

**HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION
AGE DISCRIMINATION ACT 2004 (Cth)
Section 44(1)**

NOTICE OF GRANT OF APPLICATION FOR TEMPORARY EXEMPTION

By this instrument, the Human Rights and Equal Opportunity Commission ('the Commission') grants to the Department of Health and Ageing ('the Department') a temporary exemption pursuant to s 44(1) of the *Age Discrimination Act (Cth) 2004* ('the ADA').

1. TERMS OF THE EXEMPTION

- 1.1 The temporary exemption is to commence from the date of this Notice and is to continue to 30 June 2006.
- 1.2 The temporary exemption is granted in response to an application made on behalf of the Department by Ms Jane Halton, Secretary of the Department, contained in her letter to the Commission dated 2 November 2004.
- 1.3 It is granted in respect of the Continence Aids Assistance Scheme ('the Scheme'). The Scheme provides assistance in defraying the costs of continence aids and is limited to people between the ages of 16 and 65 years, with people over the age of 65 years able to access the Scheme if they can establish that they work in paid employment of at least eight hours per week. The Department has responsibility for the Scheme on behalf of the federal government. The administration of the Scheme is currently contracted to Intouch, the commercial arm of the Paraplegic and Quadriplegic Association of Queensland.
- 1.4 The temporary exemption is granted subject to the condition that the Department advise the Commission in writing no later than 31 December 2005 of the following:
 - The status of the review being carried out by the Department specifically in relation to the age related restrictions currently in place in the Scheme; and
 - The changes the Department proposes to make to the age related restrictions described in paragraph 2.2.3 below before the expiration of the temporary exemption on 30 June 2006.

2. BACKGROUND

- 2.1 The Department has applied for an exemption in respect of the Scheme under s 44 of the ADA. Section 44 provides as follows:

44 Commission may grant exemptions

- (1) The Commission may, on application by:
 - (a) a person:
 - (i) on that person's own behalf; or
 - (ii) on behalf of that person and another person or other persons; or
 - (iii) on behalf of another person or other persons; or
 - (b) 2 or more persons:
 - (i) on their own behalf; or
 - (ii) on behalf of themselves and another person or other persons; or
 - (iii) on behalf of another person or other persons;

by instrument, grant to the person or persons to whom the application relates, as the case may be, an exemption from the operation of a provision of Division 2 or 3, as specified in the instrument.

.....

- (3) An exemption granted under this section:
 - (a) may be granted subject to such terms and conditions as are specified in the instrument; and
 - (b) may be expressed to apply only in such circumstances, or in relation to such activities, as are specified in the instrument; and
 - (c) is to be granted for a specified period not exceeding 5 years.

2.2 The following information was provided in letters from the Department dated 2 November 2004, 11 February 2005 and 21 April 2005:

2.2.1 The Scheme commenced in 1992. It was originally developed as an entitlement scheme and was targeted at working age people (then considered to be between 16 and 65 years of age) and who were eligible to receive either the Disability Support Pension or the Mobility Allowance. The aim of the Scheme was to assist eligible clients with a permanent disability to overcome disability specific costs that create barriers to seeking and obtaining employment and participating in the community.

2.2.2 The Scheme was initially administered by the Commonwealth Department of Health, Housing and Community Services. In 2000, responsibility for the Scheme was transferred to the Department of Health and Ageing. At the same time, eligibility for the Scheme was extended to include people over the age of 65 years who worked in paid employment for eight hours or more per week.

2.2.3 Currently, people are eligible for the Scheme if they meet the following criteria:

- They have permanent loss of bladder and/or bowel function due directly to a permanent neurological condition (such as paraplegia, quadriplegia, cerebral palsy, spina bifida, multiple sclerosis or Parkinson's disease) or a permanent and severe intellectual impairment; and
- They are at least 16 years of age but not yet 65 years of age; or aged 65 years or over and working in paid employment at least 8 hours per week; and
- They are eligible for the Disability Support Pension (regardless of the pension they are actually receiving, such as the age pension); or they are eligible for the Mobility Allowance or are in receipt of the equivalent sales tax or GST exemption on a vehicle.

