- Explain what discrimination and sexual harassment are and draw attention to the organisation's policy on discrimination and sexual harassment.
- Point out that discrimination and sexual harassment are unlawful.
- Suggest some informal remedies such as apologising, if there is agreement that the incident/s took place.
- If admitted, ensure that there is an undertaking from the person accused of discrimination or sexual harassment that the behaviour will cease immediately.
- Advise that there may need to be further investigation and that witnesses may be interviewed if there is denial or disagreement.
- Advise that the issue should not be discussed with co-workers or with the person who has complained.
- Advise that there is to be no victimisation of the complainant and the consequences should victimisation occur.

Adapted from: *Eliminating Sexual Harassment from the Workplace* - Human Rights and Equal Opportunity Commission 1993

## Tips for managers on keeping records about complaints of discrimination and sexual harassment

### General record keeping principles

- In a complaint where supervisor/management intervention may be required, record the date, name of the person/s complaining and the substance of the allegations – time, date, places and incidents. (In the case of informal complaints and where the matter looks like being able to be resolved quickly and easily, a note in your diary should suffice).
- Document all interviews with the complainant, alleged harasser or any witnesses/other contributing staff. Your records should be accurate and not contain any irrelevant information. It is desirable that the interviewees' own words are recorded as far as possible. The parties to a complaint and any witnesses/other contributing staff should be given the opportunity to peruse, correct and endorse their record of interview. The interviewee should be provided with a copy if they request it.
- As with other types of conduct-related disciplinary matters, records need to be kept for a reasonable period of time. In determining how long records should be retained, consider the nature of the complaint and the action taken by the organisation and the other parties involved in the case. Management, complainants and other staff have an interest in ensuring that complaints are thoroughly investigated and followed up. To do this, records will need to be held after the event so that a particular staff member or work section can be monitored, and in some cases so that it can be seen whether an incident is isolated or forms part of a pattern. A company may decide to destroy records of a complaint after a certain period of time if there has been no repetition of the behaviour and no likelihood of involvement from an external agency.
- Where a person approaches a contact officer for discussion/information the contact officer's notes should record information for necessary statistical monitoring purposes. What additional information (if any) is recorded is a matter for the organisation to determine in accordance with their policy.
- If a complaint is made, investigated, appears to have substance, and the person has been disciplined, their personal file should contain a summary of the nature of the complaint, the outcome and the action taken against them. The full record of the information obtained in the investigation and of the disciplinary interview should be kept in a separate confidential file, so that access is limited to 'a need to know' basis. This also applies to the records in cases where, after formal investigation, it cannot be established whether the complaint has substance or not. The records need to be kept so that the situation can be monitored. If there are further allegations, the earlier complaint can be relevant in identifying a pattern of behaviour.
- Employers should be aware that if a person decides to take their complaint to an outside agency (such as the Anti-Discrimination Commission Queensland) the company may be identified as a co-respondent due to the vicarious liability provision in the Queensland Anti-Discrimination Act 1991. Records of any internal complaint proceedings will be useful in establishing whether the company took steps to address the complaint and prevent discrimination and sexual harassment occurring.
- All records associated with a complaint should be kept in a secure place, preferably in locked storage, where access is restricted to authorised personnel only. Records should not be placed on general or open access files.

Staff members need to have confidence in the organisation's ability to investigate and resolve complaints of discrimination and sexual harassment effectively. The record keeping practices are an important part of this process, particularly where some form of administrative action or

counselling has occurred. Authorised personnel must be able to readily understand and explain, if appropriate, the reasons for a change in an officer's employment (e.g. why the officer was moved; demoted; suspended; dismissed etc.).

Ultimately, the decision about whether a complaint is formally recorded and kept on a file is a decision for the organisation. Whatever the decision, an organisation needs to have a clear policy on the collection, use, storage and disclosure of any records associated with a complaint of discrimination or sexual harassment. Information associated with a complaint needs to be handled sensitively and carefully to ensure that confidentiality is respected.

Adapted from: *Eliminating Sexual Harassment from the Workplace* - Human Rights and Equal Opportunity Commission 1993

## Tools for educating the workplace about rights and responsibilities

- Discrimination in Employment booklet

## Discrimination in employment

The Queensland *Anti-Discrimination Act 1991* (the Act) promotes fair treatment and equality of opportunity by protecting everyone from unfair discrimination, sexual harassment and vilification in employment. Because the majority of discrimination and sexual harassment complaints occur in the employment area, this booklet has been designed to assist employers and employees to understand anti-discrimination law and to answer the most commonly asked questions.

