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Balancing the Act

Issue 29 Summer 2010

Don't be a Christmas turkey!

As the silly season fast approaches, most of us can probably reflect on Christmas parties past and the work colleague who inevitably has a few too many celebratory drinks. The colleague from the next cubicle somehow transforms into an uninhibited, extravert, unleashing themselves on unsuspecting co-workers.

But when does this behaviour turn from being an embarrassing topic of conversation in the office lunch room, to an inappropriate and illegal act of sexual harassment? Moreover, at what point is the employee no longer considered to be in the workplace and what powers do employers have to act in relation to employee behaviour at Christmas parties?

'Behaviour of workers at the staff Christmas party is conduct within the course of work', says Acting Commissioner Neroli Holmes. 'An employer can be vicariously liable for any harassment that occurs at the staff party, and they have the right to discipline an employee for engaging in sexually harassing behaviour at a work-related function'.

Under Queensland anti-discrimination legislation, sexual harassment is unwelcome conduct of a sexual nature, which a reasonable person expects would make the person feel offended, humiliated or intimidated. Intoxication or overzealous Christmas spirit are not an excuse and are not a defence to complaints of sexual harassment.

However, employers can protect themselves against vicarious liability by demonstrating they have taken reasonable steps to prevent the harassment from occurring.

'Standards of workplace behaviour should be clearly communicated to staff on a regular basis', advises Ms Holmes. 'At this time of year, it is particularly important to remind staff that these standards apply to end of year work functions as well'.

Some tips for avoiding inappropriate behaviour at the office Christmas party:

- Ensure policies are in place regarding workplace behaviour standards and that all staff are trained;
- Remind staff prior to work functions that the office policies extent to out-of-hours work-related events;
- Remind managers of their responsibilities to model appropriate behaviours and address improper employee conduct at the earliest opportunity;
- Ideally, have a manager responsible for overseeing the work function so that appropriate action can be taken when necessary, including closing the bar if behaviour seems to be escalating;
- Set guidelines for practices such as 'Secret Santa' gift exchange, to ensure gifts are not offensive or sexual in nature;
- Suggest a dress code for the function that will maintain a level of professionalism and appropriate behaviour;
- Make it clear to staff which events are 'work functions' and which are not;
- Make it clear when a work event ends;
- Deal with complaints promptly, and get advice depending on the seriousness of the incident;
- Ensure any entertainment provided could not be considered offensive or sexist.

Anti-discrimination laws, codes of conduct and other workplace policies exist to ensure everyone can enjoy themselves free from harassment. So don't be the Christmas turkey this year; enjoy yourself but not at the cost of someone else's enjoyment.

If you feel as though you have been subjected to sexual harassment, or if you'd like more information on preventing harassment in your workplace, the ADCQ can be contacted on 1300 130 670.

Commissioner's Foreword

Law reform needed

Acting Commissioner Neroli Holmes

Acting Commissioner Neroli Holmes has called upon the Queensland government to repeal a provision of the *Anti-Discrimination Act 1991* that exempts not-for-profit associations from the anti-discrimination provisions of the Act when providing goods and services.

'Recreation is an important part of the Australian lifestyle. We all enjoy our recreational activities but unfortunately, the law does not set a level playing field to allow all to participate. A recent Tribunal case has made it clear that in Queensland, sporting and other recreational clubs are free to discriminate when providing goods and services' Ms Holmes said.

The recent decision handed down by QCAT *(Yohan v Queensland Basketball)* has made it clear that sporting and other 'not-for-profit' associations are free to discriminate in the provision of goods and services on any of the 16 grounds covered by the Act.

'In 2010, it is appropriate that associations that are such an integral part of our community should be covered by the prohibition of discrimination on all grounds under the Act' Ms Holmes said.

In response to the call for law reform, the Attorney-General has requested further exploration of the issues by the Department of Justice and Attorney-General.

QCAT in making its decision did not examine or make any findings about whether or not the associations were involved in race discrimination or any other activity covered by the Act. The Anti-Discrimination Commission does not make any judgement or determination on whether or not the associations were involved in any discrimination or other activity covered by the Act

Video conferencing technology – spreading the message

The Queensland Anti-Discrimination Commission, as the leading human rights agency in Queensland has a role in providing education to Queenslanders about their rights and responsibilities under the *Anti-Discrimination Act 1991.*

A state-wide staff of only 35, and a finite budget makes delivering the anti-discrimination message to towns outside major population centres in Queensland exceedingly difficult.

