



# Fair Employment for People with a Disability

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The Welfare Rights Centre is a community legal centre that specialises in Social Security and Disability discrimination law

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### **Disclaimer**

Legal issues are often complex. Individual circumstances vary. Expert legal, professional and other assistance should be sought if you are experiencing discrimination in the workplace. Anti-discrimination and Industrial Relations are ever changing areas of law. Every effort has been made to ensure accuracy at 1 October 2007. This booklet should not be used as a substitute for legal advice. No responsibility is accepted for loss, damage or injury, financial or otherwise, suffered by any person acting or relying on information contained in, or omitted from this booklet.

## HOW TO USE THIS BOOKLET

This booklet has 8 Parts that are intended to assist people with a disability who are entering or who are already a part of the Australian workforce. People with a disability make up approximately 19% of the Australian population, and many are productive employees. Recent changes to the Social Security Act mean that a lot more people with a disability will be required to work or look for work.

The Welfare Rights Centre Inc. is concerned that there will be many barriers stopping people from getting work and that disability discrimination may be one of them.

This booklet will provide general initial advice and assistance to people about disability discrimination as well as directing readers to services and Tribunals that may be able to help. It does not try and explain complex legal concepts therefore it is always up to the reader to seek legal advice. Part 8 of this booklet details services that may be available to assist you obtain this advice.

Both the *Disability Discrimination Act 1992* (Commonwealth) and the *Anti-Discrimination Act 1991* (Queensland) apply in Queensland. In this brochure the Commonwealth Act will be referred to as "the DDA" and the Queensland Act will be referred to as "the ADA".

The DDA uses the term "disability" to cover a broad range of conditions and illnesses whereas the ADA uses the term "impairment" to cover a similar range of conditions and illnesses. For simplicity, this booklet uses the term "disability" regardless of which act is referred to.

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# PART ONE

## WHAT IS DISABILITY DISCRIMINATION?

Discrimination based on disability, where the result is less favourable treatment of the person, is unlawful under both Commonwealth and Queensland law. The discrimination may be very obvious, such as not hiring a person with a mental illness in a clerical position even when the illness does not affect the persons work. The discrimination may be less obvious such as not providing a sign language interpreter so that an employee who is deaf can participate in training or staff meetings.

Not everything bad that happens at work can be called discrimination. For example; if a person with a disability is not the best applicant for the job and another person is appointed then there is unlikely to be a case of discrimination. Some bad things that happen at work, like assault, bullying and workplace injuries etc should be investigated by the authorities and taken to other courts and tribunals but they are not disability discrimination.

Having a disability does not create any additional human rights. People with disability simply have the right to not to be treated less favourably than people without a disability in various situations, including in connection with employment.

### Impairment and Disability

The Anti-Discrimination Act 1991 (Queensland) and the Disability

Discrimination Act 1992 (Commonwealth) (the DDA) cover a broad range of conditions. Both of these Acts apply in Queensland.

A disability includes any physical or sensory disability, neurological, psychiatric or intellectual condition, learning difficulty, disfigurement, malformation, malfunctioning or loss of function of part of the body and the presence in the body of organisms which may or actually do cause disease.

The definition of disability has been written extremely widely on purpose. It was meant to include almost everything. In Queensland the condition need not even be long standing or permanent. A sprained ankle would qualify as a disability. The condition may be in the past and no longer present such as childhood polio. The condition may be present from time to time such as an episodic mental illness where the person goes through 'episodes' of the condition but is well the rest of the time. The condition, such as an infectious disease, need not even be present but only believed to be present.

Some examples to assist in identifying disability for the purposes of anti-discrimination law include:-

- Conditions such as being HIV positive, AIDS, hepatitis, tuberculosis and viral infections. They come within the part of the definition about organisms in the body which may cause disease.
- Cancer would be an example of malfunctioning of part of the body.

- Burns would be a disfigurement.
- Loss of function of part of the body might be from epilepsy, diabetes, a vision or hearing disability as well as more visible issues such as a physical disability where a person uses a wheelchair.
- Cerebral palsy would be both a malfunctioning of part of the body and a neurological condition.
- Dyslexia and auditory processing problems are examples of learning disabilities.
- Environmental and chemical sensitivities such as multiple chemical sensitivity, fibro myalgia, and chronic fatigue syndrome may be a loss of function of part of the body.
- The part of the definition which describes 'conditions that affect thought processes, perception of reality, emotions and judgement or result in disturbed behaviour' covers the full range of mental illnesses and disorders such as depression, Bipolar Affective Disorder, Schizophrenia, panic attacks, obsessive compulsive disorder.
- Ruptured discs in the spine, arthritis and other muscular-skeletal conditions would be covered if they result in a loss of function.