### Discrimination

Discrimination occurs when someone is treated unfairly or badly in certain respects. Not all discrimination is against the law, even if it is unfair. In Queensland the *Anti-Discrimination Act 1991* determines what kind of discrimination is unlawful by identifying particular attributes and areas (see below).

Discrimination happens because people have stereotypical or prejudiced ideas or beliefs about other people because they happen to belong to a particular group of people or because they have certain personal characteristics or attributes. This kind of direct discrimination is often the result of failing to treat each person as an individual regardless of their sex, age, race etc.

Discrimination can also happen in a more indirect way. Sometimes treating everybody the same can be unfair because it disadvantages a whole group of people. For example, an arbitrary rule that employees must not wear headaddress may inadvertently exclude people of particular ethnic or religious origin. Unless such a rule is necessary or reasonable in all the relevant circumstances it will be indirect discrimination and against the law. Indirect discrimination is not usually intentional but is often the result of failing to think about the impact of rules and requirements on different people.

#### Case study

Tom, employed in the same job for a number of years, cared for his elderly father. After some time, his father developed symptoms of Alzheimer's disease, and Tom asked his boss if he could have extra time off at lunchtime to go home and make sure his father was OK. He said he didn't want to leave his father alone for any longer than half a day at a time.

Tom offered to make up the time at the end of the day, so that he was still doing his full-time hours. He said his sister could stay with his father until he got home at night.

The boss refused, saying he wasn't 'running a charity' and Tom would work the hours he was told.

Tom could lodge a complaint of discrimination on the basis of family responsibilities.

The *Anti-Discrimination Act 1991* says that it is against the law to discriminate against people because of their:

- family responsibilities
- sexuality
- gender identity
- sex (gender)
- relationship or parental status (whether they are married, single, widowed, divorced, separated or living with someone as if they were married (de facto, including same sex de facto), and whether they have children or not)
- race

- age (whether they are young or old)
- impairment (whether they have or have had a physical, intellectual, psychiatric or mental disability, injury or illness, including whether they are HIV+, or use a guide dog, wheelchair or some other remedial device)
- religious belief or activity
- political belief or activity
- trade union activity
- lawful sexual activity (a lawfully employed sex worker)
- pregnancy or breastfeeding
- association with or relation to someone who has any of these listed attributes or personal characteristics

### **Case Study**

Six months after Dominic began working as a chef, his boss discovered that he was on medication for schizophrenia. Dominic's boss sacked him after learning of his impairment. Dominic could make a complaint of direct discrimination to the Commission.

### **Sexual harassment**

Sexual harassment is any form of unwanted, unwelcome or uninvited sexual behaviour which is or might be offensive, humiliating or intimidating. It can include an unwelcome sexual advance, unwelcome request for sexual favours or other unwelcome conduct of a sexual nature. Where sexual interaction is invited, mutual, consensual or reciprocated it is not sexual harassment.

The law further defines sexual harassment as unwelcome sexual conduct that a 'reasonable person' might anticipate would offend, humiliate or intimidate. When applying the 'reasonable person' test to sexual harassment, the particular circumstances of the case will be taken into account. These might include the age, race or impairment etc. of the person being harassed, and the relationship between the people involved (e.g. manager and apprentice).

Sexual harassment can take various forms and may be obvious or indirect, physical or verbal. Specifically, examples of sexual harassment include:

- unwelcome physical touching;
- sexual or suggestive comments, jokes or innuendo;
- unwelcome requests for sex;
- intrusive questions about a person's private life;
- showing a person sexually explicit images or material e.g. on a phone or computer;
- unwanted invitations of a sexual nature;
- leering;
- sex based insults or taunts;
- sexually offensive communications, including telephone calls, letters, faxes, email and computer screen savers.

Sexual harassment does not have to be repeated or continuous to be against the law. Some actions or remarks are so offensive that they constitute sexual harassment in themselves, even if they are not repeated. Other single incidents, such as an unwanted invitation or compliment, may not be sexual harassment. Some forms of sexual harassment, such as

assault, physical molestation, stalking, sexual assault and indecent exposure, are also criminal offences.

### Case study

Kim complained to her boss that a co-worker kept trying to touch her breasts, pressing himself against her in a sexual manner and making lewd remarks about her appearance. This constitutes sexual harassment and is against the law. Kim could complain to the Commission about the harassment.

### Vilification

Vilification (inciting hatred, serious contempt or severe ridicule of others because of their race, religion, gender identity or sexuality) can take many forms, including hate-speech, graffiti, websites and the distribution of propaganda or other forms of offensive literature.

Vilification is public behaviour that can incite others to hate, to have serious contempt for, or to severely ridicule individuals or groups because of their race, religion, gender identity or sexuality.

