

List of Exemptions in Commonwealth Anti-Discrimination Legislation

General exemptions

There are a number of common exemptions in three of the four Commonwealth anti-discrimination laws (*Age Discrimination Act 2004*, *Disability Discrimination Act 1992* and *Sex Discrimination Act 1984*). These are:

- Inherent requirements / genuine occupational requirements – only in relation to employment
- Charities – allows charitable instruments to discriminate on the basis of age, sex or disability when conferring benefits to a particular group (this also applies to the *Racial Discrimination Act 1975*)
- Superannuation, insurance etc – only where discrimination is based upon actuarial or statistical data and is reasonable having regard to that data or where no such data is available the discrimination is reasonable having regard to any other relevant factors
- Compliance with laws, statutory authorities – includes migration laws and Commonwealth employment programs
- Exemptions granted by the Australian Human Rights Commission, and
- Special measures / positive measures – defined as measures that are discriminatory but are designed to promote equality or meet special needs (this also applies to the *Racial Discrimination Act*).

Some anti-discrimination Acts contain a number of other more contentious exemptions, including exemptions for clubs, voluntary and religious bodies, and educational institutions established for religious purposes.

Temporary exemptions

The Australian Human Rights Commission is able to grant temporary exemptions from some parts of the Sex Discrimination Act, the Disability Discrimination Act and the Age Discrimination Act (section 44 SDA, section 55 DDA and section 44 ADA). The Racial Discrimination Act does not allow the granting of temporary exemptions.

The Commission has developed criteria and procedures to determine when an exemption is appropriate. Under these criteria, any temporary exemption must be consistent with the objects of the Act. Temporary exemptions must be for a term of no more than five years, however, there is provision under the relevant Acts for the Commission to grant a further exemption on an application by the applicant. Public comment on exemption applications is generally sought before the Commission makes a decision. The Commission may also set conditions on temporary exemptions. Exemptions are commonly granted to allow time, where necessary, to make changes to comply with anti-discrimination legislation.

Age Discrimination Act

The Age Discrimination Act contains a number of specific exemptions, for example:

- Domestic Duties: there is an exemption in relation to employment for domestic duties - subsection 18(3)
- Inherent Requirements: there are exemptions in relation to the inherent requirements of the particular employment - subsections 18(4) and (5) (general employment), 19(3) and (4) (commission agents), 20(2) and (3) (contract workers), 21(4) and (5) (partnerships), 22(2) and (3) (qualifying bodies), 24(2) and (3) (employment agencies).
- Education: subsection 26(3) provides an exemption in relation to admission to an educational institution established wholly or primarily for students above a particular age
- Accommodation: subsection 29(3) provides an exemption where the accommodation is provided by a person who lives on the premises or whose near relative lives on the premises where the accommodation is offered to 3 or less persons, and
- Land: section 30(2) provides an exemption to section 30 in relation to the giving of land in a will or as a gift.

The Age Discrimination Act (Division 4) also contains a number of permanent general exemptions, these are:

- Positive Measures: section 33 allows positive measures to be taken on the basis of age, allowing an act which provides a bona fide benefit to persons of a particular age, or an act which is intended to meet a need that arises out of the age of persons of a particular age, or an act which is intended to reduce a disadvantage experienced by persons of a particular age
- Youth Wages: section 25 provides that it is not unlawful to discriminate against a person on the grounds of the person's age in relation to youth wages in a number of areas including in determining who should be offered work
- Superannuation, Insurance and Credit: section 37 provides an exemption in relation to age-based discrimination in respect of the terms and conditions on which an annuity, life insurance policy, membership of a superannuation scheme or credit is offered or refused on the condition that the discrimination is based upon actuarial or statistical data and is reasonable having regard to that data or where no such data is available, the discrimination is reasonable having regard to any other relevant factors.
- Charities, Religious and Voluntary Bodies:
 - Charities: section 34 provides an exemption for provisions in charitable instruments that confer charitable benefits or allow such benefits to be conferred on persons of a particular age and also exempts any act done to give effect to such benefits
 - Voluntary Bodies: section 36 allows a voluntary body to discriminate on the ground of a person's age in connection with the admission of the person as a member of the body or in the provision of benefits, facilities or services to members of the body
 - Religious Bodies: section 35 exempts an act or practice of a body established for religious purposes that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious sensitivities of adherents of that religion

- Health: section 42 contains a number of exemptions in relation to health, specifically providing that the following are not unlawful:
 - exempted health programs
 - anything done by a person in accordance with an exempted health program
 - decisions relating to health goods or medical goods and services where the decision is reasonably based on evidence and professional knowledge about the ability of the person to benefit from the goods or services.

