



ANTI DISCRIMINATION
COMMISSION QUEENSLAND

**DISCRIMINATION &
SEXUAL HARASSMENT IN
THE WORKPLACE:
Prevention & Resolution of
Complaints**

HR 04/07

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INTRODUCTION

All employees are entitled to work in an environment free from the embarrassment, Intimidation or humiliation caused by discrimination, sexual harassment and other forms of inappropriate behaviours.

The Anti-Discrimination Commission Queensland (ADCQ) seeks to ensure that staff are not subjected to hostility, offensiveness and intimidation. This means that they must be free from sexual harassment, as well as other forms of discrimination.

To achieve its corporate goals, the ADCQ requires all staff to maintain high standards of professionalism, courtesy and efficiency. Inappropriate workplace behaviour, such as discrimination and sexual harassment, can interfere with service delivery and, therefore, the achievement of agency goals. It can also result directly in the loss of self-confidence of another staff member and adversely affect his or her ability to act independently in the workplace.

Discrimination and sexual harassment grievances are to be taken seriously and complaints will be investigated promptly, confidentially, objectively and rigorously.

OBJECTIVE

The objectives of this policy are to:

- prevent discrimination and harassment at work and in work-related activities;
- ensure that managers and staff are aware of their responsibilities regarding harassment;
- provide guidance for managers and Equity Contact Officers (ECO's) for the informal and formal resolution of incidents of sexual harassment;
- reinforce effective personnel management and appropriate workplace behaviour and encourage respect for others and high ethical standards; and
- manage risks by reducing the potential for direct and indirect financial costs associated with discrimination and sexual harassment.

AUTHORITY

- *Age Discrimination Act 2004* (Federal)
- *Anti-Discrimination Act 1991* (Qld)
- *Disability Discrimination Act 1992* (Federal)
- *Equal Opportunity in Public Employment Act 1992*
- *Public Service Act 1996*
- *Racial Discrimination Act 1975* (Federal)
- *Sex Discrimination Act 1984* (Federal)
- *Workplace Health and Safety Act 1995*
- Grievance Resolution Directive No 11/07
- Appeals Directive No 6/03
- ADCQ Code of Conduct

HARASSMENT IN THE WORKPLACE

The term 'harassment' is usually seen to include a range of behaviours, such as discrimination, sexual harassment and other inappropriate actions including bullying.

This policy is about preventing and resolving issues of inappropriate workplace behaviour and includes reference to all types of behaviour mentioned above. For ease of reading, all behaviours are referred to simply as 'harassment'.

DISCRIMINATION

Discrimination in the workplace occurs when someone is treated unfairly or inappropriately. By definition, 'the workplace' includes areas of activity beyond the normal workplace, for example, residential training courses and officially sponsored social functions.

Not all discrimination is against the law, even if it is unfair. In Queensland *the Anti-Discrimination Act 1991* (henceforth referred to as 'the Act') determines what kind of discrimination is unlawful by identifying particular grounds and types of discrimination which are prohibited. The Act also prohibits discrimination in certain areas of activity (see Part 4 of the Act). While it is unlawful to discriminate against people in areas of activity outside the workplace, the focus of this document is on work.

The definition of work included in the Act is a broad definition and can be found in Section 5. Managers and staff are encouraged to familiarise themselves with this definition.

The Act also specifically prohibits discrimination in particular areas and types of work activity, including pre-work activities, for example, recruitment and selection activities. With regards discrimination in the work area, Section 15(1) of the Act states a person must not discriminate:

- (a) in any variation of the terms of work; or
- (b) in denying or limiting access to opportunities for promotion, transfer, training or other benefit to a worker; or
- (c) in dismissing the worker; or
- (d) by denying access to a guidance program, an apprenticeship training program or other occupational training or retraining program; or
- (e) in developing the scope or range of such a program; or
- (f) by treating a worker unfavourably in any way in connection with work.

Is all discrimination against the law?

Not all discrimination is against the law. The legislation is very specific and provides a range of exemptions that can be raised and argued. Exemptions recognise that in some circumstances discrimination can be acceptable provided it occurs for particular reasons or purposes. This may allow, for example, the employment of a person of a particular gender or age when it is necessary.

