



DISCRIMINATION

IN EDUCATION

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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 education. This booklet has been designed to assist teachers, students and education administrators to understand anti-discrimination law and to answer the most commonly asked questions.

WHAT IS 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 Act 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. In some cases treating everybody the same can be unfair because it disadvantages a whole group of people. For example, requiring all enrolment applicants for a hospitality course to meet minimum height requirements may disadvantage women or people of particular ethnic 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 forgetting to think about the impact of rules and requirements on different people.

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 (whether they are female or male)*
- *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*

For more information about different kinds of discrimination refer to the Commission's series of specific discrimination information brochures.

CASE STUDIES

Carmel enrolled in an adult education course in car maintenance. She was the only woman enrolled in the course and found that the instructor ignored her, criticised her work and didn't take her complaints about her treatment seriously. The instructor taunted Carmel about her mechanical skills telling her that women couldn't understand cars. Eventually she dropped out of the course. Carmel could complain to the Commission about sex discrimination.

Robert dropped out of a training course as a result of sexual harassment by the trainer, who kept asking him questions about his private life and repeatedly referred to his presumed sexual preference in front of other members of the training course. Robert could lodge a complaint with the Commission where a conciliation conference might be held to resolve the complaint. Possible outcomes from conciliation could include an apology, a promise that the behaviour will cease, re-entry into the training course, disciplinary action against the trainer, and an undertaking by the trainer to participate in sexual harassment and anti-discrimination training.

WHAT IS 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 (eg. principal and student teacher).

Sexual harassment can take various forms and may be obvious or indirect, physical or verbal. It also includes behaviour and practices which create a sexually hostile or intimidating environment. 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*
- *the display of sexually explicit material such as posters or pictures*

- *unwanted invitations*
- *staring or leering*
- *sex based insults or taunts*
- *offensive communications, including telephone calls, letters, faxes, E-mail 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 harassment if they are not repeated. Some forms of sexual harassment, such as assault, physical molestation, stalking, sexual assault and indecent exposure, are also criminal offences. More detailed information about sexual harassment can be found in the Commission's sexual harassment information brochure.

WHAT IS 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. Racial and religious vilification is generally behaviour that happens in a public place and incites others to hate, to have serious contempt of or to severely ridicule individuals or groups because of their race, religion, gender identity or sexuality.

CASE STUDIES

At a school sports carnival, a person urged supporters to racially abuse Nasya, a female Muslim student, telling her to take off her veil (Hijab). Nasya refused and the abuse increased to a chant from a group of people being led by one person. Nasya could make a complaint of religious vilification to the Commission.

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

WHEN IS DISCRIMINATION UNLAWFUL?

Not all discrimination is against the law. The legislation is very specific. The Anti-Discrimination Act 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 persons*
- *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.

HOW DOES ANTI-DISCRIMINATION LAW AFFECT EDUCATION?

The Anti-Discrimination Act 1991 makes discrimination, sexual harassment and

vilification in education against the law. The legislation applies to all facets of education, including:

- *admission and enrolment applications*
- *terms of admission and enrolment*
- *variation of the terms of a student's enrolment*
- *denial or limitation of benefits normally resulting from enrolment*
- *exclusion or suspension of students*
- *assessment and examination*
- *access to resources and facilities*
- *treatment of a student in regard to training or instruction*

Discrimination, sexual harassment and vilification in the classroom, lecture theatre, tutorial, training course, education workshop, information session, field trip, excursion or other similar educational setting or venue is also against the law.

Equal opportunity principles and practices make good sense. The benefits of equal opportunity in education include high quality teaching and learning environments, greater diversity amongst staff and students, better capacity to attract high quality education staff, less conflict and disruption amongst staff and students, and minimised legal liability and costs. It also provides opportunities to enhance the image of the educational institution, possibly leading to increased enrolments. In the competitive education market, a reputation as a fair and diverse institution can attract overseas students more readily, improving funding security.

The Act also confers certain rights and responsibilities on all educators, students and educational administrators and institutions.

What are my rights and responsibilities as an education provider?