In response to the challenge, staff from the Rockhampton office identified an opportunity to provide education sessions in a cost-effective manner to some outlying centres by utilising video conferencing facilities to bridge the distance gap.

The Rockhampton office is currently running a pilot on the process with education sessions having been delivered by video conference in August from Rockhampton to a community group in Hervey Bay.

Rockhampton public education December 2010

Date	Session	Cost per person	Time
01 December	Introduction to the Anti-Discrimination Act	$155	10:30am–12:30pm
03 December	Introduction to the Anti-Discrimination Act	$155	10:30am–12:30pm

'The feedback received from the participants was very positive and has encouraged us to schedule more sessions in November which we will be delivering by videoconference to Emerald, Bundaberg and again to Hervey Bay' commented Assistant Human Rights Officer Alison Cox of the Rockhampton office.

'Although the pilot videoconferencing sessions in August were successful we learned some valuable lessons from them and we have modified some processes which should lead to an enhanced experience for future sessions. We are very keen to test and evaluate these changes in our November sessions' said Ben Cooke, Regional Manager, CQ Region.

Special thanks to staff of the Rockhampton and Hervey Bay courthouses and the Courts Technology Group helpdesk for their assistance and co-operation during these initial trials.

Assistant Human Rights Officer, Alison Cox

Meet the Community Relations team

The ADCQ Community Relations team is responsible for the Commission's public affairs activities including event coordination, training and education, library services and media liaison. The team is located within the Brisbane office, but can coordinate activities across the state or provide appropriate referral to one of our regional offices in Rockhampton, Townsville and Cairns.

Our experienced and dedicated team consists of qualified trainers who can assist you and your organisation to determine your training needs. They can tailor an education session to suit your workplace and prepare packages of information and promotional materials for your colleagues, staff and clients.

The team harnesses expertise gained from a diversity of backgrounds including human rights, disability services, government, education, community services and multicultural affairs.

Within the Community Relations Team is the A&TSI Unit. This two member team specialises in Indigenous-specific anti-discrimination training and advice to A&TSI advocacy services and Indigenous complainants.

The ADCQ's library is open to the public by appointment, and assistance can be provided by our dedicated librarian to access a wide variety of books, journals, case law and electronic resources.

Our Community Relations team is dedicated to providing high quality training and information to individuals and organisations. They are available to:

- Conduct community visits to your organisation to provide information brochures and discuss briefly the services offered by the ADCQ and how we can assist your organisation;
- Deliver training to staff on-site at your location or at a public session held at ADCQ premises;
- Speak at your event/meeting/conference.

To contact the Community Relations team, phone 1300 130 670 or TTY 1300 130 680

Brisbane public education calendar - February to June 2011

Date	Session	Cost per person	Time
16 February	Introduction to the Anti-Discrimination Act	$155	9am–1pm
23 February	Tracking Your Rights (A&TSI training)	Free	10am–12pm
9 March	Introduction to the Anti-Discrimination Act for Community Organisations	Free	9am–1pm
23 March	The Contact Officer: Introductory	$155	8:30am–12:30pm
23 March	The Contact Officer: Advanced	$155	1pm–5pm
24 March	The Contact Officer: Refresher	$155	9am–1pm
06 April	Introduction to the Anti-Discrimination Act for Managers	$155	9am – 1pm
13 April	Introduction to the Anti-Discrimination Act for Community Organisations	Free	9am-1pm
12 May	Introduction to the Anti-Discrimination Act	$155	9am–1pm
19 May	Investigating Complaints under the Anti-Discrimination Act	$155	9am–1pm
25 May	Fairness – Everyone's Business (train the trainer session)	$310	9am-4pm
01 June	Recruitment and Selection	$155	9am–1pm
08 June	The Contact Officer: Introductory	$155	8:30am–12:30pm
08 June	The Contact Officer: Advanced	$155	1pm–5pm
09 June	Tracking Your Rights (A&TSI)	Free	10am–12pm
15 June	The Contact Officer: Refresher	$155	9am–1pm
23 June	Introduction to the Anti-Discrimination Act for Managers	$155	9am-1pm

Community Relations Team: Mackayla Jeffries, Caron Menashe, Jenny Crisci and Helen Bannerman (librarian)

A&TSI Unit: Liz Bond & Lea Yettica-Paulson

What happens when a complaint is made under the *Anti-Discrimination Act 1991?*

The Anti-Discrimination Commission Queensland (the Commission) receives 800 to 900 complaints each year. Have you ever wondered what happens to them?