As wide as the definitions are, physical appearance and obesity are not covered as disabilities. Although obesity of itself is not a disability, if it results from a medical condition, such as a thyroid condition, that condition may be a disability.

## Employment situations covered

Nearly all imaginable work situations are covered by anti discrimination law and are meant to be free from discrimination e.g. applying for work (see section 4 of the DDA), terms of employment, training, promotion and redeployment (see section 5 of the DDA) and also dismissal (see section 6 of the DDA).

In addition to 'normal' employer/employee relationships contract workers are covered, as are partnerships (like law firms). Casual and temporary workers are also protected, as are volunteers under the ADA but not the DDA. Trade unions and professional bodies are covered, as are 'qualifying bodies' like the Medical Board of Queensland. Employment agencies are covered.

There are three questions to ask when considering if there has been disability discrimination in an employment situation:

1. Is there a person with a disability?
2. Has there been less favourable treatment in the work area because of the disability? (see parts 2 and 3)
3. Do any exemptions apply that would make the discrimination lawful?

The definition of disability has been designed to rapidly answer the first question, most often in favour of the applicant. However questions 2 and 3 still present major hurdles.

# PART TWO

## DIRECT AND INDIRECT DISCRIMINATION

There are only two types of unlawful discrimination - direct and indirect.

### Direct Discrimination

Direct Discrimination is the easier of the two types of discrimination to understand.

For direct discrimination to apply there are two requirements; first a person must have been treated less favourably because of the disability, secondly the treatment must be worse than how a person without the disability would have been treated in the same situation.

If the less favourable treatment is unrelated to the disability or a person without the disability would have been treated the same in similar circumstances then it is not direct discrimination.

The employers motives or intention are not relevant.

Examples of direct discrimination in the workplace would be:-

- An employee with well controlled epilepsy has been working as a factory manager for nine years without having a seizure. She has one grand mal seizure resulting in her being taken to hospital. Her neurologist says she is fine to go back to work but the employer doesn't want to see the medical report and she is fired the next day.

- A person discloses their mental illness on a job application form for a clerical position. Their illness does not in any way affect their performance or the ability to do the essential requirements of the job. When the applicant rings up to ask why they did not receive an interview the response is that "we don't want any "nutters" at our company".

The following example would not be discrimination:-

- An employee has a spinal condition. She is not offered training within the company which would lead to a promotion. The employee admits that the reason for her being overlooked for training was not her disability but her attitude problems with clients and other staff members.

### Indirect discrimination

This is the harder of the two types of discrimination to understand. It was developed to fight unfair practices and institutional discrimination. It has also been called 'covert' discrimination.

Indirect discrimination is an unreasonable requirement or condition that a person, because of their disability, cannot meet, and that a higher proportion of people, without the disability can meet.

To use the example of the requirement to enter the workplace via a staircase. A person using a wheelchair cannot use the stairs, nor can the majority of people who have a mobility disability. However, it may or

may not be reasonable to impose the requirement to use the stairs. A number of factors will need to be taken into account such as the cost of alternatives, what work needs to be done to make it accessible (i.e. disruptions to the workplace etc), the financial status of the employer, the benefits to other workers in making the adjustment. A small business that engages only a few staff may be able to argue that it is reasonable to only provide access by stairs. Whereas a larger employer may reasonably be expected to do more.

The obligation to show that the requirement is unreasonable in the DDA is on the person alleging discrimination. This differs from the ADA where the obligation is on the employer to show the requirement is reasonable.

**It will usually be fairly easy for a person with a disability to work out when they have been directly discriminated against. Indirect discrimination can be more difficult to spot. Whenever an employer refuses to make changes which would allow a person with a disability to work or continue to work in their business the applicant should ask the question "Is there a case of indirect discrimination here?"**

**Whether direct or indirect discrimination exists are questions of fact and law and up to a Tribunal to determine (see section 6 of the DDA for the definition of indirect discrimination). There are no hard and fast rules but a lawyer**

**will be able to give advice about how likely a case is to succeed. The Welfare Rights Centre Inc provides such legal advice and may be able to represent people through the complaints and legal process.**



## PART THREE

### LIMITATIONS/EXEMPTIONS TO LIABILITY FOR DISABILITY DISCRIMINATION

Once direct or indirect discrimination has been established there are a still many arguments the employer can make in order to avoid liability. This Part explores some of these arguments.

