



# **DISCRIMINATION**

IN ACCOMMODATION

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## IN ACCOMMODATION

**The Queensland Anti-Discrimination Act 1991 (the Act) promotes fair treatment and equality of opportunity by protecting everyone from unfair discrimination, sexual harassment and vilification in accommodation. This booklet has been designed to assist those involved in the accommodation and property sector to understand Queensland anti-discrimination law and to answer the most commonly asked questions.**

### WHAT IS DISCRIMINATION?

Discrimination occurs when someone is treated unfairly or badly in certain respects. Not all discrimination is against the law, even if it is unfair. In Queensland the Anti-Discrimination Act determines what kind of discrimination is unlawful by identifying particular attributes and areas (see below).

Discrimination happens because people have stereotypical or prejudiced ideas or beliefs about other people because they happen to belong to a particular group of people or because they have certain personal characteristics or attributes. This kind of *direct discrimination* is often the result of failing to treat each person as an individual regardless of their sex, age, race etc.

Discrimination can also happen in a more indirect way. In some cases treating everybody the same can be unfair because it disadvantages a whole group of people. For example, requiring all new tenants to have been in the workforce for at least five years would disadvantage young people who

may have little chance of complying. Unless such a rule is necessary or reasonable in all the relevant circumstances it will be *indirect discrimination* and against the law. Indirect discrimination is not usually intentional but is often the result of failing to think about the impact of rules and requirements on different people.

**The Anti-Discrimination Act 1991 says that it is against the law to discriminate against people because of their:**

- family responsibilities
- sexuality
- gender identity
- sex (whether they are female or male)
- relationship or parental status (whether they are married, single, widowed, divorced, separated or living with someone as if they were married (*de facto*, including same sex *de facto*), and whether they have children or not)
- race
- age (whether they are young or old)
- impairment (whether they have or have had a physical, intellectual, psychiatric or mental disability, injury or illness, including whether they are HIV+, or use a guide dog, wheelchair or some other remedial device)
- religious belief or activity
- political belief or activity
- trade union activity
- lawful sexual activity (a lawfully employed sex worker)
- pregnancy or breastfeeding
- association with or relation to someone who has any of these listed attributes or personal characteristics

**For more information about different kinds of discrimination refer to the Commission's series of specific discrimination information brochures.**

Margaret, a single parent with two young children, applied to rent a unit. The real estate agent told her she would have to pay extra rent because of her children. This is direct discrimination on the basis of parental status and is unlawful.

## CASE STUDIES

Pat lived in a boarding house that provided shared bathroom facilities for all residents. The lock on the door to the bathroom was broken and Pat complained to the manager of being stared at and sexually propositioned by other residents when using the facilities. After Pat complained she saw the manager pinning up sexually explicit materials in the bathroom and adding insulting comments about Pat's appearance to them. Pat could complain about sexual harassment.

### WHAT IS SEXUAL HARASSMENT?

Sexual harassment is *any* form of unwanted, unwelcome or uninvited sexual behaviour which is or might be offensive, humiliating or intimidating. It can include an unwelcome sexual advance, unwelcome request for sexual favours or other unwelcome conduct of a sexual nature. Where sexual interaction is invited, mutual, consensual or reciprocated it is not sexual harassment.

The law further defines sexual harassment as unwelcome sexual conduct that a 'reasonable person' might anticipate would offend, humiliate or intimidate. When applying the 'reasonable person' test to sexual harassment, the particular circumstances of the case will be taken into account. These might include the age, race or impairment etc of the person being harassed, and the relationship between the people involved (eg. manager and trainee).

