



DISCRIMINATION

IN THE PROVISION OF GOODS & SERVICES

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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 the provision of goods and services. This booklet has been designed to assist those involved in the provision of goods and services 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. Sometimes treating everybody the same can be unfair because it disadvantages a whole group of people. For example, a rule specifying that all users of a swimming pool must first walk through a disinfecting solution would disadvantage people with certain impairments, particularly those who

use a wheelchair or similar remedial device. 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.

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

Nicole phoned a garage for a quote on a mechanical service for her vehicle. When she queried the amount the mechanic told her “don’t worry about it. You wouldn’t understand the reasons anyway”. Nicole then asked a male friend to phone the garage with the same request. He was quoted a substantially lower price for the same work. Quoting or charging different amounts because of a person’s sex is unlawful sex discrimination.

Michelle hired a plumber to fix a leaking household pipe. During the repair work the plumber kept asking Michelle intrusive questions about her personal life and relationships. He also included a lot of sexual innuendo in his comments. Michelle felt uncomfortable and vulnerable, especially since she was alone in the house with the plumber. She complained to the Commission about sexual harassment and received an apology. The plumber also agreed to undertake an appropriate training course.

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. manager and apprentice).

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

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.

WHEN IS DISCRIMINATION UNLAWFUL?

Not all discrimination is against the law. The legislation is very specific. The 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 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.

HOW DOES ANTI-DISCRIMINATION LAW AFFECT THE PROVISION OF GOODS AND SERVICES?

The Act makes discrimination in the provision of goods and services against the law. The law applies across the sector, including:

- *access to and use of any place, vehicle or facilities that members of the public are permitted to use*
- *transport and travel services*
- *professional, trade and business services (eg. plumbing, medical, legal, mechanical etc)*
- *banking, finance and credit services*

- *public and local government services*
- *hospitality and the supply of refreshments (eg. hotels, cafes, restaurants)*
- *health and community services*
- *recreation (eg. entertainment, sports, tourism, arts)*
- *retail and wholesale*

The legislation is very broad and can be widely applied to many aspects of the provision of goods and services. This means that any less favourable treatment of a person in connection with the supply of goods and services (eg. refusing to serve an Aboriginal person in a hotel), the way in which they are supplied (eg. charging women more than men for the same garage services) or the terms on which they are supplied (eg. requiring a young person to leave a bigger deposit on hire items such as sailboards than older people) may be against the law.

The legislation does not apply to non-profit organisations or associations established for social, literary, cultural, political, sporting, athletic, recreational, community service or other such lawful purposes. This excludes most common clubs and all voluntary associations. However clubs and associations are still covered by the legislation in their capacity as employers.

What are my rights and responsibilities as a provider of goods and services?

All workers in the goods and services 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 goods and services without discrimination, sexual harassment and vilification. All providers of goods and services must take reasonable steps to prevent or minimise this type of conduct. The implementation of specific policies can help to minimise the scope and impact of discriminatory attitudes and practices and to reduce legal liability.

As an employer, goods and service providers should formally counsel any employee who might be engaging in discriminatory conduct while at work.

CASE STUDIES

In a case heard at the Anti-Discrimination Tribunal (*Wharton & Oths v Conrad International Hotels Corporation* unreported HEA 98/13) six Aboriginal people were discriminated against on the basis of their race when visiting a nightclub. The discrimination included ejection from the nightclub and the refusal to serve members of the group. The Tribunal member found that the only reasonable explanation for what had occurred was ‘because of the complainants’ race and their association with each other at Fortunes that evening’. The Tribunal found the discrimination to be “serious and blatant” and that it “occurred in a public place over some time” causing the complainants to be deeply hurt because of the treatment they had to suffer. The Tribunal awarded each of the complainants the sum of \$10,000 plus interest of \$1,375.

What are my rights and responsibilities as a user of goods and services?

