



Balancing the Act

Issue 34 Summer 2013

Workers Comp changes not a licence to discriminate

The Queensland Parliament has passed amendments to *Workers Compensation and Rehabilitation Act 2003* and the changes are now in force. The changes have an impact on people applying for work and prospective employers in relation to pre-existing injuries and medical conditions, as well as claims histories.

Unless there is a valid exemption under the *Anti-Discrimination Act 1991*, it is unlawful to make recruitment decisions based on a person's impairment, perceived impairment or their previous or current injuries and medical conditions.

Relevant exemptions are:

- a worker not being able to perform the genuine occupational requirements for a position;
- an employer fixing reasonable terms for a person with restricted capacity;
- an employer being exposed to unjustifiable hardship in making adjustments or providing special services or facilities to enable a worker to perform the job;
- an employer making reasonable decisions to protect the health and safety of people at a place of work.

Generally it is unlawful for an employer or recruitment agent to ask for information on which unlawful discrimination might be based.

However, under the *Workers' Compensation and Rehabilitation Act 2003* a prospective employer can:

- give a written request to a job applicant to disclose any pre-existing injury or medical condition that might be aggravated by performing the duties of the job;
- ask a job applicant to consent to the prospective employer obtaining a copy of the applicant's claims history from the Workers' Compensation Regulator.

A pre-existing injury or medical condition is one that exists during the period of recruitment that the applicant suspects, or should suspect, would be aggravated by performing the duties of the job.

Where a valid request has been made, an applicant must disclose any relevant pre-existing injury or medical condition. In some circumstances, not disclosing a pre-existing injury or medical condition that would be aggravated by the duties of the job might constitute a false or misleading disclosure. This can result in the applicant not being entitled to compensation or damages for any event that aggravates the pre-existing injury or medical condition.

Tips for employers and recruitment agents

- Ensure job applicants are provided with comprehensive job descriptions which clearly identify duties and the environments in which the duties are to be performed. This will assist applicants to assess the likelihood of aggravating a pre-existing injury or medical condition.
- Only obtain an applicant's claims history during a recruitment process and with the consent of the person.
- Ensure any information obtained about applicants is used for the purpose of the recruitment process only.
- Where medical conditions or injuries are disclosed, consider whether any adjustments or changes can be made to enable the worker to do the job.

Tips for prospective employees:

- Carefully consider the contents of job descriptions and objectively assess the likelihood of aggravating any pre-existing injuries or medical conditions.
- Disclose any medical information that is relevant to the position being applied for and keep a copy of both the request and the disclosure for your records.

A person who has been unfairly excluded from employment on the basis of an injury or medical condition has a right to make a complaint of discrimination under the *Anti-Discrimination Act 1991*.

More details about claims histories, injuries and medical conditions existing during the recruitment process are available in fact sheet format on the ADCQ website: www.adcq.qld.gov.au/resources/brochures-and-guides/fact-sheets

Commissioner's Foreword



Anti-Discrimination Commissioner,
Kevin Cocks AM

People with disabilities are significantly over-represented as both victims of crime, and as suspects, defendants and offenders in the criminal justice system. This is not a problem which relates solely to Queensland, but is a common experience of people with disability in Australia and internationally.

The Australian Law Reform Commission (ALRC) is

holding a national inquiry into the legal barriers for people with disability. This inquiry will examine laws and legal frameworks within the Commonwealth jurisdiction that deny or diminish the equal recognition of people with disability as persons before the law and their ability to exercise legal capacity. It will consider what changes could be made to Commonwealth laws and legal frameworks to address these matters.

Research shows that Australians with disability experience disproportionate rates of physical violence and abuse. To compound this, when this violence occurs, often victims are disbelieved or discredited; sometimes due to their disability they are unable to convey their version of events. They are denied appropriate support and are often dependent upon their offender for material or financial assistance.

In a disturbing case in 2009 that did come before the courts, staff members of a Queensland independent living facility were found guilty of assaulting and depriving resident children and

adults with disability of their liberty. Common practices included tying children to the toilet, rubbing chilli in their mouths, beating them with fly swatters, removing prosthetic limbs, washing out residents' mouths with soap, hitting and humiliating residents and pulling their hair. Upon sentencing one of the former staff, the judge noted that a culture of abuse flourished in the facility and 'permeated from the top down'.

Behaviours towards an able-bodied person that would unquestionably be considered a violation of rights – enforced isolation, the administering of chemical restraint, or depriving a person of the ability to attend to their personal hygiene – are seen as almost inevitable or normal behaviours in association with a person with disability.