The *Anti-Discrimination Act 1991* gives a meaning of 'public act' as follows:

#### 4A Meaning of **public act**

(1) A **public act** includes—

- a. any form of communication to the public, including by speaking, writing, printing, displaying notices, broadcasting, telecasting, screening or playing of tapes or other recorded material, or by electronic means; and
- b. any conduct that is observable by the public, including actions, gestures and the wearing or display of clothing, signs, flags, emblems or insignia.

(2) Despite anything in subsection (1), a **public act** does not include the distribution or dissemination of any matter by a person to the public if the person does not know, and could not reasonably be expected to know, the content of the matter.

It is also a criminal offence to incite hatred of others by threatening physical harm or inciting others to threaten physical harm towards another or their property.

### Case study

A person encouraged his colleagues to racially abuse Josh, an Aboriginal employee, in the work cafeteria. The worker also sent email messages to all workers about white supremacy, calling for the eradication of the Aboriginal race. Josh could lodge a complaint of racial vilification with the Commission.

### When is discrimination unlawful?

Not all discrimination is against the law. The legislation is very specific. The *Anti-Discrimination Act 1991* says that it is against the law to discriminate against people in particular circumstances, including when they:

- apply for a job or try to get into a course
- work, whether it be full-time, part-time, casual, temporary or voluntary
- attend schools, colleges, universities or other educational institutions
- buy things in shops, hotels, cafes, restaurants, cinemas etc.
- seek or use services from legal, medical and other professionals, businesses and trades people
- rent a house, flat or apartment, hotel or motel room, caravan, office or shop

- purchase land or property
- apply for credit or a loan
- join, visit or use the services of a profit-making club or similar organisation
- deal with banks, superannuation or insurance companies
- seek or use the services of state or local governments

Particular exemptions mean that not all forms of discrimination are against the law in all circumstances. These exemptions are further explained later.

### **Case study**

In a matter heard at the Anti-Discrimination Tribunal (*McRostie v Boral Resources Qld Pty Ltd* [1999] QADT 4) a woman had been discriminated against at work on the basis of her gender. It was found that the employer had treated Ms McRostie less favourably by paying her less than male colleagues, and awarded her \$5,960 as loss of wages. The Tribunal also found that she was not given the same opportunities as men in the workplace, including relieving in more senior positions. Ms McRostie was awarded the sum of \$7,500 by way of general damages to compensate her for her hurt and humiliation.

## **Anti-discrimination law and employment**

The Act makes discrimination, sexual harassment and other offensive behaviour such as victimisation and vilification in employment against the law. This applies to every aspect of work, including recruitment, terms and conditions, and termination of employment. It also applies to all categories of work, whether it is full-time, part-time, casual, voluntary etc.

### **Rights and responsibilities as an employer**

All employers have the right to appoint and dismiss workers in accordance with proper procedures and to expect reasonable performance from their employees. However, employers do not have the right to discriminate against existing or potential employees or to allow sexual harassment or vilification.

The Act establishes a legal responsibility on employers to provide workplaces free from discrimination, sexual harassment and vilification. All employers need to therefore take reasonable steps to prevent or minimise these behaviours in the workplace. Reasonable steps might include the implementation of appropriate policies and practices, training and education of staff and the establishment of grievance and complaint procedures. Employers must not allow workers to be discriminated against, sexually harassed or subjected to vilification by other workers, clients or management. If they do they can be held legally liable.

Employers also have the right to take appropriate action against any employee who might be engaging in this type of conduct while at work. Such action might include formal staff counselling, disciplinary procedures and, in serious cases, dismissal.

Equal opportunity principles and practices make good business sense. The benefits include improved productivity, smoother workplace relations with less conflict and disruption, reduced staff turnover, enhanced workplace and market diversity, better client service delivery, decreased training costs and minimised legal liability and costs. It also provides opportunities to enhance a corporate image as a responsible employer and to more effectively use the diverse skills and experience of staff. Client responses to diverse non-discriminatory workplaces are often positive and may lead to market loyalty, enhancing continuity and profit.

Employee entitlements leave provisions, pay rates etc. should be based on the duties and responsibilities of the job rather than personal characteristics of individual workers. Employers and organisations also need to ensure that employment and management practices do not incorporate unlawful discrimination. The implementation of specific policies and training

programs can help to minimise the scope and impact of discriminatory attitudes and practices in the workplace and to reduce legal liability.

### **Rights and responsibilities as an employee**

All employees have the right to be free from discrimination, sexual harassment and vilification in the workplace. If employees believe that this type of behaviour is occurring in the workplace, they have the right to make a complaint to the Commission and seek a solution through conciliation.

Employees also have a responsibility not to engage in this type of conduct and to uphold an employer's policies on these issues. Workers who behave in a discriminatory fashion, who sexually harass or vilify co-workers or clients can be disciplined by their employer, and may be dismissed in serious cases.