SEXUAL HARASSMENT

Sexual harassment means engaging in unwelcome conduct of a sexual nature in relation to another person, either with the intention of offending, humiliating or intimidating the other person, or in circumstances where a reasonable person would expect that it would give offence.

What constitutes sexual harassment?

Sexual harassment is defined in section 119 of the *Anti-Discrimination Act 1991* as follows:

“119. Sexual harassment happens if a person –

- (a) subjects another person to an unsolicited act of physical intimacy; or*
 - (b) makes an unsolicited demand on 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.*

The Act's definition of sexual harassment forms a legislative minimum with which Queensland Public Sector agencies must comply.

What behaviour is interpreted as sexual harassment?

In its most general sense, sexual harassment is any behaviour of a sexual nature that is 'unwelcome'. It is a form of inappropriate workplace behaviour that should be dealt with by management.

The person who decided whether behaviours are unwelcome is the person 'on the receiving end'. In identifying sexual harassment, the intent of the person whose behaviour caused offence may be largely immaterial, as it is the way their behaviour is received and its effects that are relevant.

When considering whether behaviour constitutes sexual harassment, it is important to remember the application of the 'reasonable person' test, as explained in Section 119(f) of the Act. Also, what constitutes sexual harassment to one person may be acceptable and inoffensive behaviour to another. Different social or cultural backgrounds may lead people to perceive the same conduct differently. It is also important to note that sexual harassment may involve a single incident or a series of incidents. There does not necessarily have to be continuing inappropriate sexual conduct for the behaviour to be regarded as sexual harassment.

OTHER INAPPROPRIATE BEHAVIOUR

Other types of behaviour occurring in the workplace may seem inappropriate or unfair, but are not covered under legislation because they are not linked to the person's age, sex, religion, disability or other grounds listed above. The most common of these is workplace bullying or harassment.

A person is subjected to workplace harassment if the person is subjected to repeated behaviour, other than behaviour amounting to sexual harassment, by a person, including the person's employer or a co-worker or group of co-workers of that person that:

- is unwelcome and unsolicited; and
- the person considers to be offensive, intimidating, humiliating or threatening; and

- a reasonable person would consider to be offensive, intimidating, humiliating or threatening.

This type of behaviour is incompatible with professional, efficiently run workplaces and is unacceptable to management of the ADCQ (see Preventing Workplace Harassment Policy and ADCQ Code of Conduct).

Further information on workplace bullying may be obtained from the Department of Employment and Industrial Relations, Division of Workplace Health and Safety.

PREVENTING HARASSMENT

What are my responsibilities as a staff member?

The ADCQ, through its Code of Conduct, requires all officers to treat other officers, clients and contractors with respect and dignity. The Code of Conduct specifically prohibits harassment and discrimination.

The ADCQ has taken initiatives to raise awareness of the problem of harassment and is presenting the clear message that it will not be tolerated. Accordingly, staff must shoulder complementary responsibilities, such as:

- ensuring that they avoid perpetrating harassment. If any behaviour could be perceived to be harassment, then officers should not engage in such behaviour or cease the behaviour immediately.
- Offering support to anyone affected by harassment. There is no onus on the person being harassed to say they find the conduct objectionable. Many people find it difficult to speak up.
- Reporting any example of harassment that they observe to their Manager, Supervisor or Equity Contact Officer.

All staff are responsible for their own behaviour.

Staff are also responsible for any complaints they may lodge. They should be aware that frivolous, fabricated or vexatious complaints might result in management initiating disciplinary action against the complainant.

What are my responsibilities as a Manager/Supervisor?

Managers and organisations can incur legal liability and costs for allowing such behaviour to occur. Discrimination and sexual harassment can seriously affect productivity, service delivery and the health and careers of staff. Management, therefore, has a compelling interest in preventing it.

In discharging their responsibility, Managers need to ensure they are conversant with this policy and their responsibilities. In particular, Managers are expected to explain and model appropriate workplace behaviour and monitor the behaviour of staff to prevent any harassment or discrimination.