**The employee cannot perform the inherent requirements of the job (whether or not 'reasonable accommodations' are made).**

#### *Inherent Requirements*

The 'inherent requirements' of a job are the essential or main features of the job. They are not necessarily what is contained in the job description but are decided by looking at what the job actually involves in an objective sense.

For example –

- A call centre employee would have the inherent requirement of being able to use a telephone. The inherent requirement is to use a telephone, not to use a hand set. The ability to use a hands-free phone or head set would still meet the inherent requirement and providing this equipment would probably be a 'reasonable accommodation'.
- A taxi driver would be required to hold a driver's licence and be able to drive. A person with a significant vision disability or uncontrolled epilepsy simply won't be able to meet the inherent requirement regardless of what accommodations are made.

A similar exemption exists under the ADA which allows an employer to impose a "genuine occupational requirement" for position. The requirements must be genuine and not an arbitrary and must be related to the occupation in a real sense.

#### *Reasonable Accommodations*

An employer is required to make reasonable accommodations for a person with a disability. 'Accommodations' are adjustments or changes that can be made to cater for a person's disability.

There are countless examples of reasonable accommodations in the employment area. Some common accommodations which may be found to be 'reasonable' are:

1. Inclusion of ramps, lifts, raised workplace, accessible bench tops, accessible toilets, accessible car parking, widened doorways, automatic doors etc for people with physical disabilities.
2. Time off work and a gradual return to work for a person with a mental illness.
3. Sign language interpreters for staff meetings and training for a person who uses AUSLAN (Australian sign language) to communicate.
4. Computer assisted reading devices and screen readers for a person with a vision disability.
5. Support person allowed on the job for a period to assist a person with an intellectual disability to learn the job.
6. Employee allowed to bring special equipment, guide dog or assistance animal to work.

7. Timetable rescheduling to allow worker to receive ongoing treatment.

Larger employers will generally be expected to do more to accommodate the employee's disability than smaller ones as they are judged to be in a better financial and organisational position to do so. However many accommodations do not require the expenditure of any money. Reorganising a work schedule for a person with insulin dependent diabetes so that the worker can start half an hour earlier and have a break to test his or her blood sugar and inject insulin is quite simple and costs nothing.

Discrimination legislation attempts to remove barriers to full participation in employment and other areas. Where these barriers are attitudinal ones there may be no accommodations necessary. For many persons with a disability, including those with mental illnesses or those who are HIV positive, removal of the assumption that they are a danger or risk to the workplace is all that is required.

Under the ADA there is no requirement on employers to provide "reasonable accommodations" but the fact that an employee requires special services or facilities because of their disability is not relevant to direct discrimination but would be relevant to an assessment of what terms were reasonable in relation to indirect discrimination.

### ***Unjustifiable Hardship***

Where accommodating the disability would amount to an unjustifiable hardship on the employer then it will

not be a 'reasonable accommodation'.

The concept of 'Unjustifiable Hardship' brings a cost/benefit analysis to potential accommodations being suggested. It is a question of fact for a tribunal as to whether providing the necessary accommodations would impose an 'unjustifiable hardship' on the employer.

A number of things must be considered:-

*What is the cost of the accommodation and what is the financial status of the employer?*

While the vast majority of accommodations will be of little or no cost to the employer this defence applies when some hardship will be borne by the employer. The financial status of the employer is very important in working out whether the hardship is unjustifiable.

*Are 'special services' (eg a lift) needed?*

Installing a lift may be an unjustifiable hardship to an employer on the second floor of a building who employs two staff. It may not be if the employer is the Commonwealth of Australia. Any disruption must be considered. If installing the lift closes a large office for many days this is a consideration.

*What are the benefits and detriments for all persons?*

The benefit and detriment to all persons is to be considered. Widening a doorway may improve the access for not only the person who uses a wheelchair but for other staff and clients as well.

## **Reasonably necessary to protect workplace health and safety/compliance with other Acts**

The ADA provides an exemption for what would otherwise be unlawful discrimination where there is an 'unreasonable risk to workplace health and safety'. The DDA doesn't have such a specific exemption but it is something that will be looked at in considering the inherent requirements of the job.