All workers in the education sector have the right to work in an environment free from unlawful discrimination, sexual harassment and vilification.

The legislation also establishes a legal responsibility to provide fair and safe teaching and learning environments where all staff and students have equal opportunities.

Educational institutions need to take reasonable steps to prevent or minimise unlawful discrimination, sexual harassment and vilification by their employees or agents. The implementation of specific policies and training programs can help to minimise the scope and impact of discriminatory attitudes and practices in education and to reduce legal liability.

As an employer, an educational institution should formally counsel any employee who is engaging in discriminatory conduct while at work.

What are my rights and responsibilities as a student?

All students have the right to be free from discrimination, sexual harassment and vilification in an educational setting. While some cases of discrimination between students can be complex, if students believe that this behaviour is occurring, they have the right to make a complaint to the Commission and seek a solution through conciliation.

ARE THERE ANY 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. Only certain exemptions apply in relation to education.

It is also possible to apply to the Anti-Discrimination 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. 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' provisions are designed to benefit or promote equal opportunity for a member of a disadvantaged group or a person with particular needs, eg. special tertiary education entry programs for Indigenous Australians recognise the severe disadvantage they experience compared to others in terms of access to education.

Educational Institutions

Educational institutions catering for students of a particular sex, religion or general or specific impairment, can lawfully exclude students who are not of the particular sex or religion or who do not have a general or specific impairment.

Qualifying Age

Students may be selected for educational programs on the basis of a minimum qualifying age. This may include setting aside places for mature age students.

Supplying special services or facilities

An exemption may apply where supplying special services or facilities for a person with an impairment would impose an unjustifiable hardship on the educational institution. Educational

In a case heard at the Anti-Discrimination Tribunal Queensland ("*I*" v. *O'Rourke and Corinda State High School and Minister for Education Queensland* EOC (2001 93-132) it was found that a student at a State high school had been discriminated against on the basis of her impairment in relation to her attendance at three school events. In relation to two of the events (a school formal and year 12 graduation dinner), the Tribunal found that special services or facilities would have been required and providing them would impose unjustifiable hardship on the school. In relation to the third event (a school excursion), the Tribunal awarded "*I*" the sum of \$3,000 in general damages because she was not allowed on the excursion - other people in wheelchairs had travelled to the destination without any adjustments needed.

institutions must offer equal opportunity to everyone and make reasonable adjustments to meet the needs of people with impairments. Discrimination against people with impairments, for example by refusing them enrolment in a tertiary degree program, is only lawful if the institution can demonstrate that it would impose an unjustifiable hardship to make reasonable adjustments. Factors that are relevant include the nature of the special service or facility, cost of supplying it, the number of people to benefit, the financial circumstances of the organisation, the disruption that the supplying of those services or facilities might cause and the nature of any benefit or detriment to all people concerned.

Non-government schools

Non-government schools are allowed to discriminate in the education area on any basis except for reasons of race or impairment. However, State schools must always comply with the legislation.

Sporting Activities

Participation in competitive sporting activities can be restricted on the basis of sex once a person turns 12 years old. Restricted participation must be reasonable and take into account the strength, stamina or physical requirements of the sporting

activity. The legislation also allows restriction of participation in sport on the basis of age and impairment. This exemption does not apply to coaching, umpiring or sports administration.

WHO IS LEGALLY LIABLE?

Anyone who unfairly discriminates against another person, sexually harasses or vilifies them can be complained about and may be liable under the law. The law also allows for educational institutions and their employees or agents to be liable for this type of conduct occurring.

What is vicarious liability?

Educational institutions can be liable for these discriminatory practices by their employees or agents because they are obliged by law to protect staff and students from this behaviour. Complaints can therefore be made against individuals, staff and educational institutions. Previous cases show staff can be found jointly liable at law with the educational institution, including the payment of compensation. In practice, this *vicarious liability* means that a complaint against an individual may also be sent to their employer.

An educational institution may be liable if a person could be seen as representing the institution or as

During her final year of high school, Alice wrote a short story about discovering she was a lesbian. She submitted the story to her English teacher as part of her mid-term assessment. Although Alice had always achieved consistently high marks for her written work, this time she failed.