***Sexual harassment can take various forms and may be obvious or indirect, physical or verbal. It also includes behaviour and practices which create a sexually hostile or intimidating environment. Specifically, examples of sexual harassment include:***

- *unwelcome physical touching*
- *sexual or suggestive comments, jokes or innuendo*
- *unwelcome requests for sex*
- *intrusive questions about a person's private life*
- *the display of sexually explicit material such as posters or pictures*
- *unwanted invitations*
- *staring or leering*
- *sex based insults or taunts*
- *offensive communications, including telephone calls, letters, faxes, E-mail and computer screen savers*

Sexual harassment does not have to be repeated or continuous to be against the law. Some actions

or remarks are so offensive that they constitute sexual harassment in themselves, even if they are not repeated. Other single incidents, such as an unwanted invitation or compliment, may not be harassment if they are not repeated. Some forms of sexual harassment, such as assault, physical molestation, stalking, sexual assault and indecent exposure, are also criminal offences. More detailed information about sexual harassment can be found in the Commission's sexual harassment information brochure.

### WHAT IS VILIFICATION?

Vilification (inciting hatred, serious contempt or severe ridicule of others because of their race, religion, gender identity or sexuality) can take many forms, including hate-speech, graffiti, websites and the distribution of propaganda or other forms of offensive literature. Vilification is generally behaviour that happens in a public place and incites others to hate, to have serious contempt for or to severely ridicule individuals or groups because of their race or religion.

It is also a criminal offence to incite hatred of others by threatening physical harm or inciting others to threaten physical harm towards another or their property.

### WHEN IS DISCRIMINATION UNLAWFUL?

***Not all discrimination is against the law. The legislation is very specific. The Act says that it is against the law to discriminate against people in particular circumstances, including when they:***

- *apply for a job or try to get into a course*
- *work, whether it be full-time, part-time, casual, temporary or voluntary*

## CASE STUDIES

In a case that was heard in the Anti-Discrimination Tribunal, an Aboriginal woman was refused rental accommodation because of her race (*Lynton v Maugeri* (1995) EOC 92-754). When the woman arrived to inspect a house she was told it had already been rented to another person. A relative of the woman phoned the lessor and was told the house was still available for rent. The person asked why her relative had earlier been told the house had already been rented out. The daughter of the owners told them "My parent's wouldn't rent the house to black people". The Tribunal awarded Ms Lynton compensation of \$18,000.

- attend schools, colleges, universities or other educational institutions
- buy things in shops, hotels, cafes, restaurants, cinemas etc
- seek or use services from legal, medical and other professionals, businesses and tradespeople
- **rent a house, flat or apartment, hotel or motel room, caravan, office or shop**
- **purchase land or property**
- apply for credit or a loan
- join, visit or use the services of a profit-making club or similar organisation
- deal with banks, superannuation or insurance companies
- seek or use the services of state or local governments
- emergency accommodation and housing services (eg. domestic violence refuges, homeless shelters)
- owners or operators of boarding houses and hostels
- business premises
- building and construction sites
- company housing (eg. mining communities)

The legislation is very broad and it can be widely applied to many aspects of accommodation. This means that any **less favourable treatment** of a person in connection with accommodation matters such as tenancy, property sales, eligibility criteria, references, maintenance arrangements, sub-letting, the imposition of conditions, eviction and the charging of rent, bonds and purchase prices may be against the law.

Particular exemptions also mean that not all forms of discrimination are against the law in all circumstances. These exemptions are further explained later.

The Act also confers certain rights and responsibilities on all accommodation workers, agencies, tenants and other users of accommodation services and facilities.

### HOW DOES ANTI-DISCRIMINATION LAW AFFECT ACCOMMODATION?

**The Anti-Discrimination Act makes discrimination, sexual harassment and vilification in accommodation against the law. The law applies across the sector, including:**

- tenants
- lessors and property owners
- real estate and property agents
- hotel, motel and backpacker hostel operators
- providers of mobile homes (eg. caravans and caravan sites, tent sites, houseboats)
- suppliers of university accommodation (eg. halls of residence)

### **What are my rights and responsibilities as an accommodation provider?**

All staff have the right to work in an environment free from unlawful discrimination, sexual harassment and vilification. The legislation also establishes a legal responsibility to provide property and accommodation services and facilities without these types of behaviours.