### **Exemptions**

Particular exemptions mean that not all forms of discrimination are against the law in all circumstances. The Act provides a range of exemptions that can be argued. However, only certain exemptions apply in relation to employment. It is also possible to apply to the Queensland Civil and Administrative Tribunal for the granting of an exemption.

Exemptions recognise that in some circumstances discrimination can be acceptable provided it occurs for specific reasons or purposes. Many exemptions allow the employment of people of a particular sex or race or age etc. when it is necessary for the particular job. Other exemptions allow employers to boost the employment opportunities for people from disadvantaged groups through equal opportunity policies. Whether a particular exemption will apply will usually be a question of fact, which only the Tribunal can decide. However, any possible exemption should be raised with the Commission as this may assist in conciliating a resolution of a complaint.

### **Welfare and equal opportunity measures**

Special measures designed to benefit or promote equal opportunity for a member of a disadvantaged group or a person with particular needs, (e.g. special training courses for people from non-English speaking backgrounds) may be used if it can be shown that they are for the benefit of a disadvantaged group in a particular area of employment.

### **Genuine occupational requirements**

An employer may impose genuine occupational requirements for a position. This may include selecting an actor for a dramatic performance on the basis of age or race for reasons of authenticity, or employing only women applicants for positions involving body searches of women.

### **Workplace Health and Safety**

It is lawful to discriminate in order to protect public health or the health and safety of people at a place of work. For example, a person with a chronic back injury may not be suitable for work requiring heavy physical labour.

### **Supplying special services or facilities**

Employers need to offer equal opportunities to everyone and when necessary make reasonable adjustments to meet the needs of workers with impairments. Discrimination against people with impairments, for example by denying them a job, is only lawful if an employer can demonstrate that it would impose an unjustifiable hardship to make reasonable adjustments to accommodate their impairment.

Factors that are relevant in determining whether unjustifiable hardship applies include the nature and cost of supplying the special service or facility, the number of people to benefit, the financial circumstances of the employer, the disruption that the supplying of those services or facilities might cause and the nature of any benefit or detriment to all people concerned. Reasonable adjustments may include modifying premises or equipment (e.g.

providing ramp access, lowering workbenches etc.), adjusting recruitment and selection procedures (e.g. providing an interpreter), changing the job design and work practices (e.g. allowing regular meal breaks for a worker with diabetes) and providing training and other assistance (e.g. support persons).

### **Educational or health related institutions**

The 'genuine occupational requirement' exemption has been extended to allow religious bodies to 'reasonably discriminate' (except on the basis of age, race or impairment), in the area of employment, against a person who openly acts in a way contrary to the employer's religious beliefs.

### **Single sex accommodation**

Live-in jobs where sleeping accommodation is provided for one sex only and supplying separate accommodation would impose unjustifiable hardship on an employer, is permitted.

### **Workers to be a married couple**

An employer may discriminate on the basis of marital status if the live-in job is to be held concurrently by a married or de facto couple.

### **Work with children**

The exemption regarding work with children has also been extended to allow employers hiring people to work with children, to discriminate on the basis of gender identity (but not sexuality), lawful sexual activity (which now means sex workers), people with a conviction for a child sex offence, or people disqualified from working with children under any Act in Australia.

Discrimination on any grounds except race is also allowable when employing someone to perform domestic or child care services in the employer's own home.

### **Acts in compliance with other laws**

Discrimination is permitted when a person is acting in compliance with pre-existing industrial awards and agreements, other pre-existing legislation and court orders.

### **Youth wages**

An employer may advertise for a worker who is under 21 years of age and pay them according to their age.

## **Recruitment**

The aim of recruitment is to employ the best person for the job.

Selection criteria and position descriptions need to focus on the skills and capabilities being sought in the employee. Emphasis should be placed on a person's abilities rather than their formal qualifications and length of service because it is often the case that people in disadvantaged groups have not had fair opportunity to obtain previous experience or formal qualifications. However, they may well be able to do the job. Nonetheless, some jobs, such as teaching and nursing, require mandatory formal qualifications.

### **Job advertisements**

Discriminatory advertising is against the law. Job advertisements need to communicate that all suitable applicants are welcome to apply. References to sex, relationship status, age, race, religion etc. should be avoided, as should the use of words that may indicate a preference for particular groups or may discourage others from applying, e.g. foreman, tradesman, glamorous, well-built, mature, youthful, office girl etc. Publishers can be fined and be the subject of a complaint to the Commission for publishing discriminatory advertisements that show an intention to contravene the *Anti-Discrimination Act 1991*. Discriminatory advertisements will therefore often be refused or modified by publishers in order to avoid legal liability.

