

Unlawful discrimination

Presented by
Klaire Coles
18 April 2016

Objectives for session

Review the law on discrimination

- Explain grounds/attributes on which unlawful discrimination can occur
- Explain areas of public life in which unlawful discrimination can occur
- Explain the different types of discrimination
 - Direct and indirect
- Exemptions
- Explain sexual harassment, victimisation and vilification
- What to do if you or one of your clients has a complaint of discrimination.

Legislation (Law)

Queensland

- Anti-Discrimination Act 1991

Commonwealth

- Age Discrimination Act 2004
- Racial Discrimination Act 1975
- Sex Discrimination Act 1984
- Disability Discrimination Act 1992
- Australian Human Rights Commission Act 1986.

Unlawful discrimination

Grounds of discrimination

- Sex
- Relationship status
- Pregnancy
- Parental status
- Breastfeeding
- Age
- Race
- Impairment

Grounds of discrimination (cont.)

- Religious belief or religious activity
- Political belief or activity
- Trade union activity
- Lawful sexual activity
- Gender identity
- Sexuality
- Family responsibilities
- Association with, or relation to, a person identified on the basis of any of the above characteristics.

Impairment / disability

- Impairment and disability are very broadly defined in the legislation.
- In the *Anti-Discrimination Act 1991* (Qld) impairment means:
 - “The total or partial loss of the person’s bodily functions, including the loss of a part of the person’s body; or
 - The malfunction, malformation or disfigurement of a part of the person’s body; or
 - A condition or malfunction that results in the person learning more slowly than a person without the condition or malfunction; or
 - A condition, illness or disease that impairs a person’s thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour; or
 - The presence in the body of organisms capable of causing illness or disease; or
 - Reliance on a guide, hearing or assistance dog, wheelchair or other remedial device;

Impairment / disability (cont.)

- Whether or not arising from an illness, disease or injury or from a condition subsisting at birth, and includes an impairment that –
 - Presently exists; or
 - Previously existed but no longer exists.”
- The definition of disability in the *Disability Discrimination Act 1992* (Cth) is quite similar but also includes behaviours linked with a disability for example, aggressive behaviour resulting from an acquired brain injury.
- The legislation covers a wide range of impairments or disabilities including physical disabilities, mental illness and other illnesses.

Areas of life where discrimination is prohibited

- Work and work-related areas (eg at work, applying for a job, doing work experience or volunteer work)
- Education (eg at school, TAFE college, university or other place of education)
- Obtaining goods or services, includes accessing premises or facilities, banking and the supply of loans, finance or credit, and transport and travel, it can also include access to police services
- Accommodation and pre-accommodation (eg renting a house or flat, a hotel or motel or business premises)
- Buying real estate
- Joining or as a member of a club (non-profit clubs not covered but profit making clubs, eg nightclubs are covered).

Examples

- Not being offered a job interview because of your race or nationality
- Being sacked from your job because of your religious beliefs
- Refusal to rent you a house because you have children
- Having comments made about you by a teacher because of sexuality.

Types of discrimination

Direct discrimination

- less favourable treatment
- than person without an attribute (“comparator”)
- in same or similar circumstances
- treatment on basis of attribute must be “a substantial reason”, if two or more reasons.

Example

- Applicant who is a refugee from Africa goes into a real estate agent to look for a house to rent.
- They are told there is no house available.
- Then another person who is white Australian goes into the real estate agent and is offered a house.

Types of discrimination

Indirect discrimination – “one size fits all”

- term imposed
- person with attribute does not comply
- people without the attribute can comply
- term not reasonable.

Example

- You have a disability.
- You can't use stairs as you have a wheelchair.
- You can't get into a public building because it doesn't have a ramp.

Example: culturally inappropriate services

- A woman requests a female doctor as she requires examination.
- She explains that culturally she cannot have a male doctor.
- The hospital refuses to provide the woman with a female doctor even though one is available.

Exemptions

Exemptions – specific to area include

Work

- Genuine occupational requirements (includes exemption for work for religious schools/bodies)
- Work with children
- Youth wages
- Special services or facilities required – unjustifiable hardship.

Accommodation

- Shared accommodation if no more than four people
- Accommodation for various purposes such as work, religious purposes etc
- Special services or facilities required – unjustifiable hardship.

Specific exemptions (cont.)

Clubs

- May exclude if club for minority culture or disadvantaged group (profit making)
- “Reasonable” sex discrimination permitted
- Special services or facilities required – unjustifiable hardship.

Goods and services area

- Sites of cultural or religious significance (sex, age, race or religion)
- Age-based benefits, eg travel concessions, seniors cards
- Children to be accompanied by adult
- Special services or facilities required.

General exemptions ie applying to all areas

- Welfare measures (eg special accommodation for women)
- Equal opportunity measures
- Acts done in compliance with legislation
- Compulsory retirement age under legislation
- Public health (eg exclusion of child with infectious disease)
- Workplace health and safety (eg worker whose disability puts self and/or others at risk)
- Religious bodies
- Charities
- Sport
- Legal incapacity (if relevant to the transaction)
- Tribunal can grant an exemption.