Real estate and property agents have the right to select the most appropriate tenant or purchaser provided that the decision is not based on unlawful discrimination. Tenants, potential tenants and property buyers should be assessed on their individual merits rather than on the basis of bias or prejudice. Unfair assumptions about people because of their age, sex, race, parental status etc can result in unlawful discrimination. Real estate

agents and property owners therefore have the right to select a tenant primarily on the basis of the tenant's ability to fulfil basic tenancy responsibilities such as paying the rent on time and maintaining the premises.

Real estate and property agents need to be aware that if they act on unlawful discriminatory instructions given by a property owner, eg. directions to refuse to rent a flat to gay men or lesbians, both the agent and the owner may be legally liable for such discrimination.

Real estate agents and property agents also have a responsibility to take reasonable steps to prevent or minimise unlawful discrimination, sexual harassment and vilification in the accommodation and property sales sector. The implementation of specific policies can help to minimise the scope and impact of discriminatory attitudes and practices in accommodation and to reduce legal liability.

As an employer, accommodation providers are entitled to formally counsel any employee who might be engaging in discriminatory conduct while at work.

### ***What are my rights and responsibilities as an accommodation user?***

Everyone has the right to be free from discrimination, sexual harassment and vilification in accommodation services and facilities. If a person believes that they have been discriminated against, sexually harassed or subjected to vilification in relation to accommodation they have the right to make a complaint to the Commission and seek a solution through conciliation.

Tenants are entitled to rent any property provided they can pay the rent and maintain the premises, or to sublet the premises on the same terms and conditions as apply to all other tenants.

## **WHAT ARE SOME COMMON QUESTIONS ABOUT ANTI-DISCRIMINATION LAW AND RENTAL ACCOMMODATION?**

Anti-discrimination law makes it unlawful to discriminate in the rental property market. This means that it is against the law to treat people

differently because of personal characteristics or attributes, eg. sex, race etc. Answers to some of the most common questions about rental tenancy and anti-discrimination law are outlined below.

### ***Can tenants be evicted?***

Yes. Real estate and property agents and lessors have the right to give notice of alleged breaches of a tenancy agreement and terminate a tenancy agreement if necessary. Tenants cannot be evicted or otherwise penalised for discriminatory reasons, eg. because a couple become parents during the term of the tenancy.

### ***What about accommodation advertisements?***

The legislation imposes a legal responsibility on real estate and property agents and lessors to ensure that accommodation advertisements do not appear to be discriminatory. The easiest way to do this is to encourage all tenants to apply by describing the property rather than the tenant wanted, eg. "one bedroom flat" instead of "suit couple or bachelor", and "four bedroom house" instead of "suit family". However, advertisements can specify that references are required and that pets are not allowed (guide dogs are not pets). These conditions do not apply to advertisements for shared private accommodation.

### ***Can references be asked for?***

Yes. References can be requested provided all prospective tenants are asked for them and the request does not result in unfair indirect discrimination, eg. newly arrived migrants, young people and first-time tenants might have difficulty supplying accommodation references but could provide a personal reference instead.

### ***What personal details can be asked for?***

Asking for proof of a tenant's identity and ability to pay the rent and maintain the property is permitted by the legislation. However, real estate agents, property agents and other providers of accommodation services and facilities also have a legal responsibility to avoid asking for unnecessary discriminatory information in tenancy application forms and tenant interviews. Generally it will be against the law to ask questions on application forms and in interviews about a person's marital status, sex, age, number of children (if any), plans to have children, race or nationality, sexual preference,

health condition or medical history, religious or political beliefs. To avoid complaints of discrimination it is desirable to inform tenants why they have not been successful in their application for accommodation.

### ***How much can be charged for bonds and rent?***

Charging higher bonds or rent because of discrimination is against the law. For example, tenants cannot be charged higher rent just because they have children, or be required to pay a larger bond because they are young. Unless there are adequate reasons for differentiation, such as higher rent for short-term holiday accommodation, it would be unlawful discrimination.