Women with disability are subjected to physical violence at higher rates, more frequently, for longer, by more perpetrators, and in more ways than their able-bodied peers. In addition, women with disability are less likely to report violence, to access support, to have their cases prosecuted, or to see any case they are involved in be successfully prosecuted. In short, they are denied justice.

Our legislative, policy and service environments fail women, men and children with disability because violation of their rights is considered unavoidable. The legal barriers that prevent people from obtaining justice when they have been subjected to criminal behaviour are seen as insurmountable. The ARLC enquiry is welcomed. Perhaps it can be the beginning of a conversation around Australia that leads to reforms within the justice system that ensure that the rights of people with disabilities are protected, and those people are able to obtain justice equal to all other citizens.

Creating healthy workplaces

The Workplace Health Promotion Network (WHPN) was formed in 2006 in Sydney with the aim of improving the health of the Australian working population. The network has now branched out to Queensland and is seeking new members.

QHPN (Queensland Health Promotion Network) supports organisations to create healthy workplaces. Coordinated by the Mental Health Association NSW, the network focusses on not only mental health issues, but all aspects of employee wellbeing.

Anyone who has responsibility for, or is interested in, promoting employee health and wellbeing within their own organisation is encouraged to become part of the network. Membership

includes quarterly network events, an annual forum, newsletters, online resources and consultation.

To learn more about WHPN visit: www.whpn.org

Good news stories

Do you have a good news story about human rights? Are you involved in a workplace or community initiative aimed at creating fair and inclusive spaces and communities? If so, ADCQ would love to hear from you. Send your stories to info@adcq.qld.gov.au.

Transgender project

As part of our increased focus on engagement with the community, the ADCQ is currently working on a project to support transgender persons and their employers as they navigate the difficult journey of gender transition in the context of an ongoing employment relationship.

Our activities to date have included

- gathering quality information and firsthand insights from members of the transgender communities,
- conducting research in transgender literature and from other human rights jurisdictions, and
- engaging in dialogue with local and national stakeholders and commentators.

The ADCQ has had the opportunity in the past to work consultatively with a large employer as they supported an employee through their gender transition in the workplace. Though they faced some very challenging conditions, an excellent outcome was achieved for all concerned. Informed by the insights gained during this consultation, and from the complaints of people whose transitions at work have not turned out so well, the ADCQ was given a voice at the recent Pride in Diversity conference in Sydney.



The ADCQ was invited to be part of a panel comprising individuals who have made, or who are currently making, their gender transition at work. Our role was to provide a statutory perspective to the lived experiences of the other panelists. This session, presented to an audience of 150 people mostly from the corporate world, was a much appreciated contribution to a very interesting conference.

Going forward, the project anticipates convening a series of tailored learning workshops with local stakeholders in early 2014. Following that, the ADCQ website will be updated with quality information to assist both workers and employers, including links to excellent work already done in other jurisdictions.

More about Pride in Diversity

Pride in Diversity is a not-for-profit Australian workplace program, designed specifically to assist employers with the inclusion and support of lesbian, gay, bisexual, transgender and intersex (LGBTI) employees. The member based program provides consulting services to businesses on issues affecting LGBTI employees as well as working with members to promote best practice in the inclusion and support of LGBTI employees.

Pride in Diversity was also responsible for introducing the Australian Workplace Equality Index (AWEI) in November 2010. The AWEI is the definitive national benchmarking tool for evaluating LGBTI workplace inclusion in Australia. Since the launch of this index and through the work of Pride in Diversity, there has been a significant increase in the number of organisations that include LGBTI as an element in their diversity and inclusion strategies, as well as a significant shift towards best practice in the area. While the AWEI focuses on LGBTI workplace inclusion, it has also been used by employers as a guide for other areas of diversity and inclusion.

To learn more about Pride in Diversity or become a member, visit www.prideindiversity.com.au



Engaging with Queenslanders

An important part of the ADCQ's work is promotion of understanding, acceptance and public discussion of human rights in Queensland. We achieve this by engaging with Queenslanders at community events, through working groups, online, at expos and through community conversations. Here are some highlights of ADCQ's community engagement efforts in 2013.





50 machinery operator jobs reserved for women annually

Downer EDI Mining, a large mining services contractor, applied to the Queensland Civil and Administrative Tribunal for an exemption to allow it to specifically recruit female operators at entry level each year to work at mining sites, in an endeavour to break stereotypes around gender and occupation

Downer has five long term open-cut projects in the Surat and Bowen Basins in Queensland. Traditionally the mining industry employs male workers, but skills shortages and the desire for a better gender balance in its workforce prompted Downer to take initiatives to increase female participation in the workforce. The total female workforce at Downer EDI Mining is 14%, but only 10% of waged employees are female workers. The company set a target of 25% female workforce participation by 2020.