2.2.4 The Scheme has approximately 18,500 eligible clients who each receive up to \$470 a year worth of continence products from Intouch, the contracted supplier and administrator of the Scheme. Intouch is a division of PQ LifeStyles Ltd and is the commercial arm of the Paraplegic and Quadriplegic Association of Queensland.

2.2.5 The federal government provides funding of \$11.5 million per year for the Scheme and there is an annual growth rate in client numbers of around 5%. If the eligibility criteria were to include people 65 years and older, the Department estimates that the eligible client base would increase by approximately 27,500 people to 46,000.

2.2.6 The federal government is currently undertaking a national review of community care programs that will examine issues of eligibility, consistency, overlaps and gaps in service delivery. Details of the national review and the proposed strategies for reform are set out in a publicly available document entitled *The Way Forward – A New Strategy for Community Care* (available at: <http://www.health.gov.au/internet/wcms/publishing.nsf/Content/ageing-commcare-thewayforward.htm>)

2.2.7 The Scheme is included in the national review.

2.3 The reasons given by the Department for seeking the exemption are as follows:

- A temporary exemption would provide sufficient time to review the program consult with stakeholders and implement changes, and would allow a period of grace for the Government consider (sic) the budget implications following the completion of the Community Care Review.¹
- A temporary exemption is sought to enable the Scheme to lawfully continue providing a reasonable level of benefits to people in the currently targeted age group while a review of the Scheme is conducted in the context of the broader Community Care Review.²
- Review of the Scheme will involve consultation with relevant stakeholders about program changes, including changes needed to ensure compliance with the Act. This process will help to promote the objects of the

¹ Contained in letter from Ms Jane Halton, Secretary of Department of Health and Ageing, to the Hon. John von Doussa, President of the Commission, dated 2 November 2004.

² Contained in Attachment A to a letter from Mr Warwick Bruen, Assistant Secretary of Community Care Branch of the Department of Health and Ageing, to Ms Katie Ellinson, Senior Legal Officer of the Commission, dated 11 February 2005.

ADA, in particular recognition and acceptance within the community of the principle that people of all ages have the same fundamental rights.³

- While the Scheme in its current form may discriminate against persons on the grounds of age, it should be noted that a purpose of the Scheme is to reduce discrimination on the basis of disability. A reduction in the current level of benefits in order to immediately extend eligibility beyond the currently targeted age group would result in the Scheme not being a cost effective use of public money.⁴

3. FINDINGS ON MATERIAL QUESTIONS OF FACT

3.1 Based on the evidence referred to in paragraphs 2.2 – 2.3 above, the Commission makes the following findings on material questions of fact in relation to this application:

3.1.1 The Scheme is administered by the Department.

3.1.2 To be eligible under the Scheme, a person must be, amongst other things:

- (a) between 16 years and 65 years of age; or
- (b) if over the age of 65 years, working in paid employment of at least eight hours per week.

3.1.3 The Scheme has approximately 18,500 eligible clients who each receive up to \$470.00 a year worth of continence products from Intouch, the contracted supplier and administrator of the Scheme.

3.1.4 Government funding of \$11.5 million per year is provided for the Scheme and there is an annual growth rate in client numbers of around 5%. If the eligibility criteria were to include people 65 years and older, it is estimated that the number of eligible people would increase by 27,500 to approximately 46,000.

3.1.5 The federal Government is currently undertaking a national review of community care programs that will examine issues of eligibility, consistency, overlaps and gaps in service delivery.

3.1.6 The Scheme is included in the national review.

4. REASONS FOR GRANTING AN EXEMPTION

4.1 It is likely that the application of the age restrictions in the Scheme would be in breach of sections 28 and/or 31 of the ADA:

Section 28 Goods, services and facilities

It is unlawful for a person who, whether for payment or not, provides goods or services, or makes facilities available, to discriminate against another person on the ground of the other person's age:

- (a) by refusing to provide the other person with those goods or services or to make those facilities available to the other person; or
- (b) in the terms or conditions on which the first-mentioned person provides the other person with those goods or services or makes those facilities available to the other person; or
- (c) in the manner in which the first-mentioned person provides the other person with those goods or services or makes those facilities available to the other person.

