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# **Discrimination and sexual harassment in the workplace: prevention and resolution of complaints**

# June 2020

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| Approved |
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| Scott McDougall  Commissioner  5 November 2020 |

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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 Queensland Human Rights Commission (QHRC) 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 QHRC 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 their ability to act independently in the workplace.

Discrimination and sexual harassment complaints are to be taken seriously and 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;
* provide guidance for managers and Equity Contact Officers (ECOs) 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* (Qld)
* *Public Service Act 2008* (Qld)
* *Racial Discrimination Act 1975* (Federal)
* *Sex Discrimination Act 1984* (Federal)
* *Work Health and Safety Act 2011* (Qld)
* Individual employee grievances Directive 11/20
* Appeals Directive 07/20
* Code of Conduct for Queensland public service

# Human rights

In applying this policy, QHRC staff will consider whether:

1. any human rights may be affected by decisions made under the policy
2. any legislation or other law requires a decision to be made in a certain way, regardless of the affect on any human rights.

If there is a discretion in making the decision, we will consider:

1. whether any human rights that are identified as being affected by the decision are being limited
2. whether any limitation of a human right is reasonable, and is demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

In deciding whether a limit is reasonable and justified, we will take into consideration and balance the following matters:

1. the nature of the human right
2. the nature and purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality, and freedom
3. the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose
4. whether there are any less restrictive and reasonable ways to achieve the purpose of the limitation
5. the importance of the purpose of the limitation
6. the importance of preserving the human right, taking into account the nature and extent of the limitation on the human right
7. Any other relevant matter.

Human rights means the rights in the *Human Rights Act 2019.*

# Harassment in the workplace

The term harassment can 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 as harassment.

# Discrimination

Discrimination in the workplace can occur when someone is treated unfairly or inappropriately. By definition, the workplace includes areas of activity beyond the normal workplace, including 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 Schedule 1 of the Act. 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, such as recruitment and selection processes. With regard to discrimination in the work area, Section 15(1) of the Act states a person must not discriminate:

1. In any variation of the terms of work; or
2. In denying or limiting access to opportunities for promotion, transfer, training or other benefit to a worker; or
3. In dismissing the worker; or
4. By denying access to a guidance program, an apprenticeship training program or other occupational training or retraining program; or
5. In developing the scope or range of such a program; or
6. By treating a worker unfavourably in any way in connection with work.

## Exemptions

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:

Sexual harassment happens if a person –

1. subjects another person to an unsolicited act of physical intimacy; or
2. makes an unsolicited demand or request (whether directly or by implication) for sexual favours from the other person; or
3. makes a remark with sexual connotations relating to the other person; or
4. 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 –

1. with the intention of offending, humiliating or intimidating the other person; or
2. 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 decides 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 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 in legislation. The most common of these is workplace bullying or harassment.

Workplace bullying or harassment is repeated and unreasonable behaviour directed towards a worker or a group of workers that creates a risk to health and safety. It is a risk to health and safety because it may affect the mental and physical health of workers.

This type of behaviour is incompatible with professional, efficiently run workplaces and is unacceptable to management of the QHRC (see Workplace behaviour policy and Code of Conduct for Queensland public service).

Further information on workplace harassment may be obtained from Safe Work Australia.

# Preventing harassment

## What are my responsibilities as a staff member?

QHRC, through its Code of Conduct, requires all staff members to treat colleagues, clients and contractors with respect and dignity. The Code of Conduct specifically prohibits harassment and discrimination.

Harassment will not be tolerated at QHRC. All staff are responsible for:

* 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 QHRC policies, managers also have a responsibility to ensure that staff are protected from harassment and/or discrimination, as outlined in:

* *Anti-Discrimination Act 1991*
* *Work Health and Safety Act 2011*
* Code of Conduct for Queensland public service
* *Equal Opportunity in Public Employment Act 1992*; and
* Individual employee grievances Directive 11/20

Section 98 of the *Public Service Act 2008* also requires chief executives to ensure that all agency employees are treated fairly.

A manager or supervisor also needs to be particularly aware of the concept of vicarious liability. That is, 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 their 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, and to read QHRC’s Vicarious liability policy.

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 QHRC’s Code of Conduct.

## What is the role of the union?

Staff are entitled to contact their union (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 Equity Contact Officers 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.

# Equity Contact Officers (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 ECOs is an indication that QHRC views discrimination and harassment seriously and will not tolerate it in its workplaces.