Further, subsection 42(5) provides that anything done by a person in the administration of certain health legislation is not unlawful.

- Migration and Citizenship: section 43 provides an exemption for anything done in relation to the administration of the *Migration Act 1958* (Cth) or the *Immigration (Guardianship of Children) Act 1946* (Cth) or in direct compliance with the *Australian Citizenship Act 1948* (Cth) or the *Immigration (Education) Act 1971* (Cth).
- Direct compliance with laws or orders of a court, including taxation legislation and social security legislation:
 - Section 38 provides that anything done by a person in compliance with a Commonwealth Act relating to superannuation or regulation etc made under a Commonwealth Act relating to superannuation is not unlawful
 - Subsection 39(1) provides that anything done in direct compliance with an Act or regulation etc listed in Schedule 1 is not unlawful
 - Subsection 39(1A) provides that anything done in direct compliance with a provision of an Act etc listed in Schedule 2 is not unlawful
 - Section 39 also provides that an act done in direct compliance with an Act or legislative instrument of a State or Territory (unless it is listed in regulations made under the Age Discrimination Act) is not unlawful
 - Subsection 39(7) provides that anything done by a person in direct compliance with an order of a court is not unlawful
 - Subsection 39(8) provides that anything done by a person in direct compliance with a court or tribunal determination regarding minimum wage or an industrial instrument is not unlawful
 - Sections 40 and 41 also provide that anything done in direct compliance with a taxation law and various pieces of social security legislation are not unlawful, and
- Commonwealth Employment Programs: section 41A provides an exemption in relation to exempted Commonwealth employment programs.

Further, Division 5 (section 44) provides that the Australian Human Rights Commission may grant an exemption from the operation of Division 2 (Discrimination in work) or Division 3 (Discrimination in other areas) of the Act.

Disability Discrimination Act

Defence of unjustifiable hardship: The Disability Discrimination Act has a defence that 'unjustifiable hardship' would be imposed on a respondent in order for them to avoid discriminating against an aggrieved person. This applies in many areas/ activities covered by the Act, including in relation to employment (section 15(4)), education, access to premises and clubs and incorporated associations (section 29A). Under section 11, in determining what constitutes unjustifiable hardship, all 'relevant circumstances' of the particular case are to be taken into account including:

- (a) nature of benefit or detriment likely to accrue or be suffered by any persons concerned
- (b) the effect of the disability of any person concerned
- (c) the financial circumstances and the estimated amount of expenditure required to be made by the person claiming unjustifiable hardship,
- (d) the availability of financial and other assistance to the person claiming unjustifiable hardship
- (e) any action plan given to the Commission under section 64.

The matters to be taken into account in determining whether there is unjustifiable hardship under paragraph (1)(a) includes the benefit or detriment suffered by the community.

There are a number of *specific exceptions* contained in the Disability Discrimination Act:

- Reasonable requirement or condition: subsection 6(3) provides an exception to the prohibition on indirect discrimination, where the indirect discrimination involves the imposition of a requirement or condition which has a disadvantageous effect on persons with the disability, but the requirement or condition is reasonable in the circumstances of the case.
- Education: subsection 22(3) provides an exception in respect of admission to an educational institution established for students who have a particular disability, where the aggrieved person does not have that particular disability.
- Accommodation: subsection 25(3) provides an exception where the accommodation is provided by a person who lives on the premises or whose near relative lives on the premises and the accommodation is offered to 3 or less persons. There is also an exception for accommodation provided by a charity or other voluntary body solely for persons who have a particular disability (subsection 25(3)).
- Land: subsection 26(2) provides an exemption to section 26 in relation to the giving of land in a will or as a gift.
- Clubs and Incorporated Associations: subsection 27(4) provides an exception where membership of the club or incorporated association is restricted to persons with a particular disability.
- Sport: if the person is not reasonably capable of performing the actions reasonably required in relation to the sporting activity, or if the participants in the sporting activity are selected by a method which is reasonable on the basis of their skills and abilities

relevant to the sporting activity, or if a sporting activity is conducted only for persons who have a particular disability – section 28(3)

General exemptions under the Disability Discrimination Act include:

- Special measures: provides an exemption in relation to ‘special measures’ that are reasonably intended to ensure equal opportunities for those who have a disability in circumstances covered by the Act, or which afford persons with a disability goods, access to facilities, services, grants, benefits, programs or opportunities to meet their special needs – section 45.
- Inherent requirements: it is an exception to unlawful discrimination in relation to certain aspects of employment that the person, because of the disability, would be unable to carry out the inherent requirements of the particular work, even if reasonable adjustments were made – section 21A
- Annuities, insurance and superannuation: section 46 provides an exemption in relation to disability-based discrimination in respect of the terms and conditions on which an annuity, life insurance policy, or membership of a superannuation scheme is offered or refused on the condition that the discrimination is based upon actuarial or statistical data and is reasonable having regard to that data or where no such data is available, the discrimination is reasonable having regard to any other relevant factors.
- Acts done under statutory authority: direct compliance with an order of a court, a prescribed law, an industrial instrument made under certain workplace relations legislation or a determination or order of a court or tribunal having power to fix minimum wages: section 47
- Infectious diseases: where the person’s disability is an infectious disease and the discrimination is reasonably necessary to protect public health – section 48
- Charities: exempts charitable instruments that confer benefits to persons who have a disability – section 49
- Pensions and allowances: exemption covers discriminatory provisions relating to pensions, allowances or benefits in certain social security and defence Acts – section 51.
- Migration: section 52 exempts discriminatory provisions in the *Migration Act 1958* or a legislative instrument made under the Act or anything that is permitted or required to be done by that Act or instrument.
- Defence force: only in relation to combat duties or combat-related duties or peacekeeping service or in a position involving the performance of duties as a chaplain or a medical support person in support of forces engaged in combat duties, combat-related duties or peacekeeping service (including peacekeeping services by the AFP – section 54) – section 53(1)

Section 54A provides several exemptions in relation to persons with a disability who have an assistance animal. The exemptions are related to ensuring public safety, health and hygiene.

Section 55 provides that the Australian Human Rights Commission may grant an exemption from the operation of Division 1 (Discrimination in work), Division 2 (Discrimination in other areas) or section 32 (which relates to disability standards) of the Act.

Racial Discrimination Act

There are no 'exemptions' under the Racial Discrimination Act. There are a limited number of statutory 'exceptions' to the operation of the Racial Discrimination Act:

- Section 8(1) – 'special measures' to which paragraph 4 of Article 1 of the Convention on the Elimination of All Forms of Racial Discrimination applies. Includes special measures taken for the sole purpose of securing advancement of certain racial or ethnic groups as may be necessary to ensure such groups equal enjoyment of human rights and fundamental freedoms (with certain provisos).
- Section 8(2) – instrument conferring charitable benefits to persons of a particular race, colour or national or ethnic origin
- Sections 9(3) & 15(4) - employment on a ship or aircraft if engaged outside Australia, and
- Sections 12(3) & 15(5) – accommodation and employment in private dwelling house or flat where the accommodation is shared with the person or a relative of the person.

Sex Discrimination Act

The Sex Discrimination Act contains a number of specific exemptions, for example:

- Domestic Duties: in relation to employment, there is an exemption for discrimination on the grounds of a person's sex for domestic duties on the premises where the employer resides - subsection 14(3)
- Education: subsection 21(3) provides an exception from the prohibition in relation to refusal or failure to accept an application for admission to an educational institution conducted solely for students of the opposite sex to the applicant
- Accommodation: subsection 23(3) provides an exemption where the accommodation is provided by a person who lives on the premises or whose near relative lives on the premises where the accommodation is offered to 3 or less persons or where the accommodation is provided by a religious or charitable or other non-profit body (in specified circumstances)
- Land: subsection 24(2) provides an exemption in relation to the giving of land in a will or as a gift
- Clubs: subsections 25(3) and (4) provide exemptions in relation to clubs where membership of the club is available to persons of one sex only and in relation to discrimination relating to the use or enjoyment of a benefit provided by the club where it is not practicable for the benefit to be used or enjoyed simultaneously or to the same extent by both men and women.
- Requests for information: under subsection 27(2) a specific exemption is provided in relation to requests for information concerning medical conditions that affect persons of one sex only or medical information concerning pregnancy (where the person concerned is pregnant).

