



DISCRIMINATION

IN EMPLOYMENT

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.

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 *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 headress 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.

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

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

Jenny 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. Jenny could complain to the Commission about the harassment.

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.

A person encouraged his colleagues to racially abuse Aaron, 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. Aaron could lodge a complaint of racial vilification with the Commission.

CASE STUDIES

In a matter heard at the Anti-Discrimination Tribunal (*McRostie v Boral Resources Qld Pty Ltd* unreported H20/97) 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 \$5960 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.

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 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.

HOW DOES ANTI-DISCRIMINATION LAW AFFECT EMPLOYMENT?

The Act makes discrimination, sexual harassment 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 be full-time, part-time, casual, voluntary etc.

What are my 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.

What are my 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.

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

What about job advertisements?

Discriminatory advertising is against the law. Job advertisements need to give the impression 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, eg. foreman, tradesman, glamorous, well-built, mature,

CASE STUDIES

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

An employment application form for an administrative position with a large accounting firm included an optional question about the applicants’ medical history, including mental health. Larry 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 Larry provided details of his mental illness. Larry’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, Larry could make a complaint about the discriminatory application form.

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.

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.

What can be asked in 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 (eg. for age related wages), for other reasonable purposes (eg. 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.

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

CASE STUDIES

When Tranh 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 Tranh had applied for had no such legal requirement. Furthermore, although the interview panel did not comment on his responses to the personal questions Tranh thought the questions were discriminatory. It is against the law to ask for unnecessary information during interviews. Details of Tranh's family and his religious beliefs make no difference to Tranh's capacity to do the job. Tranh could make a complaint of discrimination.

Elizabeth 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. Elizabeth complained about discrimination on the basis of impairment. Investigation showed that her hearing loss did present a significant workplace safety risk and the company was therefore able to successfully defend its action.

they may cause the discriminatory exclusion of certain people on the basis of their sex, race, age etc.

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.

Can pre-employment tests and medicals be used?

Yes. 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, eg. 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, eg. 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 (eg. 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.

EMPLOYMENT

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

What about 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.

What should I do about workplace complaints and grievances?

Employers should establish grievance and complaints procedures for dealing with 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 (eg. 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.

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 formal and informal options*
- *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*

Jacques 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 Jacques' use of a wheelchair made him unsuitable for the post. Jacques 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 Jacques' employer believed that if Jacques left his established support network his work capacity would deteriorate. The employer's assumption ignored the fact that Jacques had lived independently since leaving his overseas family and did not require the level of support assumed by his employer. Jacques' employer apologised and agreed to the transfer.

CASE STUDIES

Felicity, 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 Felicity 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 Felicity's complaint resulted in \$7000 in compensation for lost wages and injury to feeling.

When Justin turned 60 years old his office workplace held a celebration party. The next day Justin's supervisor told him it was company policy that because of his age Justin had to undergo a medical test to determine his continuing work performance capabilities. Although Justin 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 Justin 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, Justin's job did not involve physical work and he suspected that his employer wanted him to retire. At conciliation Justin 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.

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.

If an employee believes that they have been dismissed for discriminatory reasons they can complain to the Commission or can seek reinstatement through the Industrial Relations Commission. If dismissed workers apply to the Industrial Commission first, they may later come to the Commission. However, if a dismissed worker first lodges a complaint with the Commission, they cannot later apply to the

Industrial Commission.

What about 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 asked 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, eg. 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.

What about 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. Conciliation outcomes and

case law demonstrate that if discriminatory attitudes inform redundancy decisions employers can be held legally liable.

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. Organisations, employers and their agents can also be liable for discrimination, sexual harassment or vilification that occurs in the workplace.

What is 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, 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. 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*

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 Susie, 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.

Amy was the Assistant State Manager for a transport company. After Amy 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. Amy was then offered a redundancy. In contrast, the recently appointed male Office Manager who had far less experience than Amy was offered the State Manager position. Amy complained of discrimination on the basis of pregnancy and sex and received \$9000 in settlement.

- *implementation of strategies aimed at preventing and minimising unlawful discrimination, sexual harassment and vilification, eg. 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*

Recent 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.

WHAT IS VICTIMISATION?

Employers and workers should 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 from us. Please contact the Commission for information, assistance and advice.

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 were liable for the harassment and consequent compensation payment.

Jose, 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. Jose could make a complaint of victimisation.