The *Anti-Discrimination Act 1991* (the Act) says it is against the law in Queensland to discriminate against, sexually harass, publicly vilify or victimise people in certain circumstances. It can also be unlawful to ask unnecessary questions. However, not all discrimination is unlawful.

The Commission has no power to take action to address discrimination or other unlawful behaviour unless the person directly affected by the unfair treatment makes a written complaint. A bystander, no matter how interested in the event, cannot make a complaint about something they have witnessed.

A complaint to the Commission goes through up to 3 stages – assessment, conciliation and post-conference stages. These processes are designed to sort out which complaints are accepted as coming within the Commission's jurisdiction under the Act, to try to resolve those complaints that can be dealt with and to give the complainant the opportunity to refer an unresolved complaint to the Queensland Civil and Administrative Tribunal (QCAT) for hearing and determination.

When a complaint is first received, the Commission assesses the complaint to see if it comes within the jurisdiction set out in the Act. The person complaining, referred to as the complainant, must provide enough details of what happened to show that the complaint is one that, if true, might be a breach of the Act.

If it is not within jurisdiction, the Commission will normally give the complainant an opportunity to provide more details or will refer them to another agency which can better assist. A complaint which is outside the Commission's jurisdiction does not go further than stage 1 and no further action can be taken.

In most cases, the persons and organisations who were complained about will not know that a complaint has been made against them. Persons and organisations about which complaints are made are not required to respond to a complaint unless it is within the jurisdiction of the Commission under the Act.

The Commission does not have the power to decide whether a complaint has merit, only to decide if it is within our jurisdiction. If it is within the Commission's jurisdiction to deal with, the focus turns to the second stage of the process - conciliation. About 60% of all complaints are accepted as coming within the Commission's jurisdiction and proceed to the conciliation stage.

The first step the Commission takes for accepted complaints, is to notify all the persons and organisations against whom allegations have been made, referred to as the respondents. In this way, respondents have an opportunity to know the allegations made against them and to respond. A respondent can choose to respond in writing or to respond orally at the conciliation conference which is usually set 4 to 6 weeks ahead. There are some advantages to waiting to respond at the conciliation conference, as the conference is conducted in private and nothing said in conciliation can be reported to QCAT, even if the complaint is not resolved.

All parties generally participate in the conciliation conference and have an opportunity to talk about the complaint from their perspective. The conciliator's role is to assist both the complainant and respondents to understand their rights and responsibilities under the Act and how the law may apply to the particular complaint. The conciliator will also decide who attends and who speaks at the conference. Support people and interpreters are generally allowed to attend, but advocates will only be allowed to attend if it is fair and will assist to resolve the complaint.

The overwhelming concern of the conciliator is to ensure the fairness of the process for all parties. The conciliator doesn't take sides, doesn't decide whether there has been a breach of the Act and doesn't decide what the parties should agree upon to settle the complaint. The conciliator does explain the law and processes, explore what may have occurred, point out strengths and weaknesses in each party's case, suggest options for settlement and assist the parties to understand each other's points of view.

Conciliation can be through a face to face meeting, shuttle negotiations or teleconference, depending on what is practical and fair. Parties can help the conciliator by telling them if they want the conference conducted in a particular way for any reason and should raise any concerns about the way the conference is being run in a private session with the conciliator during the conference.

With assistance from the Commission's conciliators, about 60% of accepted complaints are resolved without the need to go to QCAT.

If a complaint is not resolved at the conciliation conference it will move into the third and final stage of the Commission's process – the post-conference stage. Post-conference, the conciliator can continue to assist the parties to resolve their complaint if there is some real prospect of settlement. The conciliator will also review the complaint and give the complainant the opportunity to refer the complaint to QCAT if it remains unresolved. About 20% of complaints accepted as within jurisdiction, are referred to QCAT.