In addition to the responsibilities outlined in this and other ADCQ publications, Managers also have a responsibility to ensure that staff are protected from harassment and/or discrimination, as outlined in:

- *Anti-Discrimination Act 1991* (Qld);
- Section 24 of the *Public Service Act 1996*, which outlines responsibilities in regard to providing a safe and healthy workplace;

- Section 51 of the *Public Service Act 1996* requires the chief executive to ensure that all agency employees are treated fairly;
- ADCQ Code of Conduct;
- *Workplace Health and Safety Act 1995*;
- *Equal Opportunity in Public Employment Act 1992*; and
- Grievance Resolution Directive 11/07.

A Manager or Supervisor also needs to be particularly aware of the concept of **vicarious liability**, ie, liability for the actions of others, especially employees or agents. One of the purposes of the *Anti-Discrimination Act 1991* is to promote equality of opportunity by making a person liable for certain acts of his or her employees or agents.

Section 133 of the Act explains the vicarious liability provisions pertaining to matters of discrimination. Managers are encouraged to familiarise themselves with their responsibilities in this regard.

It is important to note that, where a case proceeds under the *Anti-Discrimination Act 1991*, managers need to be able to demonstrate that all reasonable steps were taken to prevent discrimination and sexual harassment. It is not enough to show that the organisation has a mission statement or policy forbidding discrimination and sexual harassment. Managers need to demonstrate, for example, evidence of training and/or induction conducted, lists of people attending and when.

What is Victimisation?

Victimisation happens when someone who believes they have been, or might be complained about, threatens or harasses others involved in the complaint. Under the *Anti-Discrimination Act 1991*, this is prohibited and strong penalties can be imposed on those responsible. Any victimisation is also prohibited under this policy and in accordance with the ADCQ's Code of Conduct.

What is the role of the Union?

Staff are entitled to contact their union (ie, a local union delegate and/or Union official) at any time. This is true for both employees who report discrimination or sexual harassment and those employees who have complaints made against them. The Union's role is a supportive one and at times may involve acting on an employee's behalf. Unions will also advise on award conditions.

It is not the role of Managers, Supervisors or ECO's to contact the Union on behalf of a staff member, nor is it the Union's role to resolve or investigate complaints of sexual harassment.

THE EQUITY CONTACT OFFICER (ECO)

What is the ECO?

Equity Contact Officers are personnel specially trained to provide information to staff who are subjected to discrimination and harassment. They also assist management to take reasonable steps to prevent discrimination and harassment from occurring in the workplace and to discharge its responsibilities under the vicarious liability provisions of the *Anti-Discrimination Act 1991*.

The appointment of ECO's is an indication that the ADCQ views discrimination and harassment seriously and will not tolerate it in its workplaces.

The responsibilities of ECO's will be in addition to those of their normal position. The number and location of ECO's will vary from time to time and they will be deployed so that every staff member has easy access to them. The ADCQ will provide training for ECO's. The ADCQ will inform staff about the role and functions of ECO's through the induction process, Equity Awareness Sessions and generic training courses.

What is the role of an Equity Contact Officer?

Equity Contact Officers (ECO's) will be required to:

- behave as a positive role model of workplace behaviour;
- raise staff awareness on harassment issues;
- give advice on options available and information to staff who believe they are being subjected to discrimination or harassment – they will listen, encourage and discuss options for resolving a complaint;
- act as a resource for providing information to any staff member about the nature of discrimination or harassment, its effect and complaint resolution mechanisms; and
- advise Managers on general issues involved in a complaint.

What support is available to the Equity Contact Officer?

The Deputy Commissioner can assist ECO's where:

- complex issues/complaints arise where they feel they need assistance;
- an ECO is unfamiliar with the complaint processes or the possible outcomes of particular courses of action, eg, disciplinary processes;
- the alleged harasser is also seeking information – in these cases another ECO may also be able to assist;
- the complaint is about inappropriate behaviour, but of a type not covered under legislation.

THE COMPLAINT PROCESS

What action can I take?