Exemptions (cont.)

“Unjustifiable hardship”

- Supply of special services or facilities would impose unjustifiable hardship on the person
- Depends on nature and cost of facilities, financial circumstances of person supplying, disruption and nature of benefit or detriment to all
- For example \$300,000 lift for wheelchair access to convention centre not unjustifiable hardship for Queensland Government.

Sexual harassment

Sexual harassment

- Unsolicited act of physical intimacy
- Unsolicited demand or request for sexual favours
- Remark with sexual connotations
- Other unwelcome sexual conduct

AND

- Intention of offending, humiliating or intimidating OR
- In circumstances where reasonable person would anticipate possibility of offence.

Victimisation

Victimisation

- If a person has complained or intends to,
 - and is treated badly because of this
 - it may amount to victimisation.
-
- This is a separate complaint under the Act.

Case example

- Mr El Wafa complained that he was the victim of racial discrimination because of remarks made that he took offence to.
- Because he made a complaint the Company he worked for did not give him a reference.
- Even though he lost his discrimination case, the Company was found to have victimised him and ordered the Company to give him a detailed reference and to pay him \$5,000.

Abo El Wafa_ v England and Kennedy Taylor (Qld) Pty Ltd [1997] QADT 27 (16 December 1997)

Vilification

Vilification

Person must not, by a public act, incite:

- hatred towards
- serious contempt for, or
- severe ridicule of
- a person or group because of their:
 - race
 - religion
 - sexuality or
 - gender identity.
- Exemptions for fair report; public act done reasonably and in good faith etc for public interest purposes.

Serious vilification

- Offence of serious vilification where threats of physical harm or inciting others to threaten physical harm.

Making a complaint

Time limit

- 12 month time limit
- But discretion to accept complaint if “good cause” by weighing up:
 - length of delay
 - who is the delay attributable to
 - circumstances of the complainant
 - satisfactory explanation for the delay
 - will the delay cause prejudice to the respondent.

Who can you make a complaint against?

- The person who committed the act of discrimination/harassment/victimisation/vilification AND
- Their employer.

Vicarious liability and “reasonable steps”

- person is liable for worker / agent’s breach
- complaint can be made against either or both
- defence if the employer/principal proves they took “reasonable steps” to prevent the contravention – this can include training for staff regarding anti-discrimination practices, grievance procedures and posters reminding staff of their obligations.

Complaint process

Two tiered process

- Complaint made to Anti-Discrimination Commission Queensland then proceeds to Queensland Civil and Administrative Tribunal

OR

- Complaint made to Australian Human Rights Commission (Federal) then application brought in Federal Magistrates Court or Federal Court.

Conciliation

- Emphasis on the parties to the complaint resolving the complaint through conciliation
- Usually two conciliation conferences are held – one at the Commission and then before the hearing at the Tribunal
- Federal Magistrates Court usually orders mediation before hearing.

Possible outcomes

- Apology
- Reference
- Reinstatement
- Training and policy
- Compensation for:
 - hurt, humiliation, insult, embarrassment and offence
 - lost wages
 - cost of counselling and other medical costs
 - other expenses (eg relocation because of the discrimination).

Related claims for employees

- Often people who have suffered discrimination in the workplace have a number of claims that they must choose between.
- It is important that anyone who has been dismissed seeks immediate legal advice because employees only have 21 days from the date of dismissal to lodge an unfair dismissal or general protections – dismissal application in the Fair Work Commission
- Related claims that a worker may have include:
 - unfair dismissal claim
 - general protections claim
 - bullying complaint
 - discrimination complaint
- In most circumstances a worker cannot bring more than one of these complaints about the same circumstances, so they need advice to assist them to choose the best jurisdiction.

How can Legal Aid Queensland help?

Legal information

eg our website, our publications, our 1300 65 11 88 phone line and call centre operators.

Legal advice

By phone, face-to-face, by video link.

Legal representation

We practice in criminal, family and civil law, including anti-discrimination.



Who is eligible for legal aid?

- Everyone can access free legal information on the website
- Advice services are targeted to financially disadvantaged Queenslanders
- We use a means and merit test to decide whether a person is eligible for a lawyer to represent them in court.

Useful contacts and links

- Legal Aid Queensland
44 Herschel Street, Brisbane and 13 regional offices
1300 65 11 88 www.legalaid.qld.gov.au
- Anti-Discrimination Commission Queensland
1300 130 670 TTY 1300 130 680 www.adcq.qld.gov.au
- Queensland Civil and Administrative Tribunal
1300 753 228 www.qcat.qld.gov.au/
- Australian Human Rights Commission
(02) 9284 9600 Complaints infoline 1300 656 419 www.hreoc.gov.au
- Fair Work Ombudsman
131394 www.fairwork.gov.au

Questions?