The responsibilities of ECOs will be in addition to those of their normal position. The number and location of ECOs will vary from time to time and they will be deployed so that every staff member has easy access to them. QHRC will provide training for ECOs, inform staff about the role and functions of ECOs through the induction process and general training.

## What is the role of an Equity Contact Officer?

Equity Contact Officers (ECOs) will be required to:

* behave as a positive role model in the workplace
* 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 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
* provide de-identified statistics to the Executive Leadership Team on a quarterly basis for identification of trends and action as necessary.

## What support is available to Equity Contact Officers?

The Deputy Commissioner can assist ECOs 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, such as disciplinary action;
* 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 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 QHRC. The recommended processes include informal and formal options.

## Informal action

QHRC 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 include the complainant:

* dealing with the matter themselves, either face-to-face, by phone or written correspondence; 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 line with QHRC policies and the *Public Service Act 2008.*

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. QHRC 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 complaint within QHRC; or
* lodge a complaint external to QHRC.

## How do I lodge a complaint?

The process for lodging a complaint is outlined in the Individual employee grievances Directive 11/20 and QHRC Employee complaints policy.

As outlined in the Directive, the formal complaints process has three stages:

Stage 1: Local action

Stage 2: Internal review of a decision made following local action

Stage 3: External review of a decision made at internal review

## Do I need to lodge a complaint through my manager/supervisor?

All managers within QHRC have delegation to receive and manage stage 1 employee complaints. If a staff member is worried about lodging a complaint with their manager or supervisor, they should discuss it with an ECO and consider lodging a written complaint with another manager within QHRC, including the Director, Engagement & Corporate Services, the Deputy Commissioner or the Commissioner.

QHRC 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 complaints externally

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

* An appeal to the Queensland Industrial Relations Commission
* Lodging a formal complaint with the Queensland Human Rights Commission (QHRC). To avoid a conflict of interest such complaints will generally be referred to the Australian Human Rights Commission (AHRC).
* Referral to the Department of Justice and Attorney-General Dispute Resolution Centre (DRC) for mediation.
* Referral to the police or Crime and Corruption Commission (CCC), 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 Director, Engagement and Corporate Services to facilitate referral of the matter to the CCC.

## Appeals to the Queensland Industrial Relations Commission (QIRC)

The Queensland Industrial Relations Commission (QIRC) administers the public service appeals function.

Public service employees may appeal certain decisions that affect their employment. The *Public Service Act 2008* states:

* Which decisions may be appealed against
* Who can appeal
* Requirements for lodging an appeal
* How the process is conducted

Appeals can be made against:

* Decisions under a directive
* Discipline decisions
* Promotion decisions
* Transfer decisions
* Temporary or casual employment decisions
* Fair treatment decisions
* Other decisions.

In discrimination or sexual harassment complaint matters, it may be appropriate to lodge a discipline or fair treatment appeal.

The QIRC provides an independent and impartial way for public service employees to have decisions reviewed. The Appeals directive 07/20 provides more specific rules about appeal entitlements and requirements for the appeal process.

## Queensland Human Rights Commission

The Commission has functions under the *Anti-Discrimination Act 1991* to receive and attempt to resolve complaints of discrimination and sexual harassment. A person can simultaneously lodge a formal complaint with QHRC. If this occurs, QHRC will refer the matter to the Australian Human Rights Commission (AHRC) to deal with it in order to avoid a conflict of interest. AHRC will first attempt to resolve the matter 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 complaints, including discrimination or harassment complaints. For example, the Department of Justice and Attorney-General’s Dispute Resolution Branch (DRB), or Employee Assistance Program.

Benefits of mediation include:

* minimal disruption to the organisation;
* confidentiality;
* neutrality of 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 complaint procedures or lodging a formal complaint with QHRC.

Participation in mediation is strictly voluntary. Mediators will ensure the matter is suitable for mediation and that all parties are willing to attend.

## Queensland Police Service (QPS) and Crime and Corruption Commission

Complainants may take serious assaults involving criminal conduct to the police for investigation. Individuals may also complain to the Crime and Corruption 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 acknowledgement 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, QHRC 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 2008* subject to the decision of the Human Rights 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 their right to lodge a fair treatment or discipline appeal with the Queensland Industrial Relations Commission (QIRC).
* 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, including lodging a formal complaint with the QHRC 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 the harassment to stop.

# Employee Assistance Program

QHRC’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.

Further information and assistance

Employees requiring further information or assistance in relation to this policy should contact their Regional Manager or the Responsible Officer.

Implementation of this policy requires Managers to exercise professional judgement. Managers are encouraged to consult with each other in making these determinations.

Policy administration

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