Some examples of where this exemption may apply are:-

1. A person with poorly controlled epilepsy resulting in significant seizures may be a safety risk to themselves or others if working on scaffolding, helping children across an intersection or operating dangerous machinery.
2. A person engaged by the military who is considered "a soldier first" and engaged in active combat may present an unreasonable risk to their own health if they have uncontrolled diabetes or paranoid schizophrenia.

Some other acts such as the *Occupational Health and Safety Act* (Cth) and *Workplace Health and Safety Act (Qld)* prescribe certain things in relation to safety in the workplace. These acts must be complied with as well as the anti-discrimination laws, where possible. If there is a conflict between workplace health and safety laws and anti-discrimination law, a lawyer will be able to advise which laws prevail.

Workplace health and safety laws often overlap with exemptions such as for the inherent requirements of a job or being reasonable necessary to protect public health or workplace health and safety.



## PART FOUR

### ENTERING EMPLOYMENT

The object of disability discrimination laws is to remove barriers which might stand in the way of full participation in the community, including in employment. It is very easy to exclude a person from a job based through stereotyping and false assumptions. For example the common stereotype of people with a mental illness as being somehow a danger to society, or the idea that people with intellectual disability aren't able to learn.

Where there are a lot of people applying for the same job the employer will often argue that the person selected was simply the best qualified and disability had nothing to do with it. Because it is so easy to discriminate in the pre-employment stage and very difficult to prove that discrimination has occurred, discrimination laws put limits on the sort of information employers can ask for in application forms and job interviews. They make it clear what information a person with a disability does or does not need to disclose.

### Questions that can be asked

Under the DDA, in application forms and job interviews employers are only allowed to ask questions about any 'accommodations' or adjustments (see section 3 of DDA) the applicant might need to be able to perform the 'inherent requirements' or essential functions of the job. Unless the applicant wishes to seek such accommodations from the employer there is no need for them to disclose their disability.

Some acceptable questions might be:-

1. Do you have a disability that prevents or restricts you from doing the main functions of the job?
2. What accommodations do you seek from us to do the essential tasks of the job?
3. Is there any special equipment we need to provide for you to do the inherent requirements of the position?

Under the ADA, to ask the questions set out above may still be discriminatory unless the employer can show that they were being asked for a non discriminatory purpose, such as to enable them to provide any special services or facilities that were required by the employee.

If the employee has an 'invisible' disability, like mental illness or is HIV positive for example, and doesn't need anything special put in place to enable them to do the job, then they don't have to mention their disability if they don't want to. If, on the other hand, the person intends to ask for some sort of accommodation, like time off on a recurrent basis for treatment of a condition or regular breaks during the day, then they may need to disclose the disability whether they were asked about it or not.

If the applicant does not disclose a disability in a job interview but later becomes aware of accommodations that are needed in the job they will still be entitled to the accommodations so long as they would not amount to an 'unjustifiable

hardship' upon the employer (see section 3 of DDA). For example, an employee with very early multiple sclerosis who does not disclose it to his prospective employer until the condition progresses. When he does disclose it to the employer when he needs some time off work it is unlikely that the employer will be able to dismiss him for not disclosing the condition at the interview stage. If the condition is never disclosed to the employer however, and it prevents the employee from doing the inherent tasks of the job then the employer might be entitled to dismiss them. An employer does not have a duty to accommodate a disability which they are not told about.

### Questions that can't be asked

Direct questions on a job application form or in a job interview that seeks information which might be used to exclude the job-seeker from job offers will usually be against Queensland and Commonwealth Disability Discrimination laws. For example a question on an application form asking "Do you have a mental illness?" or "Have you ever had a back injury?" There have been several successful discrimination complaints challenging this type of questioning. It is clear that such questions need not be answered by the job seeker.

### Pre-employment testing

Selecting employees based on pre-employment testing will only be lawful if the tests carried out specifically relate to the job being applied for. A complaint of indirect discrimination may be successful against the use of some very general forms of pre-employment testing. In fact some of

the earliest cases of indirect discrimination were in relation to the use of an IQ test in the application process for a job. Despite this an increasing number of large corporations and government bodies routinely use very general forms of testing in their recruitment processes.

### The interview process

Employers are not allowed to ask questions about whether someone has a disability, but sometimes the person will choose to disclose the disability or it will be very obvious. When this is the case employers are obliged under disability discrimination laws to make sure that the interview process is as fair as possible.