Section 31 Administration of Commonwealth laws and programs

(1) It is unlawful for a person who:

- (a) performs any function or exercises any power under a Commonwealth law or for the purposes of a Commonwealth program; or
- (b) has any other responsibility for the administration of a Commonwealth law or the conduct of a Commonwealth program;

to discriminate against another person on the ground of the other person's age in the performance of that function, the exercise of that power or the fulfilment of that responsibility.

³ Ibid.

⁴ Ibid.

Definition

- (2) In this section: "Commonwealth program" means a program conducted by or on behalf of the Commonwealth Government.
- 4.2 It is of concern to the Commission that this situation continues to exist despite the commencement of the operation of the ADA on 22 June 2004, particularly in light of the potential number of people affected by the imposition of the age restrictions. From the figures provided by the Department (see paragraph 2.2.5 above), an additional 27,500 people over the age of 65 years would be entitled to assistance under the Scheme were it not for the age restrictions imposed.
- 4.3 However, it is also noted that the Government is intending to undertake a broad review of its community care programs with the aim of simplifying and streamlining current arrangements for the administration and delivery of community care services. The publicly available document that sets out the Government's reform proposals, *The Way Forward - A New Strategy for Community Care*, does not explicitly refer to a review of the age restrictions currently in place in the Scheme, but does make reference to a broader review of the eligibility criteria in all community care programs. The only specific reference made to the Continence Aids Assistance Scheme is contained in a letter from the Department to the Commission dated 21 April 2005 that states: 'To address the age restrictions of the Scheme, the Australian Government plans to examine eligibility in relation to age and level of disability, aimed to provide national consistency and better community care for older Australians'.
- 4.4 The Department has stated that a reduction in the current level of benefits in order to immediately extend eligibility beyond the current targeted age group would result in the Scheme not being a cost effective use of public money. The Department advised that the Australian Government provides funding of \$11.5 million per year for the Scheme and there is an annual growth rate of in client numbers of around 5%. If the eligibility criteria were to include people 65 years and older, it is estimated that the client base would increase by 27,500 people to 46,000 people. It is relevant to note that a figure has not been provided for people under the age of 16 years and it is not evident from any of the materials provided by the Department whether specific consideration is being given to this younger age group.
- 4.5 The Department has submitted that the granting of a temporary exemption would enable the Scheme to lawfully continue providing a reasonable level of benefits to people in the currently targeted age group while the review of the Scheme is conducted in the context of the broader national review.
- 4.6 It remains of concern to the Commission that the information provided by the Department does not indicate a sufficient focus on addressing the age related criteria in the Scheme and, to the extent that reference is made by the Department to 'examining eligibility in relation to age', it is only made in relation to older Australians and no mention is made to people under the age of 16 years.
- 4.7 In these circumstances the Commission has decided to grant a temporary exemption, but only to 30 June 2006 rather than the two year period sought by the Department.
- 4.8 Pursuant to s 44(3) of the ADA the Commission may grant an exemption 'subject to such terms and conditions as are specified in the instrument'. Accordingly, the Commission grants the temporary exemption to 30 June 2006 subject to the condition that the Department advise the Commission in writing no later than 31 December 2005 of the following:
- The status of the review being carried out by the Department specifically in relation to the age related restrictions currently in place in the Scheme and;
 - The changes the Department proposes to make to the age related restrictions described in paragraph 2.2.3 before the expiration of the temporary exemption on 30 June 2006.

Dated this 21st day of July 2005

Signed by the President, John von Doussa QC, on behalf of the Commission.

Please note

Subject to the *Administrative Appeals Tribunal Act 1975*, application may be made to the Administrative Appeals Tribunal for a review of a decision to which this notice relates by or on behalf of any person or persons whose interests are affected by the decision.