### **Case study**

Matt advertised for an 'office girl' to work in his real estate agency. Lucas, an experienced unemployed clerical assistant, considered applying for the job but was discouraged by the terminology in the advertisement. The discriminatory advertising disadvantaged Lucas in the employment area, even though he may well have been the best person for the job.

Advertisements need to provide a clear outline of the job rather than express an employer's automatic assumptions about who might be best for the job. Applicants are then able to apply for jobs on merit.

### **Application forms and interviews**

When a person applies for a job they need to be judged on their skills and abilities. Personal matters have nothing to do with a person's ability to do most jobs. Inappropriate personal questions can influence decisions about an applicant's suitability for the job and may result in unlawful discrimination. If it does the applicant has the right to complain to the Commission.

The legislation specifically makes it against the law to ask for unnecessary information that may result in discrimination. It is therefore only acceptable to ask questions about personal matters for very specific reasons, including where it is necessary under award conditions (e.g. for age related wages), for other reasonable purposes (e.g. if citizenship is a legal requirement of the job) or where an exemption may apply. The employer must be able to show why the information is needed, and an applicant has the right to ask an employer to do so if they ask questions about personal matters.

Generally it will be against the law for employers and employment agencies to ask questions on application forms and in interviews about a person's relationship status, sex, age, number of children (if any), plans to have children, child care arrangements, spouse's name or occupation, country of birth, medical history, sick leave and workers compensation record, religion, sexual preference, political belief or attitude to unions. It may also be unlawful to request consent for access to Worker's Compensation history. If questions like these are asked it may result in the information being used to treat applicants unfairly.

### **Case study**

An employment application form for an administrative position with a large accounting firm included an optional question about the applicant's medical history, including mental health. Yusuf was reluctant to disclose that following a car accident he had experienced clinical depression requiring a period off work. However, he thought he might be seen as uncooperative or dishonest if he didn't answer the question so Yusuf provided details of his mental illness. Yusuf's sick leave record and previous illness had nothing to do with his capacity to do the job. Because it is against the law to ask for unnecessary information on which discrimination may be based, Yusuf could make a complaint about the discriminatory application form.

Employers should avoid stereotyped assumptions about which gender, age group, race etc. would be best for the job. For example, if employers are worried about the ability of an applicant with children to work at certain hours, they should simply ask about availability rather than making guesses or unfair assumptions based on personal matters. If travel or overtime is involved with the job, all applicants should be informed and asked whether they can be available. Assuming that workers with children cannot travel or work overtime is unfair and could result in liability for unlawful discrimination.

Questions about personal matters should not even be optional because applicants may well expect that they have to answer them or else risk being seen as uncooperative and therefore an unsuitable candidate. It is similarly unacceptable to request photographs of applicants to be submitted because they may cause the discriminatory exclusion of certain people on the basis of their sex, race, age etc.

### **Case study**

Nadia is undergoing gender re-assignment. She applies for a job as a receptionist in a medium-sized firm, and is offered an interview.

At the interview, she is asked about her gender identity, and when she says she's a woman, she is told 'there's no way you could work here - the blokes who come in would tear you apart. You just wouldn't fit in, and we'd look like idiots. That's a pity, because you looked pretty good on paper.'

Nadia lodges a complaint with the Commission.

Interviewers should ask comparable questions of all applicants, otherwise biases and unfair assumptions can affect employment decision making. This allows everybody an equal chance to outline their professional interests, previous work experience, work style, career plans and the skills that they can bring to the organisation. This gives a fair and clear picture of who will be best for the job and will result in the best appointment.

Some procedural rules can also help interviewers avoid discrimination. Generally, in larger organisations interviews should be conducted by an appropriate selection panel. Panels could comprise men and women, representatives from target groups where appropriate, and an independent external member if possible. Smaller organisations and businesses may not have the resources to appoint selection panels. Despite this, small employers should adopt anti-discrimination and sexual harassment principles in conducting their recruitment, including ensuring that interviews are conducted in a non-discriminatory fashion.

The format of an interview can be agreed on by panel members before interviews are conducted and, preferably, should be outlined to candidates. All employers should keep a record of the interview with each applicant, recording the reasons for short listing and the reasons for the final choice. If there is a complaint of discrimination adequate records will help to show what really happened and why the decision was made.

### **Case study**

When Amit attended an interview for a sales position he was asked about his citizenship, the size and whereabouts of his family and his religious beliefs. Sometimes employers need to ask about citizenship because it is a legal requirement of the job. However, the position Amit had applied for had no such legal requirement. Furthermore, although the interview panel did not comment on his responses to the personal questions, Amit thought the questions were discriminatory. It is against the law to ask for unnecessary information during interviews. Details of Amit's family and his religious beliefs make no difference to Amit's capacity to do the job. Amit could make a complaint of discrimination.