Employers should ask the person with a disability whether there is anything that he or she needs at the interview. Generally the larger the employer, the more that will be expected to be done to accommodate them. Each case is different, but some common accommodations at the interview stage include:-

- Ensuring that the venue for the interview is accessible for a person who uses a wheelchair or has another physical disability. This includes but is not limited to, accessible toilet facilities, ramp or lift access to the building or interview area, wide enough doorways for the wheelchair, sufficient turning radius in the interview room for a wheelchair.
- Allowing a support person to be with or assist a person with acquired brain injury or intellectual disability during the interview.
- Reading out any written questions

and allowing more time for the preparation of an answer in the case of a person with vision disability or a learning disability such as dyslexia.

- Providing a trained and qualified sign language interpreter for a person with a hearing disability who uses Australian sign language (AUSLAN) as their preferred mode of communication.
- Refraining from the use of perfumes or chemicals when interviewing a person with multiple chemical sensitivity or fibromyalgia.

**Instances of disability discrimination in the pre-employment area are among the most common. It is as important for people with disabilities to know their rights under anti discrimination legislation when seeking jobs as it is for prospective employers to understand their obligations.**

## **DISCRIMINATION ON THE JOB**

### **Training**

The provision of training is considered an important area of employment by the courts. Anti-discrimination laws expect employers not to discriminate when it comes to which employees receive training and what training they receive. This is particularly the case when undertaking training will increase the person's chances of being promoted within the workplace. The usual tests of 'reasonable accommodations' and 'unjustifiable hardship' apply (see Section 3 of DDA), so again a larger employer will generally be expected to do more both in the provision of training and in the accommodation of persons with disabilities to undertake the training.

Examples where discrimination in relation to the provision of training has been found include:-

- a. A woman with a vision disability engaged mainly as a telephonist in the Commonwealth Public Service was notified of training only in written form which she was unable to read.
- b. A woman with a profound hearing disability employed to do data entry by a State government department was refused sign language interpreters for staff training.
- c. A man with an intellectual disability wasn't allowed to have a support person with him for his on the job training. The employer was a small business but the support person was to be provided at no charge to the employer.

Where the denial of training is not related to the disability it will not be considered discrimination. For example where training has been refused to all employees for a period for economic reasons, or where the training is not considered relevant to the employee's work.

### **Promotion**

People with disabilities are often denied promotion opportunities. There is a tendency to place them at relatively low level positions where they remain for their entire working lives. This may be data entry for a person with a hearing disability or a cleaning position for a person with acquired brain injury or an intellectual disability.

While it might be obvious to the person with a disability that they are being routinely overlooked while co-workers receive promotions on a regular basis, these sort of complaints can be very difficult to prove. For example, a man with a spinal disability working for a large supermarket chain in a checkout position for many years was unsuccessful in seeking a promotion to manager. His discrimination complaint failed because the employer showed that the worker had behavioural and attitudinal issues in dealing with other staff and clients and was not suitable for the position. Disability was found to be unrelated to the decision to refuse the promotion.

### **Redeployment**

When a worker becomes ill or sustains a disability while employed, anti-

discrimination laws expect their employer to make some effort to accommodate the worker's needs. Again the expectation is that larger employers will be in a position to do more in the way of rehabilitation, retraining and redeployment.

All of the following adjustments might be considered:-

- a. time off work
- b. graduated return to work
- c. retraining to again be able to do the job employed for, or a similar job

While an employer has to consider redeployment in the short term when an employee becomes ill or injured, there is no obligation to redefine the work where the employee was hired for a particular job and even after significant rehabilitation cannot return to that job. If an employee was hired as a baggage handler the employer doesn't have to employ him as a manager or computer operator.

**There have been many studies to show that employees with disabilities are an advantage to the employer. Generally people with a disability have a greater loyalty to their employer. It makes good economic sense to provide accommodations (that generally cost very little) to attract and retain the workers with a disability and those who acquire a disability due to accident or medical condition.**

## **EMPLOYMENT DISPUTES**

### **Dismissal from Employment**

Complaints of discrimination in the employment area occur most commonly in relation to dismissal from employment.