Once the complaint is referred to QCAT, the Commission's role is concluded and QCAT take on the more formal process of hearing and deciding the complaint. Parties are usually given another opportunity to conciliate their complaint at QCAT, and most complaints are finalised without the need for a formal hearing and determination.

Throughout the process the complainant retains the right to decide how far to take their complaint once it is accepted as within the Commission's jurisdiction to deal with. Through conciliation, all the parties retain control over the outcome of complaint.

The Commission's processes are a great opportunity to resolve complaints informally and quickly without a need for a hearing. The complaint resolution services of the Commission are free and private and are open to everyone who has an arguable complaint under the Act.

Human Rights Day celebration – 'Living Books'

The Annual 'Living Books' event will be held again in Cairns this December. ADCQ's Far North Queensland office will host the event, which has been a continuing success for the past three years.

'Living Books' is a celebration of human rights and what they mean in our community. Local people who have faced discrimination and overcome adversity will tell their inspirational real life stories, as if living books. The event will cover issues of human rights activism, asylum, race and disability and will open your eyes to the lives of those who may well live in your street.

Guest speaker at this year's event is international human rights advocate, Dr Martin Panter. The full day event will also feature live entertainment and photographic displays depicting the lives of local community members living their dreams and aspirations.

'Living Books' will be held at the Tanks Arts Centre, Cairns on Sunday 05 December from 10am – 3pm. Entry is free; the venue is air-conditioned and deaf interpreters are provided.

A bus carries the Living Books message in Cairns

It's ok to complain

www.complaints.qld.gov.au
www.adcq.qld.gov.au

Retirement of Heloise Misso

In July this year Commission staff, former staff and guests farewelled Heloise Misso.

Heloise retired after twenty-two years service with the Anti-Discrimination Commission Queensland, its predecessor, and the Human Rights and Equal Opportunity Commission. During this time Heloise was the first contact point for many community organisations, government departments and agencies.

She served as executive assistant to each anti-discrimination commissioner since the inception of the Act, many of whom attended the farewell morning tea.

A tribute was received from Her Excellency the Honourable Ms Quentin Bryce AC, Governor-General of the Commonwealth of Australia. Heloise worked with Ms Bryce, who held the position of Sex Discrimination Commissioner with the Human Rights and Equal Opportunity Commission from 1988 until 1993.

John Briton, former Anti-Discrimination Commissioner and currently Legal Services Commissioner attended as did former Commissioner Susan Booth, now Senior Member at QCAT.

Messages were also received from Helen Twohill, acting Anti-Discrimination Commissioner when the Act was proclaimed in 1991, and Karen Walters the first Commissioner appointed following the transfer of jurisdiction to the state.

The function was a happy affair with much reminiscing and Heloise looking forward to retirement and spending more time with her family.

The Commission wishes to acknowledge the work, dedication and humanity of Heloise.

Though she has retired from the workforce, she will continue to be a great advocate for human rights.

Former ADCQ staff member, Heloise Misso

QCAT decisions

The Queensland Civil and Administrative Tribunal replaced the Queensland Anti-Discrimination Tribunal on 01 December 2009. The following are summaries of recent outcomes from the Tribunal.

YB v State of Queensland [2010] QCAT 395, 16 August 2010

The applicant YB is a year 12 high school student and complained that he was subject to unlawful discrimination in the provision of educational services to him at the high school which he attends.

YB's mother made the complaint to the ADCQ as agent for YB when he was in year 10. During the course of the QCAT hearing, YB turned 18 and affirmed the complaint made on his behalf and took over the conduct of the complaint at the Tribunal.

YB claimed to have a range of impairments including a phonological processing disorder, scotopic sensitivity, dyslexia, mild dysgraphia and executive dysfunction. He said these conditions caused him to learn more slowly than students without the conditions.

Specifically, he could not get through required reading on time; had difficulty in organising, understanding and breaking down tasks; had difficulty reading documents in small font size printed on white paper and was unable to complete assignments on time or keep up with work.