Staff who consider that they are experiencing discrimination or harassment have a range of options which they may pursue within the ADCQ. The recommended processes include informal and formal options.

Informal Action

The ADCQ encourages all complainants to attempt to resolve the matter informally, as a first option, whenever possible. The resolution processes recognise a person's right to decide whether to lodge a complaint or not. Access to an ECO will give staff members the opportunity to acquire information before deciding whether or not to follow through with a written complaint.

Informal resolution options includes the complainant:

- dealing with the matter themselves, either face-to-face, or by letter; or
- taking no action.

Note: When deciding on a course of action an officer must consider their responsibility to report incidents or behaviour that may affect the safety of themselves or others. Officers are also required to report incidences of official misconduct in terms of the *Public Service Act 1996*.

Strategies for dealing with the matter informally can be discussed with:

- an ECO;
- a Manager or Supervisor;
- an Employee Assistance Provider through the Employee Assistance Program.

It is acknowledged that harassment can sometimes be experienced over a period of time prior to a complainant taking action. The ADCQ encourages complainants to take action regarding harassment or discrimination at the earliest opportunity. Early intervention in these situations will usually lead to a more successful outcome for all concerned.

Formal Action

There will be occasions where early intervention does not prove successful and/or a complainant chooses the option of formal action. In such situations the complainant may:

- seek assistance and advice from the Manager or Supervisor; or
- lodge a grievance within the ADCQ; or
- lodge a grievance external to the ADCQ.

How do I lodge a grievance?

The process for lodging a grievance is outlined in the Office of the Public Service Commissioner Directive No 11/07 and the ADCQ's Grievance Resolution Policy.

As outlined in the Directive, the formal grievance process has two stages:

Stage 1 The complainant can, where appropriate, lodge a grievance with their Manager. The Manager is required to investigate and resolve the grievance where possible. Early resolution is the key focus of the stage one process and thus discussion towards resolution should take place between the officer and their Manager immediately. The employee's Manager is to ensure that a written record is made of the action taken, the findings and the reason/s for the decision taken. If the stage 1 process remains unresolved after 21 calendar days the aggrieved employee may proceed to stage 2.

Stage 2 Where the complainant believes on reasonable grounds that the stage 1 decision is unfair and/or unreasonable, the person may submit in writing to the Anti-Discrimination Commissioner, the grounds for believing the decision is unfair and/or unreasonable. If the stage 2 process remains unfinalised after 42 calendar days from the original date of lodgement (ie at stage 1), the aggrieved employee may lodge a fair treatment appeal to the Public Service Commissioner, unless otherwise agreed between the employee and the agency.

Do I need to lodge a grievance through my Manager/Supervisor?

If the officer is worried about lodging a complaint with his or her Manager or Supervisor, they should discuss it with an ECO and consider lodging a written complaint directly with the manager or his/her Manager or Supervisor.

Direct lodgment with the Anti-Discrimination Commissioner is an alternative complaint process, able to be used specifically for discrimination and harassment complaints. This alternative is necessary because it may be inappropriate for the officer to lodge the grievance with their Manager or Supervisor, who could be the subject of the complaint or may appear to condone the behaviour.

The ADCQ encourages employees to attempt to resolve complaints of harassment or discrimination within the agency if possible. However, other options for resolving such complaints are through external agencies. Complainants can discuss these options with an ECO, or seek information directly from the relevant agency.

Resolving Complaint Externally

Various external options are available to staff who wish to lodge a complaint about discrimination or harassment. They include:

- An appeal to the Public Service Commissioner.
- Lodging a formal complaint with the Anti-Discrimination Commission Queensland (ADCQ). To avoid a conflict of interest such complaints will generally be delegated to HREOC.
- Referral to the JAG Alternative Dispute Resolution Centre for mediation.
- Referral to the Police/CMC, in cases of serious assault and/or those involving criminal conduct/official misconduct. ##

Where a serious assault is alleged, employees are strongly encouraged to contact their Manager and/or the Deputy Commissioner. In situations where the police are notified, Managers are asked to advise the Deputy Commissioner and the Manager, Support Services, to facilitate referral of the matter to the CMC.