### **Pre-employment tests and medicals be used**

Pre-employment tests can be used in recruitment processes, but only where they are applied to all applicants, are reliable, valid, free of bias and fair. For example, it is acceptable for a typing test to be applied to all applicants for a position involving computer data entry. However, if literacy tests are necessary because of the level of English required for the duties of a particular position, they should be completed by all applicants, not just those from non-English speaking backgrounds. Irrelevant general knowledge questions should be omitted from all tests because they may unfairly disadvantage people from certain groups.

Medical tests are not generally appropriate and may leave employers open to complaints of impairment discrimination. However, in some circumstances it is appropriate and even necessary to require a pre-employment medical if there are specific health risks associated with the job, e.g. asking applicants about respiratory illness for jobs involving dusty conditions. Provided that the information is not used in any discriminatory way, medicals after employment are not against the law, e.g. for superannuation purposes.

Examining medical officers must have a very clear understanding of the duties and requirements of the position because the medical examination should be focused on the applicant's ability to do the job. Applicants who are rejected on the basis of medical information they have provided (e.g. on the application form or through worker's compensation records) can complain about discrimination if the employer cannot prove on the balance of probabilities that workplace health and safety is at risk, or that another relevant exemption applies.

### **Case study**

Mei was offered a job as a factory worker. However, when a pre-employment medical showed that she had slight hearing loss, the company withdrew the offer because it was thought her hearing impairment would be an occupational safety risk. Mei complained about discrimination on the basis of impairment, and investigation showed that her hearing loss did present a significant workplace safety risk and the company was therefore able to successfully defend its action.

## **Employment Agencies**

The *Anti-Discrimination Act 1991* specifically refers to discrimination in the employment agency area and states at section 23:

A person who carries on a business (whether or not for reward or profit) of introducing people seeking work to employers must not discriminate -

- (a) by failing to supply a service of the business, whether to a person seeking work or an employer seeking a worker; or
- (b) in the terms on which a service is offered or supplied; or
- (c) in the way in which a service is supplied; or
- (d) by treating a person seeking work or an employer seeking a worker unfavourably in any way in connection with a service

## **Recruitment**

The first step is to develop a clear idea of the duties of the position. Take into account the job description, which outlines the responsibilities of the position, and to whom the person will be accountable.

Avoid stereotyped notions about which gender, race or age group would be best for the job. Your aim needs to be to employ the best person, regardless of which group they might belong to.

### **Recruitment example**

When looking for a receptionist, avoid the assumption that the best person for the job will be a young woman. The selection criteria for the position might read as follows:

Receptionist

1. demonstrated ability to deal with the public efficiently and pleasantly;
2. ability to use computer and other office equipment;
3. articulate phone manner;
4. well-groomed appearance.

As can be seen, the description doesn't limit the job to any particular type of person, and you can ask questions against these criteria at interview.

## **Accents**

The issue of accents can come up from time to time. Taking the above situation as an example, keep in mind that the requirement is for an 'articulate phone manner', not an 'Australian accent' or an 'English as a first language speaker'.

## Photos

Applicants shouldn't be asked to send in a photo. This can have the same effect as asking about someone's age, race or sex.

## Impairment issues

Applicants also shouldn't be asked to list any impairments they might have. The legislation specifically makes it unlawful to ask for unnecessary information that may result in discrimination. Asking someone to list his or her impairments could well fall into this category.

## Private Employment Agents (Code of Conduct) Regulation 2005

Under the *Private Employment Agents (Code of Conduct) Regulation 2005*, a private employment agent is required to keep a register of people looking for work, and the register is to include the name, age, and gender of the person.

If the information is being sought for the purpose of the register only, and not for a purpose that involves discrimination, it would come within the exception which allows requests for information on which discrimination might be based if 'the information was reasonably required for a purpose that did not involve discrimination.'

## Employment

The *Anti-Discrimination Act 1991* says that all employees should be treated fairly in the workplace.

### Case study

At Emma's workplace, there's an unwritten rule that all team leaders will work overtime a couple of nights a week. Emma has just been promoted to team leader, and is reluctant to work after hours as she has three young children. She raises the issue with her manager, and makes a few suggestions about how the work could be managed differently.

One suggestion involves re-organising the work so overtime isn't necessary, but her manager says it's much easier to leave things as they are, and she'll have to make her own arrangements so she is available for the overtime. He also says she should have told him she couldn't do the overtime when she was interviewed for the job. He says if he'd known that, he wouldn't have offered her the job.

Emma could complain to the Commission about this situation.

