

# Anti-Discrimination Laws

## Are they working in the Queensland Public Sector?

by Susan Booth, Anti-Discrimination Commissioner Queensland



**Queensland's Anti-Discrimination Commissioner Susan Booth believes discrimination laws have made a significant difference in the State Public Sector. However, Commissioner Booth also suggests that their very success has also created some challenges and unintended consequences.**

In this article, Commissioner Booth reflects on our anti-discrimination laws, which have now been in place for more than a decade.

Government agencies and the Anti-Discrimination Commission's relationship go back to the beginning. From the earliest days of the introduction of the laws Queensland government agencies have been involved in anti-discrimination cases.

The very first case ever reported under Queensland's anti-discrimination laws is a Queensland public sector case *Flannery v Queensland Police Service* [1993] QADT 1 (4 March 1993). Back in 1991, the Queensland Police Service had begun to modernise. The quota on women joining the Police Service as well height, weight and age restrictions had been removed. There is no doubt at that time the Service considered itself to be modern and forward thinking. So when Mr Flannery applied to join the Service and was told that his eye sight was not good enough to become a police officer, he objected and alleged impairment discrimination. Mr Flannery wore contact lenses.

It seemed reasonable that good vision was a requirement of serving police officers. Further it would be a 'genuine occupational requirement'

that an officer had excellent vision. The Service may have had some success with this argument except for the fact that once police officers passed their sight test, they would never again be tested. And of course as police officers became older, many needed glasses. In fact many serving police officers wore glasses and contact lenses to correct their vision. President Ros Atkinson, now a Supreme Court Judge, found in favour of Mr Flannery.

In this first case, the Queensland Police Service was ordered to take steps to ensure that Mr Flannery would be admitted as a serving police officer. This would not have happened without this important change in the law. And so began a new jurisprudence that has changed Queensland.

Many similar cases have been hard-fought in the decade since Mr Flannery's case on what was a 'genuine occupational requirement.' Impairments, other than vision, such as epilepsy and mental illness have also been litigated.

However, it is not only in the area of employment that the State was significantly involved in anti-discrimination matters. Perhaps the next significant case was *Cocks v State of Queensland* [1994] QADT 4 (21 September 1994). Kevin Cocks has a disability and uses a wheel chair for mobility. He sought to enter what was then the brand new Convention Centre through the front rather than being relegated to a somewhat dingy back entrance. At the time, it was a new idea that the quality of access rather than the fact of access was a matter for discrimination law. In this case it was found that not providing the same access was indirect discrimination. In a building, which had cost many millions of dollars, the provision of

an additional lift at the front, not only for people who use wheel chairs but also for those who have a temporary injury, the elderly and parents with prams, should be provided so that everyone is able to enjoy the experience of entering the Convention Centre through its magnificent main entrance.

Ten years on and issues about disability access and discrimination have a mixed score card. On the positive side, buildings such as the new State Government building Charlotte Street built by the Queensland Department of Works, comply with all access requirements, proving that buildings can look good and still have a high standard of access. Not so encouraging are the significant disputes about the implementation of national disability access standards for buildings. The benefit of national standards is that a builder who builds to the standards cannot be subject to a disability discrimination complaint. The certainty of this approach is of benefit to all. However, after a hopeful start there remains significant disagreement on what should be in the standards. It is doubtful whether a standard can be agreed to that is satisfactory to both the disability sector and representatives of the building industry. The ADCQ supports standards because they are preventative rather than reactive.

Another important case concerned politicisation of the public sector. In *Byrne v State of Queensland* [1998] QADT 20 (27 November 1998) a former Director-General

was successful in her case against her employer when she was terminated because of her political belief and activity. The then newly elected Borbidge Government was found not to have given Ms Byrne an opportunity to see whether she could perform the role of Director-General in the new Government.

These cases are important and have had influence beyond their individual outcome. However, each year Government employees and departments are involved in a significant number of individual cases. But considering the size of the public sector, there are very few complaints of discrimination.

### **Some statistics on complaints about Queensland Government Departments**

Of a total of 859 complaints lodged to the ADCQ, 164 about discrimination and sexual harassment were lodged during 2004/05 against Queensland, local governments and other government enterprises. This is across all areas including Government as an employer, and in the administration of state laws and programs. Considering the number of employees and the significant interaction of those employees with the public, this is a very small number of complaints made under the Anti-Discrimination Act 1991 about public sector entities.

Once a complaint is lodged, it is carefully and rigorously assessed. Only those that can show an alleged contravention of the Act are accepted as complaints. Ninety-eight complaints (or 60%) were accepted against government agencies in 2004-05. This means 40% of all complaints were assessed as not satisfying the requirements of the Anti-Discrimination Act 1991. These complaints are rejected at the outset because they do not provide sufficient details to allege a contravention of the Act. This process ensures that allegations, which merely assert but do not provide details of

discrimination, do not become complaints that require defending by agencies.

This year, the ADCQ is initiating a consultation program with agencies, including seeking feedback, to ensure its processes continue to be fair to both complainants and respondents.

### **Legislation – how real change happens**

To change government systems through litigation is at best piece-meal. At worst it is ineffective. A much more effective approach is through legislation. For example, in an innovative response to discrimination against same sex-couples, an amendment to the Acts Interpretation Act 1954 in 2003, by the stroke of a pen, changed 60 pieces of legislation so that the term 'spouse' included a de facto partner regardless of that partner's sexual orientation.