To increase female participation in its workforce, each year Downer wants to recruit 10 new female machinery operators at entry level, to join the teams at each of the five open cut sites.

This action could potentially give rise to a complaint of sex discrimination by a man who felt himself qualified to apply for a machinery operator job. QCAT has the power to grant an exemption to Downer, but must consider a number of things first to determine if the exemption is necessary.

Could the specific exemption of an EEO measure for women provide a defence in these circumstances?

Downer has already utilised merit based selection to attract, promote and develop female employees. The Tribunal found that the target of a 25% female workforce by 2020, which is the reason for the quota proposal of recruiting 50 new female operators each year, was not necessarily of itself promoting equal opportunity for women, and would not necessarily provide protection against a complaint.

Consultation

Consultation with relevant stakeholders showed support for the proposal by unions, a resource industry employer group and the Queensland Resources Council.

Compelling reasons for granting the exemption

The Tribunal found the following compelling reasons for granting the exemption:

- The wages workforce at open-cut mines is predominantly male.
- Inclusiveness in a workforce is desirable.
- Gender diversity in a workforce is desirable.
- Greater innovation results from a gender diverse workforce.
- An improvement in the safety culture would be achieved by employing more women, as men are more susceptible to risk taking than women.
- The company has a corporate responsibility for better gender diversity.

Terms of the exemption

The Tribunal granted Downer EDI Mining an exemption to allow the advertisement for, recruitment and employment of women at five open-cut mine sites. The exemption was granted for five years from 18 October 2013.

<http://www.austlii.edu.au/au/cases/qld/QCAT/2013/532.html>

New cooling off period for complainants who withdraw their complaint

Complainants now have 28 days to change their mind after notifying the Anti-Discrimination Commission Queensland that they wish to withdraw their complaint.

It is not unusual for complainants to find the complaint process more challenging than they had expected. With little support and unable to obtain expert legal advice, some complainants may be tempted to withdraw their complaints in the heat of the moment without understanding the full consequences of that decision.

Recent amendments to section 170 of the *Anti-Discrimination Act 1991* ensure that complainants will now have an opportunity to be fully informed of the consequences of such a decision before their complaint is lapsed and cannot be resurrected.

Under the new system, when the ADCQ receives written notice from the complainant that they do not want to continue with their complaint, the ADCQ must take the following steps:

1. Give written notice to the complainant that unless, within 28 days of receipt of our notice to them, they give us written notice (a continuation notice) that they want to continue with their complaint, then their complaint lapses and they cannot make another complaint about the same issues.
2. Lapse the complaint after 28 days unless the complainant gives a continuation notice.
3. Notify the parties that the complaint has lapsed.

This amendment also has consequences for practitioners drafting settlement agreements in relation to complaints under the *Anti-Discrimination Act 1991*. Practitioners who include a provision that the complainant must withdraw the complaint need to reconsider this approach, as it arguably will kick off the mandatory steps for the cooling off period.

Unlike civil proceedings in other jurisdictions, the complaint itself is the proceeding in the ADCQ. Once the complaint is settled by a conciliation agreement which is then filed in the Queensland Civil and Administrative Tribunal, the proceeding is at an end and there is no separate process to be withdrawn. The conciliation agreement signed by all parties effectively ends the proceeding without the need for the complainant to withdraw.

For enquiries about this amendment and its effect please contact Anne Andersen (State Director, Complaint Management) at the Commission on 3021 9111.

Online training

In early 2014 the ADCQ will launch the first module in a series of online training products.

While not intended to be a replacement for face-to-face training, the online modules will provide an affordable and practical option for individuals and organisations of all sizes.

The first module, an introduction to anti-discrimination law in Queensland, will be ideal for staff induction and refresher training. Further modules will be added to the suite over time, allowing participants to select the topics that best suit their situation and area of need.

To register your interest and be notified when the training is available, please email your contact details to: training@adcq.qld.gov.au

Focus on the Far North Queensland team

The Far North Queensland office of the Commission is located in Cairns and provides training, education and complaint management services to the far northern areas of the state, including the Gulf and Cape communities.



Far North Queensland office staff with their families

There is a strong focus on community engagement activities in Far North Queensland region, with the team having a regular presence at citizenship ceremonies, cultural festivals, employment expos and human rights day events. The team regularly visits public, private and community organisations to provide information and training. They offer their expertise on discrimination and inclusion through participation in advisory groups, such as the Cairns Regional Council Access and Equity Committee and the Multicultural Advisory Committee. One of the main highlights for the Far North Queensland team this year was the Inclusive Games Day they hosted in September.