### Promotions, training and transfers

Decisions about promotion and advancement, access to training opportunities and transfers must not be based on discrimination. Refusing to promote workers, denying training and forcing or refusing transfers because of irrelevant considerations based on one of the attributes covered by the legislation, is unlawful discrimination and employers can be held legally liable. Anybody who is subjected to unfair discrimination at work can complain.

### Case study

Tony applied to be transferred from his Brisbane based position to a vacancy at the same level in a remote area of Queensland. His application was refused by his employer on the basis that Tony's use of a wheelchair made him unsuitable for the post. Tony complained that he was discriminated against on the basis of his impairment because the job involved the same duties as his Brisbane position, the remote workplace had sufficient wheelchair access and no other adjustments were necessary to make the workplace suitable for workers with impairments. Conciliation revealed that Tony's employer believed that if Tony left his established support network, his work capacity would deteriorate. The employer's assumption ignored the fact that Tony had lived independently since leaving his overseas family and did not require the level of support assumed by his employer. Tony's employer apologised and agreed to the transfer.

## **Workplace complaints and grievances**

Employers should establish grievance and complaints procedures for managing complaints of discrimination, sexual harassment and vilification. This maximises the possibility of internal resolution and can help foster employee confidence that concerns will be taken seriously. It can also help to minimise legal liability. Such procedures can be formal, informal or both. For larger employers and organisations, formal procedures go a long way towards fulfilling their duties and responsibilities. Smaller employers also benefit but are often restricted to more informal procedures, especially in workplaces with only a few staff. In such circumstances employers should seek to ensure that employees are informed of their discrimination and sexual harassment responsibilities (e.g. verbal information, provision of brochures and posters, training etc.). Further information, suggestions and assistance for small business can be obtained from the Commission and relevant business and employer agencies.

### **Case study**

Tracey, a young apprentice hair stylist, complained of offensive sexual comments from the manager of the salon where she was employed. She told her employer that this was happening on a daily basis and that it was causing her distress. However, after talking to her employer Tracey found that the other salon staff and the manager then began to criticise her 'attitude' and work performance and soon after she was dismissed. Conciliation of Tracey's complaint resulted in financial compensation for lost wages and injury to feelings.

Regardless of the size of an organisation, several principles need to be observed for complaint handling and grievance procedures. As far as possible they should:

- be clearly documented and accessible to all employees;
- offer options for resolution;
- guarantee timeliness, confidentiality and objectivity;
- be based on principles of natural justice;
- be administered by trained personnel;
- provide clear guidance on investigation procedures and record keeping;
- give an undertaking that employees will not be victimised or disadvantaged; for making a complaint;
- be regularly reviewed for effectiveness.

Employers and organisations must take complaints of discrimination, sexual harassment and vilification seriously. Failure to do so may result in increased legal liability as well as worker dissatisfaction and decreased efficiency and effectiveness.

### **Termination**

Employers and organisations cannot terminate a person's employment because of discriminatory reasons. This means that a worker cannot be sacked because they are 'too old', the wrong sex, have or once had an impairment, become or plan to become pregnant, marry or separate from a partner, join a trade union or political party, are a member of a religious order, are gay, lesbian, heterosexual, transgender or bisexual, a particular race, or because they have a family. Termination of employment must only occur on valid non-discriminatory grounds.

### **Retirement**

Compulsory retirement (except in very limited circumstances) has been abolished by the legislation. Employers must not sack workers because they are 'too old'. Nor can workers be required to sign agreements that they will retire upon reaching a certain age. People cannot be asked to sign unlawful agreements. An employer should not engage in conduct designed to make someone retire because of his or her age, e.g. the imposition of fixed term contracts,

medical assessments or withdrawal of employee benefits such as long service leave for older workers. Such conduct will be unlawful.

### **Case Study**

When Nick turned 60 years old his office workplace held a celebration party. The next day Nick's supervisor told him it was company policy that because of his age he had to undergo a medical test to determine his continuing work performance capabilities. Although Nick did not think such a test was necessary, he agreed to cooperate because he didn't think the test would show any problems. Shortly after the medical examination Nick was told that he was being put on six monthly reviewable contracts because the test had shown that his physical reaction times had deteriorated slightly. However, Nick's job did not involve physical work and he suspected that his employer wanted him to retire. At conciliation Nick received an apology, compensation and a return to permanent status in his job. The company also agreed to withdraw its policy on age based medical tests and to implement an appropriate workplace anti-discrimination training program.