### **Examples of unlawful dismissal**

There are many examples of people being unlawfully dismissed due to their disability. A few of them are:-

- a. A manager in a chicken processing plant had epilepsy but had not had a seizure for 7 years. He had one grand mal seizure and was dismissed the same day. The employee's neurologist indicated that he was not a risk to others at work. The man was reinstated by the company after they received a letter from the neurologist and a telephone call from the ADCQ indicating that they would be prepared to consider the case.
- b. The manager of a housing project for homeless persons had bi polar affective disorder. She went to hospital for one week. Upon her return she was dismissed. The matter settled in conciliation with the ADCQ with compensation and other remedies agreed upon.
- c. A woman acting as a drug representative for a major pharmaceutical company required time off due to her bi polar affective disorder. The company terminated her employment. She was eventually awarded a full years salary in compensation.

### **Examples of lawful dismissal**

There are a number of common situations where dismissal is usually found not to be discriminatory:-

- a. Where the employer restructures the business for economic reasons. If there is a downturn in the economy and an entire section of a business is shut down (eg a car assembly plant) there is no redress for people with disability employed in that section.
- b. Poor job performance. When a person is hired to do a job such as operate machinery and the person cannot do the job even with reasonable accommodations for the disability then the dismissal will be lawful.
- c. Where there is an unreasonable risk to workplace health and safety or where the employee cannot perform the inherent requirements of the job. For instance a worker operating dangerous machinery who has uncontrolled or poorly controlled epilepsy may pose an unacceptable risk to their own safety and the safety of co-workers.

### **Issues other than discrimination**

Often discrimination is not the only issue in a dismissal, termination or sacking. There may be issues of procedural fairness, occupational health and safety and negligence. Prior to the Commonwealth *Work Choices* legislation a person with a disability who had been dismissed could bring a complaint to either the

Queensland or Australian Industrial Relations Commission which could look into these wider workplace issues as well as the discrimination. With *Work Choices* this has changed considerably.

### **Where to bring an application**

In the case of dismissal from employment a person with a disability may be able to begin their case in a variety of places:

- Queensland Industrial Relations Commission (QIRC),
- Australian Industrial Relations Commission (AIRC),
- Anti-Discrimination Commission of Queensland (ADCQ) and the
- Human Rights and Equal Opportunities Commission (HREOC).

### **Where to complain?**

There are a number of things to consider when deciding where to make your complaint.

#### Jurisdiction-

- The QIRC and AIRC can look into workplace issues far wider than disability discrimination.
- Few dismissed workers can now complain to the QIRC with most only having the right to complain to the AIRC. In the QIRC employers are no longer subject to proceedings for either *unfair* or *unlawful* dismissal where there was a genuine occupational reason (such as job restructuring), they were seasonal employers (eg fruit picking) or a 'small to medium employer', defined as one with less than 100 employees! Proceedings cannot be begun

where an employee was subject to qualifying period (eg 6 months probation).

- In the AIRC employers who fit within one of these exemptions are likewise not subject to proceedings for *unfair* dismissal. However they may still be subject to *unlawful* dismissal proceedings (eg a case of dismissal on the basis of disability discrimination). Even so the types of employers subject to the authority of the AIRC is limited mainly to companies, and the type of employees who can use it is strictly controlled and does not include casual workers
- The ADCQ and HREOC can only look at discriminatory behaviour of an employer or prospective employer. The ADCQ covers most workers whether full time, part time, casual, work experience, sub-contractors, commission agents etc.

#### Time Limits on Complaining –

- A complaint to the AIRC or QIRC must be made within 21 days of the dismissal.
- A complaint to the ADCQ or HREOC must be made within 1 year of the discrimination.

#### Timeliness –

- The QIRC and AIRC allow for the possibility of reinstatement. A conciliation conference generally scheduled within a few weeks of the application.
- The ADA now requires the ADCQ to hold a conciliation conference within six weeks of accepting a complaint so issues of time are

less important to the decision.

- The Order in which to Complain –
- If you complain to the AIRC, you must stop any complaints to the QIRC, AEDCQ or HREOC.
- If you complain about dismissal to the QIRC, you can still complain to the ADCQ or HREOC later, but the ADT cannot then order reinstatement and may stay the complaint until the QIRC has finished dealing with it.
- If you complain to HREOC, you can still complain to the ADCQ later but HREOC may then refuse to continue to deal with your complaint.
- If you complain about dismissal to the ADCQ first, you cannot later complain to the QIRC or to HREOC.

Outcomes –

- While the QIRC and AIRC cannot award monetary compensation to make up for the emotional trauma caused by the dismissal and compensation payouts are generally capped at one or two weeks salary per year of employment
- You can claim compensation for injury to feelings in the ADCQ and the HREOC and there is no cap on the compensation.

