



FACT SHEET

Unlawful Discrimination

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Both State and Federal laws prohibiting unlawful discrimination exist to protect and preserve the principles of dignity and equality. For the purposes of this Fact Sheet the Queensland legislation, being the *Anti-Discrimination Act 1991* (Qld) (the 'Act') will be examined. However, please note that Federal discrimination laws also exist.

The Act prohibits discrimination on the basis of a protected attribute in certain areas of activity – this is further explained throughout this Fact Sheet. Please note that this Fact Sheet will specifically focus on the 'work and work related' area of activity. A person in Queensland is entitled to a workplace that is free from unlawful discrimination and 'persons' include, volunteers, employees (casual, part-time and full-time) and independent contractors.

WHAT IS DISCRIMINATION?

For the purposes of the Act, discrimination occurs where one person treats another person less favourably because of a protected attribute they have or are believed to have. However, it is also necessary to recognise that discrimination can also occur in a situation where everyone is treated in the same way, for example, indirect discrimination, as defined on page 2 of this Fact Sheet.

ELEMENTS OF DISCRIMINATION

The Act aims to promote equality of opportunity for everyone by protecting them from unlawful discrimination in certain areas of activity, as defined in the Act, and reproduced below, and from sexual harassment and certain other associated objectionable conduct.

Protected Attributes

Section 7 of the Act prohibits discrimination on the basis of the below 16 attributes:

- (a) sex;
- (b) relationship status;
- (c) pregnancy;
- (d) parental status;
- (e) breastfeeding;
- (f) age;
- (g) race;
- (h) impairment;
- (i) religious belief or religious activity;
- (j) political belief or activity;
- (k) trade union activity;
- (l) lawful sexual activity;
- (m) gender identity;
- (n) sexuality;
- (o) family responsibilities;
- (p) association with, or relation to, a person identified on the basis of any of the above attributes

Areas Of Activity

Part 4 of the Act prohibits discrimination in specific areas of activity, as listed below:

- Work and work related areas;
- Proposed or existing partnership in pre-partnership area;
- Education;
- Goods and services;
- Superannuation and insurance;
- Disposal of land;
- Accommodation;
- Club Membership and affairs;
- Administration of State laws and programs; and
- Local government.

Please refer to page three of this Fact Sheet for the exemptions that are permitted in certain areas of activity.

As mentioned, this Fact Sheet focuses specifically on the 'work and work related' area of activity. However, for the hospitality industry the other areas to be aware of include 'goods and services', 'accommodation' and 'club membership and affairs' as patrons and members are able to lodge a discrimination complaint for less favourable treatment in these other areas of activity.

Less Favourable Treatment

Direct Discrimination

The Act provides at section 10 that direct discrimination happens where a person treats, or proposes to treat, a person with a protected attribute less favourably than another person without the attribute is, or would be, treated in circumstances that are the same or not materially different.

An example of direct discrimination can be seen where a prospective employee is not offered a job on the basis of their particular religious belief or activity. In this situation the prospective employee is treated less favourably than someone who does not hold the same religious belief, in the same or similar circumstances.

Indirect Discrimination

Additionally, the Act provides at section 11 that indirect discrimination happens where a person imposes, or proposes to impose, a term with which a person with a protected attribute (refer section 7 of the Act) does not, or is not able to comply, and with which a higher proportion of people without the protected attribute comply or are able to comply and that term is not reasonable. In contrast to direct discrimination, indirect discrimination occurs where a policy or informal position that appears to be neutral is adopted, yet has the effect of discriminating against those with a protected attribute.

An example of indirect discrimination can be seen where an employer imposes a requirement that all employees who want to progress into a management position must first undertake a professional development course on the weekend. This requirement may indirectly discriminate against employees on the basis of their parental status or family responsibilities, because of their weekend parental or carer obligations.

Depending on the circumstances, the requirement may also be seen as unreasonable, for example, could the professional development be undertaken at a more appropriate time? If so, it may be considered indirect discrimination.