The Sex Discrimination Act also contains a number of permanent general exemptions, these are in relation to:

- ‘Special measures intended to achieve equality’: section 7D provides that a person does not discriminate against another person on the basis of sex, marital status or pregnancy/potential pregnancy if the person takes special measures for the purpose of achieving substantive equality in those areas.
- Genuine occupational requirements (section 30): this exemption applies to certain prohibitions relating to employment (section 14(a) and (b)), commission agents (section 15(a) or (b) and contract workers (section 16(a) or (b)), and exempts discrimination on the grounds of a person’s sex where it is a genuine occupational qualification to be a person of the opposite sex. Subsection 30(2) provides guidance as to the circumstances where it will be a genuine occupational qualification to be a person of a particular sex.
- Pregnancy or childbirth: section 31 provides that it is not unlawful discrimination against a man on the ground of his sex if a right or privilege is granted to a woman in connection with pregnancy or childbirth.
- Services for members of one sex: section 32 exempts services, the nature of which is such that they can only be provided to members of one sex
- Accommodation for employees or students: section 34 exempts the provision of accommodation to employees where a different standard of accommodation is provided to different employees based on the number of persons in the household of the employee. It also exempts accommodation provided to persons of one sex who are students at an educational institution.
- Residential care of children: section 35 provides an exemption from discrimination on the grounds of sex or marital status (in specific circumstances) in connection with a position as an employee or contractor where duties involve the care of children in the place where the child/children reside.
- Charities: section 36 provides an exemption for a provision of a will or deed or an act done in order to give effect to such a provision that confers charitable benefits or allows such benefits to be conferred on persons referenced by any one or more of the grounds of discrimination referred to in the Act.
- Religious Bodies: section 37 exempts an act or practice of a body established for religious purposes that conforms to the doctrines etc of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion. It also exempts a number of other activities such as the ordination or appointment of priests or other members of any religious order or the training or education of such persons.
- Educational institutions established for religious purposes:
Employment of staff: section 38 provides an exemption for discrimination on the grounds of sex, marital status or pregnancy in the employment of members of staff or contract workers for educational institutions established for religious purposes, if the discrimination is in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion.

Provision of education or training: Subsection 38(3) also provides an exemption in relation to discrimination on the grounds of marital status or pregnancy in connection with the provision of education or training by a religious educational institution, if the person discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.

- Voluntary Bodies: section 39 allows a voluntary body to discriminate on the ground of a person's sex, marital status or pregnancy in connection with the admission of the person as a member of the body or in the provision of benefits, facilities or services to members of the body.
- Acts done under statutory authority: section 40 exempts anything done in direct compliance with a determination of the Commission, an order of a court including a court or tribunal having power to fix minimum wages and other terms and conditions of employment or an industrial instrument under the Fair Work Act 2009. Section 40 also exempts acts done in direct compliance with certain pieces of welfare and taxation legislation, anything done in the administration of the Austudy or Abstudy schemes or anything done in compliance with a law of the Commonwealth, of a State or Territory (where the provision has the purpose of achieving substantive equality between certain groups of people).
- Insurance: discrimination on the ground of sex in the terms on which an insurance policy is offered to, or may be obtained by, the client which is reasonably based on actuarial or statistical data from a source on which it is reasonable for the insurer to rely - section 41. Also includes a requirement of disclosure of the actuarial or statistical data.
- New Superannuation Fund Conditions: exempts discrimination on the grounds of sex or marital status in certain circumstances, including where discrimination is reasonably based on actuarial or statistical data - section 41A
- Existing Superannuation Fund Conditions: section 41B applies to persons who were members of a superannuation fund before the commencement of the section (with certain other conditions) and exempts discrimination on the ground of the member's sex or marital status in the superannuation fund conditions.
- Sport: subsection 42(1) creates an exemption for competitive sporting activity where the strength, stamina or physique of competitors is relevant; however, under subsection 42(2) this does not apply to specific activities such as coaching, umpiring and administration etc
- Combat Duties: section 43 exempts discrimination against a woman on the ground of her sex in connection with employment in the Defence Force in a position involving combat duties or in prescribed circumstances relating to combat duties.

Section 44 also provides that the Australian Human Rights Commission may grant an exemption from the operation of certain provisions of the Act.

Reasonableness defence: Section 7B provides a defence to indirect discrimination on the basis of sex, marital status or pregnancy or potential pregnancy where the discriminatory measure is reasonable in the circumstances. Subsection 7B(2) lists several matters that must be taken into account in deciding whether a particular measure/practice is reasonable in the circumstances.

Sexual harassment (provision of accommodation): Under Division 3, which deals with sexual harassment, there is an exception in relation to anything done by a person in the course of providing, or offering to provide, accommodation to a near relative.