YB relied on a number of reports about his conditions, and QCAT analysed the expert and lay evidence, and determined that YB has a phonological disorder and some weakness in executive functioning which results in YB learning more slowly than a person without the condition, and constitutes an impairment under the Act. The Tribunal specifically rejected the assertion that YB has the conditions of scotopic sensitivity, dyslexia or mild dysgraphia.

It was argued that the school imposed terms that, 'in order for a student to obtain the educational benefits offered by the respondent at M State High School and to prepare fully for assessment in Years 9 and 10, the student was required to read and absorb course materials printed in 8 or 10 point font, read and absorb course materials printed on white paper, read and absorb examination papers printed in 8 or 10 point font, undertake assessment, including examination assessment, within the strict universal timeframes set down by M State High School and complete their studies without any assistance from learning support teachers.'

The Tribunal found that the school did not impose the terms as argued. It found that the school:

- required YB's teachers to provide him with course, assessment and examination materials in 14 point font, and later to be printed on coloured paper (It noted that there were isolated occasions where this requirement may not have been followed.)
- required the heads of departments and YB's teachers to permit him to have extensions of time in which to complete assessment items including examinations
- provided YB with assistance from learning support teachers and with additional learning support from the deputy principal
- provided other accommodations to YB including a laptop computer and uploading course materials to it.

The complaint was not made out and was dismissed.

With regard to costs, Member Endicott said: 'In view of the fact that YB was a minor for all but the hearing stage of the claim and his claim was brought and maintained by his agent, JB, until the start of the hearing, the Tribunal is unlikely to be persuaded that in the interests of justice an award of costs should be made.'

Yohan representing PAWES (Providing Awareness with Education and Sport) v Queensland Basketball Incorporated (No. 2) [2010] QCAT 471, 24 September 2010

Mr Yohan is a coach and coordinator of basketball teams made up of players who are mostly African refugees. He claimed that his basketball teams were excluded from Brisbane competitions. Brisbane Basketball Incorporated runs the competitions, and is affiliated with Queensland Basketball Incorporated. The complaint alleged discrimination on the ground of race, association with a person of a particular race, racial vilification and victimisation.

Both the applicant and the respondents sought the determination of the preliminary issue of whether the respondents were exempt from the prohibition of discrimination in the provision of goods or services in section 46. A respondent would be exempt if it is an association that:

> (a) is established for social, literary, cultural, political, sporting, athletic, recreational, community service or any other similar lawful purposes; and
>
> (b) does not carry out its purposes for the purpose of making a profit.

Member Roney had to decide whether the respondents 'actually carried out the purposes for which they are established, namely the promotion of basketball, for the purpose of making a profit.

The constitutions of the entities were examined and it was determined that they were established for sporting, athletic or recreational purposes.

In regard to the 'not-for-profit' element, Member Roney found that simply making a profit or surplus over expenses does not mean that the respondents are acting for the purpose of making a profit.

He said: 'There is no evidence that to the extent that they derived income or revenue from the activities they carried on, that they did so for the purpose of making a profit, rather than to derive that revenue to apply it to the sporting purposes for which they were established.'

The Member found that the respondents fell within the exemption from discrimination in the provision of goods or services in section 46(2).

The Member also ruled that the respondents are not 'clubs' within the meaning of the Act and therefore not subject to the prohibition of discrimination by clubs in club membership and affairs (section 95). This definition requires that the club 'carries out its purpose for the purpose of making a profit.'

Irvine and Porter v Mermaids Café and Bar Pty Ltd (No 2) [2010] QCAT 482, 27 September 2010

In this matter Ms Irvine brought complaints of sexual harassment and discrimination on the ground of pregnancy in the area of work. Her partner, Mr Porter, brought complaints of discrimination on the ground of association with someone with an attribute (namely pregnancy) and victimisation.

Ms Irvine worked as the dining room manager at Mermaids restaurant and the second respondent, Mr Ingall, was the sole director. Mr Porter was the executive head chef.

Ms Irvine was employed under a section 457 visa sponsorship which allowed her to remain in Australia while under the sponsorship and in the employment of the sponsoring business. The Tribunal noted that this placed her in a 'somewhat vulnerable' position.