At the same time, significant improvements were made to the Anti-Discrimination Act 1991 including adding family responsibilities as an attribute. These reflected changing community attitudes. Adding family responsibilities has had far reaching consequences in terms of work-place rules and flexibility, which will be discussed later in this article.

Queensland legislation has really come into the modern age with these legislative changes and represents some of the best anti-discrimination legislation in Australia.

### **Does the Anti-Discrimination Act ever allow 'discrimination?'**

Yes, in certain circumstances, the Act allows agencies and departments to identify certain

positions as ones that require a particular person who possesses one of the attributes under the Act.

Last year, to assist decision makers, and to encourage lawful discrimination, the Office of Public Service Merit and Equity (OPSME) and the ADCQ wrote a guideline on the use of identified positions within the Queensland public sector. These guidelines make it plain that OPSME and the ADCQ encourage the use of identified positions that will allow lawful discrimination in favour of a person if it is appropriate. It is appropriate in two circumstances.

The first is where it is a genuine occupational requirement of the job.

An example of a genuine occupational requirement is considering only women applicants for a position involving body searches of women.

The second is more controversial. Where groups have experienced disadvantage in the past, it is possible and lawful to begin to redress that balance through employment practices.

### **Examples taken from the directive are:**

- A chief executive decides that one of seven aircraft pilot positions in their agency will be offered to a female pilot on an ongoing basis. The justification might be that there is considerable evidence confirming women comprise only about 6% of pilot positions worldwide and in Queensland. Given that the majority of the positions are not identified, male pilots still have substantial opportunity to apply for a job in the Queensland Government, so are not disadvantaged by this equal opportunity measure. The selection process is the same as for other pilot positions.

*“This year, the ADCQ is initiating a consultation program with agencies to ensure its processes continue to be fair to complainants and respondents.”*

- Reserving some graduate positions for people who were born in a non-English speaking country, based on evidence that these people have not been successful in gaining any graduate positions in the past five years. This is despite evidence that approximately 20% of students in the relevant tertiary courses were born in a non-English speaking country.

If your agency is keen to identify positions and it is appropriate to do so, there are a number of steps you may wish to take. These are outlined in the guidelines but it is certainly possible to seek advice from the ADCQ about the grounds for designating the position as an identified one.

The ADCQ is keen to assist departments to fully explore the role of anti-discrimination legislation, particularly for those communities that have special needs or experience disadvantage.

Many agencies have used those provisions. In the last edition of the *Public Interest*, James Purtill, Director-General of the Environmental Protection Agency, spoke of how proud he was of his agency's recruitment practices for Aboriginal and Torres Strait Islander identified positions, based on the lawful discrimination allowable under the Act.

### The benefits and some challenges of flexible work practices

The public sector and some local councils have led the way embracing non-discriminatory and strong anti-sexual harassment policies along with flexible work practices. For many workers, the public service is an employer of choice because of these work practices. The benefits of attracting and retaining staff through these simple and mostly effective practices are well known and documented.

However, some years on it is also clear that the traditional family friendly approach to flexible work places has not always been supported by all workers and their managers. Changing both the terminology to work/life balance and opening up the benefits to all workers is not only more inclusive, it allows for workers who, for a myriad of reasons, wish to work flexibly.

#### These could include:

- training for a major sporting event;
- studying;
- caring for relatives;
- participating in religious commitments.

Real work/life balance, however, is more than a few flexible work places. It is about rigorous analysis of structural barriers and identifying organisational cultures that may make

an agency workforce unattractive to women and others seeking work/life balance. It can be as simple as ensuring that productivity is not measured in the number of hours a person spends at their desk. It is about setting a good example.

Support must start at the top of an organisation and be backed by middle management. It also requires some give and take from those participating in the benefit of flexible work practices. Those participating in flexible work practices need to think through the challenges from their own point of view. Are they organised enough to participate in part time work? Will they be willing to share a desk if they are participating in a job share arrangement? Working through issues and setting clear expectations will ensure successful flexible work arrangements.

### Can the ADCQ help your department?

Government agencies can seek advice from the ADCQ about a variety of policy proposals including legislative proposals that may touch upon or potentially even breach discrimination laws. Giving this type of advice is provided for under the Act and is separate from the ADCQ's complaint role. Often policy objectives can be achieved in a non-discriminatory way and as experts in discrimination law, the ADCQ is willing to assist agencies to achieve this important purpose.

## Stuck for creative outlets? Log on to Sticky.net.au!

Does Australia's most creative young person live in Roma, Brisbane, Longreach or Tin Can Bay?

Now it doesn't matter where you live thanks to a new youth website developed by the Queensland University of Technology.

The site, [www.Sticky.net.au](http://www.Sticky.net.au), is the place to Queensland youth aged 12 to 29 stick their creative stuff.

QUT's Justin Brow, the Sticky website producer, said creativity was all around us – no matter where you lived.

He said [Sticky.net.au](http://Sticky.net.au) already had 500 items on show to the world, including short films, animation,

writing, photography, digital stories and original music.

The website is a QUT Institute for Creative Industries and Innovation project and has received \$115,000 cash funding from the Queensland Government's Office of Youth, Brisbane City Council, and Arts Queensland.

"Sticky isn't just a place for kids to sticky their stuff – it enables them to download programs on things like making music and do online tutorials to improve their skills," Mr Brow said.

"Rural and regional communities don't always have access to this sort of information."