Appeals to the Public Service Commissioner (OPSC)

There are a number of appeal options available within OPSC and to determine which appeal option is the most appropriate, it is useful to determine whether or not the discrimination or harassment is related to an administrative action or decision.

In cases where discrimination or harassment is not related to other administrative actions or decisions, lodgement of a 'fair treatment' appeal would be appropriate. If the sexual harassment is believed to be related to an administrative decision, the complainant should seek information from the Equity and Resolution Section, OPSC, to determine whether an appeal right exists and what action is required.

Anti-Discrimination Commission Queensland (ADCQ)

The Commission administers the *Anti-Discrimination Act 1991*. A person can simultaneously lodge a formal complaint with the ADCQ. If this occurs, the ADCQ will refer the matters to HREOC to deal with in order to avoid a conflict of interest. HROEC will first attempt to resolve the problem informally by discussion and conciliation. If this proves unsatisfactory, a further attempt at resolution can be made by referral to a Tribunal hearing. This is a more formal process that may result in costs being awarded and the Tribunal's decision is binding.

Mediation

A number of sources/providers are available to offer mediation services for the resolution of workplace grievance, including discrimination or harassment complaints. For example, the JAG Alternative Dispute Resolution (ADR) Branch, or the Employee Assistance Program (EAP).

Benefits of mediation include:

- minimal disruption to the organisation;
- confidentiality;
- neutrality of ADR mediators;
- helping people to understand how their behaviour affects others;

- improved working relationship between the parties and improved working environment; and
- preventing the escalation of the dispute.

It is an alternative to more formal processes, such as organisational grievance procedures or lodging a formal complaint with the ADCQ.

Participation in a mediation session is strictly voluntary. Also, the Centre staff carefully checks that the matter is suitable for mediation and that all parties are willing to attend.

Qld Police Service (QPS) & Crime & Misconduct Commission (CMC)

Complainants may take serious assaults involving criminal conduct to the police for investigation. Individuals may also complain to the Complaints Section of the Crime and Misconduct Commission about discrimination or harassment where the behaviour is perceived to be, or may be, official misconduct.

RIGHTS OF RESPONDENTS

People who are accused of discrimination or harassment have the right to:

- be informed of the nature of the allegations;
- respond to the allegations;
- an impartial investigation applying the principles of natural justice; and
- confidentiality.

If the complaint is found to be unsubstantiated, an alleged harasser may be entitled to:

- an apology or some other type of acknowledgment by management;
- reinstatement of any loss of privileges;
- removal of all records of the matter from relevant files.

If the complaint is found to be vexatious or malicious, the ADCQ may initiate disciplinary action against the complainant.

POSSIBLE OUTCOMES OF INVESTIGATION

Generally, people who lodge a complaint are looking for two outcomes – for the inappropriate behaviour to stop and for no one else to experience the behaviour. Outcomes from a complaint may include one or more of the following.

Complaint Substantiated

For the Complainant

- An undertaking that the behaviour will cease. This may also involve an apology.
- A recommendation that unfavourable comments be removed from the complainant's personal file. When people are harassed their work often suffers and if comments are made on this basis and placed on their service record, it would be inappropriate to leave them there.
- A referral to the Employee Assistance Program (EAP) for professional counselling.
- A recommendation that staff undertake an awareness session about harassment in the workplace.

- A recommendation that the complainant be compensated for financial costs incurred in connection with the harassment. For example, medical or counselling costs.
- A recommendation that leave taken as a result of the harassment be re-credited.

For the Respondent

- A recommendation of disciplinary action. This may include any penalty defined in the *Public Service Act 1996* subject to the decision of the Anti-Discrimination Commissioner. If formal disciplinary action is warranted, one outcome may be placing a record of the outcome on the personal file of the person who was disciplined.
- Advice to the harasser of his or her right to lodge a Fair Treatment or Discipline Appeal with the Public Service Commissioner.
- A referral for the harasser to the Employee Assistance Program (EAP).