Everyone has the right to be free from discrimination, sexual harassment and vilification when obtaining goods and accessing services. If a person believes that they have been unlawfully discriminated against, sexually harassed or subjected to vilification 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. However, only certain exemptions apply in relation to the provision of goods and services.

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. an information and

referral employment service exclusively for young people.

Public health

Actions to protect public health when it is reasonably necessary are permitted. This may include, for example, temporarily excluding a child from a childcare centre while they have an infectious or communicable disease such as measles or chickenpox.

Special services or facilities

Where special services or facilities are required, an exemption can be argued on the basis of impairment if someone with an impairment needs special services or facilities, and to supply them would impose an unjustifiable hardship on the goods or service provider. Factors that are relevant include the cost of making reasonable adjustments, the number of people to benefit, the financial circumstances of the person required to provide them, and any human and other costs that may disadvantage others.

Reasonable adjustments may include modifying premises or equipment (eg. providing ramp or lift access), adjusting certain practices and procedures (eg. removing a policy that all cinema clients with a wheelchair be required to sit at the very front of the cinema) and implementing appropriate policies and practices (eg. providing visual information aids for people with an intellectual or learning impairment, or braille trails for people with visual impairments).

Cultural and religious significance

Access to land or buildings of cultural or religious significance may be restricted on the basis of sex, age, race or religion. This is permitted if it is done

CASE STUDIES

In the case of *Haar v Maldon Nominees Pty Ltd (t/a McDonalds) & Ors (2000)* FMC Mz071, a woman was awarded \$3000 by way of damages for injured feelings, distress and embarrassment.

Ms Haar, who had a visual impairment, went to a McDonalds restaurant accompanied by her guide dog and several friends. She had visited the restaurant on a regular basis since it opened. She had never been refused entry and had always been with her guide dog, although she had not sat in what was called the 'party area' before.

As she was about to leave, she says an employee said something like "It would be better if the guide dog was outside, if he sat outside or just inside the doorway". The employee says she suggested Ms Haar sit in a different place in the restaurant as there was a tap for the dog, and more space.

The hearing member found that on the balance of probabilities, the conversation took place as described by Ms Haar, and that there had been unlawful discrimination.

in accordance with cultural standards or religious doctrine and when necessary to avoid offending cultural and religious sensitivities.

Age based benefits

Age based benefits and concessions are permitted eg. pensioner and child discounts at cinemas and for travel.

Accompanying children

A provider of services may require children to be accompanied by an adult where there is a reasonable risk of disruption or danger to the child or anybody else, eg. for certain amusement rides.

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 goods and services providers (ie. businesses, organisations, employers etc) and their employees or agents to be liable for unlawful discrimination, sexual harassment and vilification that may occur during the provision of goods and services.

What is vicarious liability?

Providers of goods and services can be liable for discrimination, sexual harassment and vilification done by their employees or agents because they are obliged by law to protect staff and clients from

this type of behaviour. Complaints can therefore be made against individuals, employers and organisations. Previous cases show employees have been found jointly liable at law with the organisation, including the payment of compensation. In practice, *vicarious liability* means that a complaint against an individual may also be sent to 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.

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. Providers of goods and services may argue a defence to vicarious liability if it can be shown 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 supervisors)*
- *establishment of appropriate grievance and complaints procedures*
- *removal of any discriminatory or offensive materials, rules and practices*

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

Established 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 it is reasonable. For example, an Internet cafe accessible only by stairs would disadvantage clients who use wheelchairs, prams or walking frames. Unless the business could argue that the cost of relocation or of modifying access was unreasonable, the limited access could constitute unlawful indirect discrimination on the basis of disability, parental status and age.

WHAT IS VICTIMISATION?

Providers of goods and services 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, library resources and education and training services are also available. Please contact the Commission for information, assistance and advice.

Marco complained about racial discrimination when the owner of a store where he routinely shopped subjected him to ongoing racist comments and remarks. When the shop owner learnt of the complaint, he began to threaten Marco with violence if the complaint wasn't dropped. Marco was fearful and lodged a complaint of victimisation with the Commission.