Alice was then made to read her story out loud to the class while her teacher made derogatory remarks. She was also teased and isolated by other class members, and graffiti about her began to appear in the school toilets.

Alice complained to another teacher about her experiences, but was told that she should keep quiet about it or the harassment could get worse. As a result her school work began to suffer and she increasingly missed classes.

Alice lodged a complaint against both the teacher and the school, claiming discrimination in education because of being a lesbian. The school was vicariously liable for failing to provide a discrimination-free environment and for not taking Alice's initial complaint seriously. An agreed settlement included an apology to Alice and an undertaking by the teacher to undergo training. The school also agreed to establish an anti-discrimination and sexual harassment referral officer network, and to conduct a series of workshops for students and teachers.

CASE STUDIES

A hospitality training company devised an anti-discrimination policy applicable to all staff, clients and students. A notice advising of the existence of the policy was sent to all current staff, clients and students as well as to prospective students. David enrolled in a bar course and was subjected to racist remarks and comments and was often ignored by the trainer in class because he was Aboriginal. He complained of racial discrimination to the Commission. During the investigation the company attempted to defend itself from vicarious liability by relying on the existence of its anti-discrimination policy. However, it was clear that no staff training about the policy had occurred.

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

acting on behalf of the institution. Regardless of whether they are on contract or an employee, a person might be considered to be an *agent* of the institution. 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.

An educational institution cannot avoid vicarious liability simply because it was not aware of the unlawful discrimination, sexual harassment or acts of vilification done by its employees or agents.

WHAT CAN I DO ABOUT LIABILITY?

Risk management needs to take the requirements of anti-discrimination law into account. An educational institution may argue a defence to vicarious liability if it can show that *reasonable steps* were taken to prevent discrimination, harassment and vilification. Although this will vary, generally reasonable steps should include:

- *development of anti-discrimination and sexual harassment policies*
- *education and training of staff (especially managers and senior staff)*
- *establishment of appropriate grievance and complaints procedures*
- *removal of any discriminatory or offensive materials, rules and practices*

An educational institution may be able to successfully defend its vicarious liability if it can satisfactorily demonstrate that it took all

reasonable steps to prevent discrimination, sexual harassment and vilification.

Requirements of education tuition and other conditions or 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 groups protected by the Act. If they do it will be against the law, unless it is reasonable. For example, unless reasonable adjustments are made, assessment practices that require students to undertake a four hour exam may discriminate against people who are unable to sit for such a period of time because of a physical impairment arising from a back injury.

Schools and other educational institutions have a legal responsibility to make sure that they are as free from discrimination, sexual harassment and vilification as possible. This includes ensuring that all teachers and staff are aware of and understand anti-discrimination responsibilities. Developing anti-discrimination and sexual harassment policies and ensuring staff compliance is one way to achieve this. Many schools and other educational institutions also appoint discrimination and harassment contact officers so that students and staff can talk about what's happening. Contact officers are usually teachers trained to provide information to people who believe they have been unlawfully discriminated against, harassed or vilified.

It is very important that discriminatory behaviour is not condoned by teachers failing to reprimand or control discriminatory or harassing behaviour,

CASE STUDIES

Valentina submitted a complaint of sexual harassment by one of her university tutors. She complained that he repeatedly asked her out and suggested that her assessment might improve if she agreed. When Valentina's tutor heard of her complaint he began repeatedly phoning her at home late at night and threatening her with failure of her assessment if she didn't drop the complaint. Valentina could lodge a complaint of victimisation with the Commission.

comments and actions. For example, allowing racist behaviour in the classroom could lead to liability because the teacher could be seen as condoning it.

WHAT IS VICTIMISATION?

Teachers, students and educational institutions need to remember that the Act also prohibits *victimisation*. Victimisation happens when a person has either made a complaint or intends making a complaint to the Commission and is threatened or harassed by others involved in the complaint. This is a serious matter and penalties can be imposed on those responsible for victimisation.

WHAT ELSE DO I NEED TO KNOW?

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. Please contact the Commission for information, assistance and advice.