The harassment complaint involved text messages and email invitations to dinner, movies and other social events. On a couple of occasions when Ms Irvine accompanied Mr Ingall to sporting events, she said that he touched her in a sexual way, which she felt was inappropriate. He also took her to a park away from work and expressed his feelings towards her – namely that he was physically attracted to her.

She also received two emails with attachments of nude people. The Tribunal noted that Ms Irvine was in the practice of sending risqué emails herself, and that there was a practice generally of sending risqué emails at work. This part of the sexual harassment complaint failed.

The Tribunal found that there was an incident of unwelcome touching following a sporting event, and together with the fact that Mr Ingall had expressed to her that he had feelings for her, it was sufficient to amount to sexual harassment. However, the Tribunal found that it was an isolated incident and did not appear to cause Ms Irvine any particular upset or concern, and she was able to continue working with Mr Ingall. The Tribunal awarded compensation of $2,650 including interest for hurt and humiliation associated with the sexual harassment.

Ms Irvine became pregnant with Mr Porter's child and gave notice that she would be taking unpaid maternity leave. The restaurant's financial advisers mistakenly believed that a section 457 sponsored employee was entitled to be paid her full wage during any period of maternity leave. Two weeks after giving notice of her intention to take maternity leave, Ms Irvine received advice of the termination of her section 457 visa, and that her employment was also to be terminated, due to the economic downturn.

Ms Irvine and Mr Porter attended a meeting the following day with Mr Ingall, during which Ms Irvine became upset. As they were leaving Mr Porter audibly told one of the other staff members that 'he has just sacked a pregnant woman.' Mr Porter came back later to pick up the termination letter and made another comment that this would 'bring the house down'.

The Tribunal found that the decision to terminate the visa sponsorship and Ms Irvine's employment was made in the erroneous belief that Mermaids would have to pay her full wages while on maternity leave, and that this was financially unviable. The Tribunal considered the evidence of distress as a result of the termination on Ms Irvine, at a time when her status as a resident of Australia was uncertain and leading up to the birth of a child, and awarded compensation of $15,900 for emotional distress and interest.

Economic loss from the time of termination of employment to the date when Ms Irvine would have taken unpaid leave was assessed at $37,147.60 including interest. The total award for pregnancy discrimination was $53,047.60.

Mr Porter's employment was terminated two days after Ms Irvine. He claimed discrimination on the ground of association with someone with the attribute of pregnancy and victimisation.

The Tribunal found that the real basis for the decision to terminate Mr Porter was not any association with Ms Irvine, but probably a serious over-reaction to or misunderstanding of the comments Mr Porter made to some staff. Accordingly, no discrimination or victimisation was found to have taken place in relation to Mr Porter.

The applicants and the respondents were all legally represented at the hearing, and the matter is to be re-listed for the parties to make submissions as to costs

Celebrate Human Rights Day

Living Books

at

Tanks Arts Centre, Cairns

Sunday 5 December 2010

10am to 3pm

A fair go for Schoolies

School's out and for a lot of year 12 students that means it's time to enjoy some short-lived freedom before the reality of tertiary study, employment or other life challenges kick in. What better way to wind down from 12 hard years of schooling than to hit the Coast for Schoolies Week? But for some students, this celebration won't eventuate because their attempts to secure accommodation for the week have been met with refusals, excuses and blatant discrimination.

Some service providers continue to use the negative stereotypes of young people as a basis for age discrimination. Acting Commissioner Neroli Holmes has reminded accommodation, tourism and service providers that 'young people have as much right as anyone else to rent holiday accommodation'.

Some examples of age related discrimination during Schoolies Week include:

- Accommodation providers refusing to rent a property to people because of their age;
- Increasing bonds or accommodation rates for Schoolies;
- Imposing rules or restrictions on accommodation and/or services that only apply to Schoolies;
- Stores or venues refusing entry to young people, except in the instance of under age patrons at licensed premises.

Property owners can choose not to rent their property at certain times of the year or to limit the number of tenants they have in their premises; however they cannot refuse to rent to particular groups based on stereotypes or assumptions about how they will conduct themselves. Accommodation providers have businesses to run and they should certainly exercise their right to address any behaviour that may put their business or other residents at risk. But these practices should represent equality for all, and not disadvantage young people.

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