In the work and work related area or activity, unlawful direct and indirect discrimination can occur:

- during the recruitment process: for example, job advertisements, job application forms, interview questions;
- during the selection process: for example, who is offered the job, who is not offered the job, setting the terms, conditions and benefits offered as part of employment;

- during the employment relationship: for example, treatment of employees, opportunities for promotion, transfers, training and professional development; and
- when termination is being considered: for example, termination of employment and selection for redundancy.

It is important to note that an employer's motive is irrelevant and therefore it will not be considered, even where there was no intention to discriminate. For example, a woman with family responsibilities is denied a promotion because her manager thought she wouldn't accept it. This may be regarded as unlawful discrimination on the basis of family responsibilities because the manager assumed she would not accept the promotion because of the attributes she has (parental status and family responsibilities), instead of giving her the opportunity to decide.

Exemptions

There are specific circumstances where actions that may seem discriminatory are in fact lawful. The Act provides at sections 24-36 a list of exemptions for discrimination in work and work-related areas of activity; these exemptions include, but are not limited to:

- genuine occupational requirements;
- age in the payment of Youth wages;
- lawful sexual activity or gender identity when working with children;
- workplace health and safety; and
- unjustifiable hardship – special services or facilities that would be needed, but for it being an unjustifiable hardship to provide it.

Please note however, that exemptions aren't automatic and must be raised when a response to a complaint of discrimination is made. The decision on whether or not an exemption is accepted generally lies with the Anti-Discrimination Commission Queensland and, if a complaint proceeds to hearing, the Queensland Civil and Administrative Tribunal.

Unlawful discrimination must not be confused with legitimate and reasonable comments and advice (including relevant constructive comments or feedback) from managers on the work performance or work related behaviour of an individual or group. Employers should manage these processes with sensitivity, but they should not let the thought of discrimination deter them from providing full and frank feedback to employees.

OTHER FORMS OF DISCRIMINATION

The Act provides for various other forms of discrimination including, but not limited to:

Sexual Harassment

Sexual harassment is unwelcome conduct of a sexual nature and is unlawful. The Act does not limit sexual harassment to an area of activity or activities, therefore hospitality employers should be aware that all persons coming into their venue, including suppliers, patrons, and employees are protected from being sexually harassed.

The Act provides at section 119 that sexual harassment happens if a person:

- (a) subjects another person to an unsolicited act of physical intimacy; or
- (b) makes an unsolicited demand or request (whether directly or by implication) for sexual favours from the other person; or
- (c) makes a remark with sexual connotations relating to the other person; or
- (d) engages in any other unwelcome conduct of a sexual nature in relation to the other person;

And the person engaging in the conduct described in paragraphs (a), (b), (c) or (d) does so—

- (e) with the intention of offending, humiliating or intimidating the other person; or
- (f) in circumstances where a reasonable person would have anticipated the possibility that the other person would be offended, humiliated or intimidated by the conduct.

Further, section 120 of the Act provides for the relevant circumstances in determining whether a reasonable person would have anticipated the possibility that the other person would be offended, humiliated or intimidated by the conduct. They include:

- (a) the sex of the other person; and
- (b) the age of the other person; and
- (c) the race of the other person; and
- (d) any impairment that the other person has; and
- (e) the relationship between the other person and the person engaging in the conduct; and
- (f) any other circumstance of the other person.

Common examples of sexual harassment may include:

- unwelcome touching, hugging or kissing,
- staring or leering,
- suggestive comments or jokes,
- unwanted invitations to go out on dates or requests for sex,
- intrusive questions about an employee's private life or body,
- insults or taunts based on sex,
- sexually explicit emails, SMS messages, posters or screen savers,
- accessing sexually explicit internet sites; and
- behaviour which would also be an offence under criminal law, such as physical assault, indecent exposure, sexual assault, stalking or obscene communications.

Sexual harassment is not considered to be any of the below listed behaviours which are invited, mutual, consensual or reciprocated:

- sexual interaction; or
- flirtation; or
- attraction; or
- friendship.

Please note that invited, mutual, consensual or reciprocated refers to the other person and can change by the other person deciding that the behaviour is no longer invited mutual, consensual or reciprocated.