Complaint Not Substantiated

For the Complainant

- Advice to the complainant that the complaint has been dismissed.
- Advice to the complainant of further rights of complaint, eg, lodge a formal complaint with the Anti-Discrimination Commission under the *Anti-Discrimination Act 1991*.
- A referral for the complainant to the Employee Assistance Program.
- Advice to the complainant to keep diary notes or try to obtain other witnesses if there are further incidents.
- A recommendation to consider disciplinary action against the complainant if the complaint was vexatious or malicious.

For the Respondent

- A recommendation that an apology or some form of acknowledgement be made by management that the complaint was not substantiated.
- A referral for the respondent to the Employee Assistance Program.

CONFIDENTIALITY

Any allegation of discrimination or harassment is potentially damaging to a person's reputation and credibility. Therefore it is necessary to treat all cases in the strictest confidence. To ensure the integrity and confidentiality of harassment cases, officers must ensure that files are kept in a locked filing cabinet and are not left on desks or any other accessible areas. A break in confidentiality or communication of damaging material may result in legal action being commenced by the respondent or other parties.

NATURAL JUSTICE

The principles of natural justice should be followed in proceedings for discrimination or sexual harassment action. Natural justice refers to procedural fairness, ensuring a fair decision is reached by an objective decision-maker.

Natural justice requires two rules to be observed:

- (1) The hearing rule, which states that a person or body deciding a particular matter must ensure the affected person knows the case against them and has the opportunity to present their case before any decision is made.
- (2) The rule against bias, which states that a decision-maker (including an investigation officer) should have no personal interest in the matter to be decided, have no bias as to the outcome and act in good faith throughout the process. Care should also be exercised to exclude perceived bias from the process.

Managers/employees involved in the procedures must aim to strike a balance between the rights of the complainant and the right of the respondent to know the substance of allegations against them and to respond to them.

Where appropriate, allegations of inappropriate conduct should be resolved, where possible, by non-punitive, educational, advisory and conciliatory methods. The object is to alter behaviour and to change attitudes rather than to punish. It must be recognised that in some cases the behaviour may be unconscious or unintentionally offensive. There is every indication that the most frequent desire of a victim is not for punishment of the harasser, but for the harassment to stop.

EMPLOYEE ASSISTANCE PROGRAM

The ADCQ's Employee Assistance Program (EAP) is available on a confidential basis to all staff. The EAP may be a useful resource to provide:

- counselling for the complainant; and
- ongoing assistance and behaviour modification techniques for the alleged harasser.

It is not appropriate for the Employee Assistance Program to be involved in the resolution of complaints. The resolution of complaints remains management's responsibility.

FREEDOM OF INFORMATION

The *Freedom of Information Act 1992* is designed to extend, as far as possible, the right of individuals to have access to information held by government agencies and authorities, in particular, information relating to their personal affairs.

In relation to discrimination and harassment matters, an agency's policies and procedures should be freely available and widely publicised to all staff.

Records of individual complaints and associated grievance investigations may, however, be exempt from disclosure under various provisions of the *Freedom of Information Act 1992*.

Section 46 of the Act provides, for example, that matters communicated in confidence need not be released under freedom of information where the disclosure would prejudice the flow of further information. It is possible that this would ensure that ECO records would be exempt from the legislation, since a major purpose of the ECO is to encourage reporting of complaints and this could be jeopardised were ECO's likely to be asked to reveal their confidential information.

In relation to grievance investigations, the ADCQ will follow the procedures outlined in the Grievance Resolution Policy.

RELATED POLICIES

Related policies and procedures have been developed in the areas of:

- Code of Conduct.
- Official Misconduct.
- Equal Employment Opportunity.
- Discipline.
- Grievances.

FURTHER INFORMATION & ASSISTANCE

The ADCQ has established and appointed Equity Contact Officers who can provide confidential advice and assistance concerning discrimination or harassment.

Further information may be obtained and specific questions answered by the Deputy Commissioner or Manager, Support Services.

REVIEW

This policy will be reviewed 2 years from the date of approval by the Anti-Discrimination Commissioner.