### ***Can special tenancy terms and conditions be imposed?***

Yes. Entering the premises as allowed by the tenancy agreement or tenancy laws is permissible, as is the application of special terms and conditions for all tenants, eg. banning pets (guide dogs are not pets). In general, unless good reasons can be argued, the same rules and conditions should be applied to all tenants in order to avoid unlawful discrimination. For example, carrying out more frequent inspections just because the tenants are young, or are Aboriginal, would be unlawful discrimination.

### ***What about tenants with impairments?***

A person who has an impairment has the right to enter into a tenancy agreement without being discriminated against because of their impairment. Specifically, a tenant with an impairment has the right to make reasonable alterations to the property in order to meet their needs. This can only be done if the alterations do not affect the structure of the premises or other premises, the tenant agrees to remove any alterations when they move out, and the tenant pays for the installation and removal of the alterations. Property agents and owners have the right to demand that any alterations made to the premises be removed at the expense of the tenant when they leave.

Tenants who have a guide dog because of their visual, hearing or mobility impairment cannot be asked to keep the dog elsewhere or to pay extra if the dog lives at the accommodation. It is also an offence punishable by a fine for someone to separate a person from their guide dog. However,

if the dog causes damage to the premises the tenant will still be liable.

## **ARE THERE ANY EXEMPTIONS?**

Particular *exemptions* mean that not all forms of discrimination are against the law in all circumstances. The Act provides a range of exemptions that can be argued.

It is also possible to apply to the Anti-Discrimination Tribunal for the granting of an exemption. However, only certain exemptions apply in relation to accommodation.

Exemptions recognise that in some circumstances discrimination can be acceptable provided it occurs for specific reasons or purposes. Whether a particular exemption will apply will usually be a question of fact which only the Tribunal can decide. However, any possible exemption should be raised with the Commission as this may assist in conciliating a resolution of a complaint.

### ***Welfare and equal opportunity measures***

'Special measures' provisions are designed to benefit or promote equal opportunity for a member of a disadvantaged group or a person with particular needs. This can include the provision of special accommodation for women experiencing domestic violence, or to frail, older people or young people.

### ***Shared accommodation***

People can choose whoever they like to share their private homes provided that there are no more than three tenants besides themselves and their family. Anti-discrimination laws apply if there are more than three tenants involved. This means that a tenant wishing to have another tenant share with them may legally specify preference for people of a particular sex, age, religion, parental status etc.

### ***Charities***

Charitable organisations may discriminate on the basis of sex, relationship status or age in the provision of accommodation in order to fulfil their charitable purposes.

## CASE STUDIES

Jim and Linda rented a permanent caravan. When Linda's pregnancy became noticeable the caravan park manager gave them an eviction notice, saying that he didn't "want any more kids running around the park". Jim and Linda complained to the Commission about discrimination on the basis of pregnancy. The caravan park manager was personally liable for the discrimination and agreed to apologise and pay compensation. The company that managed the caravan park was also vicariously liable for the discrimination since it had not taken any reasonable steps to minimise or prevent discrimination on the basis of pregnancy. As part of the settlement the park manager agreed to implement appropriate anti-discrimination guidelines for the caravan park and to provide training to all staff.

### ***Educational Institutions***

Sex, religion and impairment specific educational institutions can lawfully provide accommodation for students of the particular sex or religion or for those with a specific impairment or impairments in general.

### ***Supplying special services or facilities***

An exemption may apply where supplying special services or facilities for people with an impairment imposes an unjustifiable hardship on accommodation providers. Factors that are relevant include the cost of supplying the special service or facility, the number of people to benefit, the financial circumstances of the person required to provide them, and any human and other costs that may disadvantage others.

### ***Religious organisations***

Accommodation services run by religious organisations may discriminate when it is necessary to do so in order to comply with religious doctrine and to avoid offending religious sensitivities.