Public education calendar 2014

Date	Session	Time	Location
6 Feb	Introduction to the Anti-Discrimination Act for Community Organisations	9-11	Townsville
12 Feb	Understanding Discrimination Law	9-1	Brisbane
21 Feb	Introduction to the Anti-Discrimination Act for Managers	9-1	Brisbane
26 Feb	Contact Officer	9-4	Brisbane
27 Feb	Contact Officer – Refresher	9-1	Brisbane
5 Mar	Contact Officer	9-4	Townsville
6 Mar	Contact Officer – Refresher	9-1	Townsville
	Introduction to the Anti-Discrimination Act	2-4	Townsville
7 Mar	Introduction to the Anti-Discrimination Act for Managers	9-1	Townsville
11 Mar	Understanding Discrimination Law for Community Organisations	9-1	Brisbane
19 Mar	Contact Officer	9-4	Brisbane
2 Apr	Understanding Discrimination Law	9-1	Brisbane
	Managing Complaints	9-4	Cairns
3 Apr	Introduction to the Anti-Discrimination Act for Managers	9-1	Cairns
	Introduction to the Anti-Discrimination Act	3-5	Cairns
4 Apr	Contact Officer	9-4	Cairns
28 Apr	Contact Officer - Refresher	9-1	Cairns
15 May	Introduction to the Anti-Discrimination Act for Community Organisations	9-11	Townsville
16 May	Understanding Discrimination Law for Community Organisations	9-1	Brisbane
20 May	Contact Officer	9-4	Brisbane
21 May	Contact Officer – Refresher	9-1	Brisbane
18 Jun	Introduction to the Anti-Discrimination Act for Managers	9-1	Brisbane

To register for a public training session, visit our website at www.adcq.qld.gov.au or phone 1300 130 670.

Can't make it to a public session? ADCQ's training courses can be customised to meet your particular requirements and can be delivered at your workplace or venue. To learn more, email our education team at training@adcq.qld.gov.au

**DISCRIMINATION
LAW TRAINING
CAN YOU
AFFORD NOT TO?**

Don't put Christmas in the too hard basket

Some employers are choosing to forego the end of year staff party in an attempt to avoid liability for issues of discrimination or harassment. But with some thoughtful preparation, staff parties can be enjoyable, inclusive and incident free.

Although often referred to as Christmas parties, end of year staff gatherings tend to be about acknowledging a team's hard work and achievements throughout the year, rather than a religious celebration.

For this reason it is important to take into consideration factors that may prohibit some staff from attending the celebration, and find solutions where possible. While it is rarely possible to fully satisfy everyone's needs and preferences, all efforts should be made to plan an inclusive event that will promote maximum attendance and enjoyment.



The following tips will help in planning your end of year event:

- Ensure policies and codes of conduct are in place and that staff understand not only their contents, but that they extend to work parties as well.
- The event should have a designated finishing time, but staff should be reminded that any 'kick on' events still require appropriate behaviour.
- If you are encouraging staff to bring partners to the work party, ensure that the invitation extends to all partners including those in same sex or non-traditional relationships.
- Consider the location and accessibility of the party venue as well as any planned activities. Age, impairment, religious beliefs and family responsibilities can all restrict individuals' ability to access or participate in activities.

To avoid inadvertently excluding anyone from participating, enquire about special needs of attendees prior to planning the event.

- Encourage all staff to be involved in planning the event. This is likely to result in a more inclusive event, catering to a wide variety of needs and interests.
- Consider the timing of your staff party. Those with family or child care responsibilities may be more likely to attend if the function is held during business hours.
- Ensure that a variety of food and beverage options are available. If alcohol is being provided, non-alcoholic alternatives should also be offered. Senior managers should encourage staff to drink and act responsibly, modelling those behaviours themselves.
- If inappropriate behaviour is observed at the event, it needs to be addressed then and there. Post event issues must be dealt with, not trivialised.
- Through social media it is possible to post inappropriate comments, photos and videos online unobtrusively. Ramifications from inappropriate posts include damage to individuals' reputations, corporate brand damage and formal complaints of discrimination and sexual harassment in which the posts may be used as evidence. Staff should receive training about the risks of social media, backed up by a robust social media policy.
- Be aware of age. Staff under the age of 18 should not be permitted or encouraged to consume alcohol. Older employees' needs should also be considered when planning venues, activities and entertainment.
- Remember, it is okay not to attend. For a variety of reasons some staff may choose not to participate in the end of year staff party. These individuals need not be interrogated about their reasons for not attending, or treated less favourably as a result.



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