### **Redundancy offers**

Redundancies must also be handled in a non-discriminatory way. Employers need to be careful to ensure that decisions about workers being offered a redundancy are not based on direct or indirect discrimination. Often the result of restructuring or financial reorganisation, redundancies provide opportunities for unfair discrimination if not carefully monitored for assumptions and biases. In particular, offering redundancies to workers because of their age, sex, cultural or racial background, or pregnancy etc. will be unlawful discrimination and could be complained about. If discriminatory attitudes inform redundancy decisions employers can be held legally liable.

### **Case Study**

Laura was the Assistant State Manager for a transport company. After Laura became pregnant she informed her employer and submitted an application for maternity leave for the birth of her child. However, shortly after this, the company merged with another business and was restructured. Laura was then offered a redundancy. In contrast, the recently appointed male Office Manager who had far less experience than Laura was offered the State Manager position. Laura complained of discrimination on the basis of pregnancy and sex and received a financial settlement.

### **Legal liability**

Anyone who unfairly discriminates against another person, sexually harasses or vilifies them can be complained about and may be liable under the law. Organisations, employers and their agents can also be liable for discrimination, sexual harassment or vilification that occurs in the workplace.

### **Vicarious liability**

An employer or organisation can be liable for discrimination, sexual harassment and vilification done by their employees or agents because employers are obliged by law to protect staff and clients from this type of behaviour. Complaints can therefore be made against individuals, workers, employers and organisations. Previous cases show employees have been found jointly liable at law with the employer, for the payment of compensation. In practice, vicarious liability means that a complaint against an individual may also include their employer.

An organisation may be liable if a person could be seen as representing the organisation or as acting on behalf of the organisation. Regardless of whether they are on contract or an employee, a person might be considered to be an agent of the organisation. The easiest way to work out if someone can be considered an agent is to think about whether others might see a connection or relationship between the two.

### **Case Study**

A local government subcontracted a suburban pavement refurbishment job to a landscape company. Employees of the landscape company were required to wear local government uniforms and identification while undertaking the work. During the work Amy, a local resident, was sexually harassed by one of the landscape company employees. Because the landscape company was an agent of the local government, visibly confirmed by the uniforms and name tags, the local government was also vicariously liable for the sexual harassment and at conciliation agreed to pay compensation.

An employer or organisation cannot avoid vicarious liability simply because they were not aware of the unlawful discrimination, sexual harassment or vilification done by their employees or agents.

### **What can I do about liability?**

Risk management needs to take the requirements of anti-discrimination law into account. Employers can argue a defence to vicarious liability if they can show that they took reasonable steps to prevent discrimination, sexual harassment or vilification in the workplace. Although the steps may vary, generally they include:

- development of anti-discrimination and sexual harassment workplace policies
- implementation of strategies aimed at preventing and minimising unlawful discrimination, sexual harassment and vilification, e.g. providing educative posters and brochures in the workplace, and examining existing policies, practices and procedures for indirect discrimination
- education and training of staff (especially managers and supervisors)
- establishment of appropriate grievance and complaints procedures
- removal of any discriminatory or offensive materials

### **Case Study**

A company designed a sexual harassment policy and pinned it to the staff noticeboard. A year later a worker complained that another employee was subjecting her to unwelcome sexual advances. Despite the policy, the organisation was found vicariously liable for the harassment because it had failed to provide training to managers and their employees about the meaning of the policy. The company therefore appeared to only pay 'lip-service' to the responsibilities imposed by the legislation and subsequently agreed to implement its policy more seriously. As a result of conciliation both the individual harasser and the organisation accepted responsibility and agreed to a compensation payment.

Rulings and case outcomes in Queensland, other states and at the federal level have shown that an employer's obligation does not just involve the introduction of appropriate policies, but also entails ensuring such policies are positively and actively implemented.

Requirements of employment and other conditions and practices must also be examined to ensure that indirect discrimination is not occurring. Often such rules or practices appear neutral when in fact they have a disproportionately negative impact on certain people. If they do it will be against the law, unless reasonable. For example, promotion based on seniority can indirectly discriminate against women who have taken time out of the workforce because of family responsibilities.

### **Victimisation**

Employers and workers should remember that the Act also prohibits victimisation. Victimisation happens when a person is threatened or harassed because they have either made a complaint, intend to make a complaint or are involved in a complaint. This is a serious matter and penalties can be imposed on those responsible for victimisation.

### **Case Study**

Jung, a garage mechanic, had his complaint about racial discrimination accepted by the Commission. His boss then told him that if he did not withdraw his complaint he would be sacked. Jung could make a complaint of victimisation.

### **Other information**

The Commission can provide more detailed information about the legislation, the complaint process, exemptions, liability, victimisation and rights and responsibilities in relation to unlawful discrimination, sexual harassment and vilification. A number of specific brochures, posters, library resources and education and training services are also available from us. Please contact the Commission for information and assistance.