### ***Live in positions***

Live-in jobs where sleeping accommodation is provided for one sex only and the supply of separate sleeping accommodation for each sex would impose unjustifiable hardship on the employer, is permitted. Different standards of accommodation may also be provided for different workers where it is not reasonable to expect the same standard for all workers and where the standard can be determined according to the size of the worker's family or household, the kind of work performed, or the nature of the position held by the worker.

## **WHO IS LEGALLY LIABLE?**

Anyone who unfairly discriminates against another person, sexually harasses or vilifies them can be complained about and may be liable under the law. The law also allows for accommodation providers and their employees or agents to be liable for discrimination, sexual harassment and vilification that occurs in accommodation.

### ***What is vicarious liability?***

Accommodation providers and real estate and property agents can be liable for discrimination, harassment, vilification done by their agents or employees because they are obliged by law to protect staff and clients from such behaviour. Complaints can therefore be made against individuals, employers and organisations. Previous cases show employees have been found jointly liable at law with the organisation, including the payment of compensation. In practice, *vicarious liability* means that a complaint against an individual may also be sent to their employer.

An organisation may be liable if a person could be seen as representing the organisation or as acting on behalf of the organisation. Regardless of whether they are on contract or an employee, a person might be considered to be an *agent* of the organisation. The easiest way to work out if someone can be considered an agent is to think about whether others might see a connection or relationship between the two.

Vicarious liability in the accommodation sector also applies to relationships between employees and employers of accommodation services as well as to property owners and their agents. For example, a real estate agent may be liable for the

discriminatory actions of a staff member, and a property owner may be liable for the discriminatory actions of a real estate agent.

An employer or organisation cannot avoid vicarious liability simply because they were not aware of the unlawful discrimination, sexual harassment or acts of vilification done by their employees or agents. A real estate agent also cannot avoid liability if they carry out the discriminatory instructions of a property owner.

### **WHAT CAN I DO ABOUT LIABILITY?**

Risk management needs to take the requirements of anti-discrimination law into account. Real estate agents and other property management businesses may argue a defence to vicarious liability if they can show that *reasonable steps* were taken to prevent discrimination, sexual harassment or vilification. Although this will vary, generally reasonable steps should include:

- *development of anti-discrimination and sexual harassment policies*
- *education and training of staff (especially managers and supervisors)*
- *establishment of appropriate grievance and complaints procedures*
- *removal of any discriminatory or offensive materials, rules and practices*

Recent rulings and case outcomes in Queensland, other states and at the federal level have shown that an employer's or organisation's obligation does not just involve the introduction of

appropriate policies, but also entails ensuring that such policies are positively and actively implemented.

### **WHAT IS VICTIMISATION?**

Tenants, agents, property owners and agencies need to be aware that the Act also prohibits *victimisation*. Victimisation happens when a person who has either made a complaint or intends to make a complaint to the Commission, is threatened or harassed by others involved in the complaint. This is a serious matter and penalties can be imposed on those responsible for victimisation.

### **WHAT ELSE DO I NEED TO KNOW?**

The Commission can provide more detailed information about the legislation, the complaint process, exemptions, liability, victimisation and rights and responsibilities in relation to unlawful discrimination, sexual harassment and vilification. A number of specific brochures, library resources and education and training services are also available. Please contact the Commission for information, assistance and advice.

Fatima and Ali were told by a real estate agent that a rental property was no longer available but it was advertised again the next day. When they contacted the agent again they were told the same thing. The real estate agent also told Fatima and Ali that there was nothing suitable for 'people like you' and they shouldn't bother coming again. Fatima and Ali were hurt and distressed by the rude and abrupt treatment they experienced from the real estate agent and complained to the Commission of racial discrimination. When the real estate agent became aware of their complaint he began to subject Fatima and Ali to abusive phone calls and threats about their chances of finding anyone to help them. The agent also embarked on a campaign to encourage other real estate agencies to 'boycott' them. Fatima and Ali also made a complaint of victimisation to the Commission.