**Deciding whether a person can bring a dismissal complaint to the QIRC or AIRC after *Work Choices* is quite complex and is best left to the experts. Reading your employment contract closely may be useful as a first step and further guidance may be**

**available from your union or from the *Work Choices Info-line* or *Wage-line*. The Queensland Working Women's Service and the Young Workers Advisory Service also provide advice in relation to employment matters for women and people under 25. See Part 8 of this booklet for contact details.**



## PART SEVEN

### BRINGING A DISABILITY DISCRIMINATION COMPLAINT

For all non-dismissal discrimination matters and for dismissal matters that are not resolved by the QIRC or AIRC, the person discriminated against has a choice between the ADCQ and HREOC.

#### ADCQ and HREOC

The Anti-Discrimination Commission Queensland (ADCQ) administers the *Anti Discrimination Act 1991* (ADA) of Queensland. It is a general Act that prohibits discrimination on a number of grounds including disability (referred to as “impairment”), in areas including employment.

The Human Rights and Equal Opportunities Commission (HREOC), on the other hand, administers a number of Commonwealth Acts, such as the *Disability Discrimination Act (DDA)*, which prohibit specific types of discrimination in areas which again include employment.

‘Disability’ is defined just as widely in the DDA as impairment is defined in the ADA. The time limit for bringing a complaint is the same. Apart from some limited exceptions it is really a choice for the applicant between either the State or the Federal anti-discrimination jurisdiction.

#### Queensland *Anti-Discrimination Act (ADA)*

A complaint, whether for dismissal based on discrimination or other forms of discrimination in the workplace, must be lodged with the

Anti-Discrimination Commission of Queensland (ADCQ). If accepted it will be investigated and a conciliation conference will be scheduled no later than 6 weeks after acceptance of the complaint. There are no costs payable while a matter is still with the ADCQ.

If the complaint cannot be settled by agreement between the parties then the complainant can choose to refer the complaint to the Anti-Discrimination Tribunal of Queensland (ADT) for resolution and there is a further opportunity to resolve the complaint through conciliation at the Tribunal prior to a hearing. A tribunal consists of one member who is generally a senior lawyer. Although the strict rules of practice and evidence do not apply the ADT functions very much like a court. A full range of orders is possible including the payment of money for hurt feelings, lost wages, future wages and reinstatement and these orders are fully enforceable through the courts. The ADT will often require the losing party to pay the winning party’s legal costs on a ‘standard’ basis, that is those costs that were absolutely necessary to run the case.

An appeal from a decision of the Tribunal is only allowable on a point of law or upon judicial review grounds to the Supreme Court of Queensland.

#### The Commonwealth *Disability Discrimination Act (DDA)*

Complaints under the DDA are made to the Human Rights and Equal Opportunity Commission (HREOC) in Sydney where the investigation and

complaint handling is undertaken by a conciliator. A conciliation conference will generally be scheduled after a response is obtained from the employer and the complainant has been given the chance to reply, although the Commission has the option of terminating the complaint at this time.

Hearings are not conducted by the Commission (HREOC). If the complaint is unable to be resolved through conciliation it will be terminated by HREOC and the complainant has 30 days to apply to the Federal Court or Federal Magistrates Court on the same grounds as the initial complaint. The case then becomes like any other case in those courts and will be heard by a judge. The losing party may be required to pay the winning party's costs.

### **Reasons to choose the ADCQ/ADA(Qld)**

- The ADCQ process will generally be quicker than the HREOC process. ADCQ is required to hold a conciliation conference within 6 weeks of accepting a complaint and can arrange for even earlier resolution where appropriate. With HREOC there is a process of receiving the complaint, awaiting a response from the employer then awaiting a reply to that response. A conciliation conference will generally be held 6 to 12 months after lodging a complaint.
- Complaints of indirect discrimination may have a better chance under the ADA. This is because the employer has to

show that requirement is reasonable, while under the DDA the employee has to show that the requirement is unreasonable. This is an important difference when the case is a close one.

- There are fewer grounds to refuse to accept a discrimination complaint to the ADCQ. Cases rejected by HREOC, for example where avenues of internal review weren't used, can be sent to the Federal Court or Federal Magistrates Court.
- Cases begun in the ADCQ cannot be moved to HREOC but cases begun with HREOC can be moved to the ADCQ.
- Queensland Government employees can use either Act but the Queensland Act specifically applies to people involved in the administration of State laws and programs.