Vilification

Section 124A (1) of the Act provides that vilification on the grounds of race, religion, sexuality or gender identity is unlawful. The Act also provides that a person must not, by a public act, incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race, religion, sexuality or gender identity of the person or members of the group.

DISCRIMINATION UNDER THE FAIR WORK ACT 2009

The *Fair Work Act 2009* provides that an employer must not take Adverse Action against a person who is an employee, or prospective employee, of the employer because of the person's race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

Adverse action is defined in the *Fair Work Act 2009* at section 342, and it includes:

- dismissing an employee; or
- injuring an employee in his or her employment; or
- altering the position of the employee to the employee's prejudice; or
- discriminating between the employee and other employees of the employer; or
- refusing to employ a prospective employee; or

- discriminating against a prospective employee in the terms and conditions on which the prospective employer offers to employ the prospective employee.

Refer: QHA's General Protection Fact Sheet

DEALING WITH UNLAWFUL DISCRIMINATION

Preventing Unlawful Discrimination

Employers should have a clear and concise policy and procedures outlining:

- the legislative requirements on unlawful discrimination, and
- the employer's responsibility and commitment to a discrimination free workplace, and
- the process that will be followed after a complaint has been made.

Employers are reminded that policies must be well communicated and consistently enforced to be effective, and regular training must be conducted. These measures will help protect the employer's interests and promote and foster understanding and compliance in the workplace.

When Unlawful Discrimination Occurs or has Occurred

As soon as a manager or employer becomes aware of any allegations of unlawful discrimination occurring in their workplace, they have an obligation to undertake a fair and thorough investigation. Please note that a formal complaint or report does not need to be made before an investigation can commence.

Employers have an obligation to undertake an investigation if they reasonably suspect any form of unlawful discrimination occurring in their workplace.

Refer: QHA's Investigating a Workplace Incident Fact Sheet

THE ANTI-DISCRIMINATION COMMISSION QUEENSLAND

The Anti-Discrimination Commission Queensland ('ADCQ') is an independent statutory authority established under the Act. The ADCQ's core business is to receive and deal with complaints of discrimination and other contraventions of the Act, and to promote human rights in Queensland. It is important to note that the ADCQ is not a tribunal or court and complaints are managed by ADCQ conciliators who assist people to resolve issues by mutual agreement, using a conciliation process which is confidential, free and impartial.

If a complaint can't be resolved through conciliation, it may be referred to the Queensland Civil and Administrative Tribunal ('QCAT') by the complainant, for a decision made by a Tribunal member hearing the matter. When a complaint reaches this stage, the decision is a public decision, that is, it is readily available for anyone to read.

OTHER LEGISLATION

Federal Discrimination Legislation

- *Fair Work Act 2009* (Cth)
- *Racial Discrimination Act 1975* (Cth)
- *Sex Discrimination Act 1984* (Cth)
- *Age Discrimination Act 2004* (Cth)
- *Australian Human Rights Commission Act 1986* (Cth)
- *Disability Discrimination Act 1992* (Cth)

Complaints under the above legislation, with the exception of the *Fair Work Act 2009*, can be made to the Australian Human Rights Commission.

IN SUMMARY

Discrimination is any practice that creates distinctions between individuals or groups so as to disadvantage some and/or advantage others. However, as previously outlined it is also necessary to recognise that indirect discrimination can also occur in situations where everyone is treated in the same way, for example via a workplace policy that may appear to not discriminate, however, in practice, does.

As outlined throughout this Fact Sheet, the Act provides three elements that must **all** be satisfied in order to establish whether unlawful discrimination (direct or indirect) has occurred. In summary, they are that the conduct engaged in:

1. is based on one of the 16 protected attributes of which discrimination is prohibited; and
2. is within one of the certain areas of activity in which discrimination is prohibited; and
3. results with the less favourable treatment of a person than another person without the protected attribute is or would be treated in a similar circumstance.

Further Assistance

Financial QHA members are encouraged to contact the QHA's Employment Relations Department (refer the contact details at the bottom of this page) for a confidential discussion about the information in this Fact Sheet, or to discuss any queries relating to specific workplace matters.

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