### **Reasons to Choose HREOC/DDA (Commonwealth)**

- Complaints for direct discrimination may fare better with a DDA complaint where there are several reasons for the less favourable treatment and disability isn't necessarily the main one. For example a dismissal where there are some performance issues as well as a mental illness. Under the ADA the substantial reason for the less favourable treatment must be the disability. The DDA only requires that the disability be one of the reasons.
- Partnerships of between 3 and 5 persons can only use the DDA. Partnership is defined as 6 or more persons in the ADA and 3 or more

persons in the DDA.

- Complaints of being treated less favourably due to an association with a person with a disability may fare better under the DDA which has a definition of 'associate' which includes a sporting colleague or work colleague. The ADA only speaks of a 'relative or associate' and does not define associate.
- Large representative complaints may be better off under the DDA. For instance if you are part of a very large organisation with many individuals who have access problems to a building. There is a very restrictive interpretation of representative complaints in the ADCQ. Complainants must be affected by the same issues of law and fact, to the same extent. A representative complaint with HREOC may have a better chance of acceptance.
- By law Commonwealth employees have to use the DDA. It contains an additional discrimination area relating to the administration of Commonwealth laws and programs.

**It is anticipated that more Queensland workplace discrimination complaints will be dealt with solely by either the ADCQ or HREOC in the future. The ADCQ's role will expand considerably following *Work Choices* due to the dramatically reduced access to the QIRC in termination cases. Amendments shortening the time period for conducting a conciliation conference to 6 weeks after acceptance of a complaint mean**

**the ADCQ process is now similarly paced to the QIRC and AIRC anyway. The AIRC may have an expanded role in mediation and conciliation as the number of Australian Workplace Agreements increases and problems relating to them arise.**



## SERVICES AND TRIBUNALS

### WELFARE RIGHTS CENTRE INC.

**Ph:** (07) 3847 5532  
**Free call** (outside metro area):  
1800 358 511  
**TTY:** (07) 3847 5533  
[www.wrcqld.org.au](http://www.wrcqld.org.au)

### ANTI-DISCRIMINATION COMMISSION OF QUEENSLAND

**Ph:** 1300 130 670  
**TTY:** 1300 130 680  
[www.adcq.qld.gov.au](http://www.adcq.qld.gov.au)

### ANTI-DISCRIMINATION ACT

[http://www.austlii.edu.au/au/legis/  
nsw/consol\\_act/aa1977204/](http://www.austlii.edu.au/au/legis/nsw/consol_act/aa1977204/)

### AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**Ph:** 1300 737 841  
[www.airc.gov.au](http://www.airc.gov.au)

### CAIRNS COMMUNITY LEGAL CENTRE INC.

**Ph:** (07) 4031 7688  
**Free call:** 1800 650 197  
[www.cclc.org.au](http://www.cclc.org.au)

### HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION

**Ph:** 1300 656 419 - Complaints  
Infoline  
**TTY:** 1800 620 241  
[www.hreoc.gov.au](http://www.hreoc.gov.au)

### DISABILITY DISCRIMINATION ACT

[http://www.austlii.edu.au/au/  
legis/cth/consol\\_act/dda1992264/](http://www.austlii.edu.au/au/legis/cth/consol_act/dda1992264/)

### QUEENSLAND COUNCIL OF UNIONS

**Ph:** (07) 3846 2468  
[www.qcu.asn.au](http://www.qcu.asn.au)

### QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

**Ph:** (07) 3227 8060  
[www.qirc.qld.gov.au](http://www.qirc.qld.gov.au)

### WORKCHOICES

**Ph:** 1300 363 264  
**Hearing/Speech Impairment  
Service:** 133 677  
**Translating & Interpreter  
Service:** 131 450  
[www.workchoices.gov.au](http://www.workchoices.gov.au)

### WAGELINE

**Ph:** 1300 369 945  
[www.wageline.qld.gov.au](http://www.wageline.qld.gov.au)

### QUEENSLAND WORKING WOMEN'S SERVICE INC.

**Ph:** (07) 3211 1440  
**Free call:** 1800 621 458  
[www.qwws.org.au](http://www.qwws.org.au)

### YOUNG WORKERS

[www.youngworkers.com.au](http://www.youngworkers.com.au)



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