



Australian  
Human Rights  
Commission  
*everyone, everywhere, everyday*

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**2009**

Temporary exemptions  
under the Sex  
Discrimination Act

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Commission Guidelines

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## 1 The purpose of these guidelines

Section 44 of the *Sex Discrimination Act 1984* (Cth) (the Sex Discrimination Act) gives the Australian Human Rights Commission (the Commission) the power to grant temporary exemptions from certain provisions of the Sex Discrimination Act. Section 44 of the Sex Discrimination Act 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.
- (2) The Commission may, on application by a person to, or in respect of, whom an exemption from a provision of Division 2 or 3 has been granted under subsection (1), being an application made before the expiration of the period to which the exemption was granted, grant a further exemption from the operation of that provision.
- (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.

Temporary exemptions may, for example, allow a person time to make changes to comply with the Age Discrimination Act. Actions or circumstances covered by an exemption are not unlawful under the Sex Discrimination Act while that exemption is in force.

This means that if a temporary exemption is granted the activities covered by it cannot be the subject of a successful complaint under the Sex Discrimination Act.

The Sex Discrimination Act does not say how the Commission should exercise the power to grant exemptions. The Commission has therefore developed these guidelines, which explain:

- The criteria the Commission applies in deciding whether to grant an exemption;

- The process the Commission may adopt in considering an exemption application (including seeking public submissions);
- How to apply for an exemption; and
- How to seek review of the Commission's decision.

## **2 Summary**

In deciding whether to grant an exemption, the Commission will consider:

- Whether an exemption is necessary;
- The objects of the Sex Discrimination Act;
- The applicant's reasons for seeking an exemption;
- Submissions by interested parties; and
- All relevant provisions of the Sex Discrimination Act.

In granting an exemption, the Commission can:

- Impose terms and conditions; and/or
- Limit the exemption to particular circumstances and activities;

The Commission can only grant the exemption for only a limited period (less than five years).

The Commission's decision-making process will depend on the circumstances. The Commission attempts, where practicable, to give persons who may be affected by the outcome of an exemption application an opportunity to comment on the application.

## **3 What criteria does the Commission apply in deciding whether to grant an exemption?**

In deciding whether to grant an exemption, the Commission will consider all of the relevant circumstances and apply the following criteria:

(a) *Is an exemption necessary?*

For an exemption to be necessary there must be at least an arguable case that the activities that are the subject of the application constitute discrimination contrary to the Sex Discrimination Act.

The Commission will consider matters including:

- Whether the circumstances are covered by the Sex Discrimination Act (see section 9);
- Whether any of the permanent exemptions to the Sex Discrimination Act apply (see sections 30-43); and
- Whether the circumstances can be brought within the ‘special measures’ provision of the Sex Discrimination Act (see sections 7D).

(b) *Is granting an exemption consistent with the objects of the Sex Discrimination Act?*

The Commission must consider the objects of Sex Age Discrimination Act, set out in section 3. In broad terms, these objects are to:

- Give effect to the object and spirit of the *Convention on the Elimination of All Forms of Discrimination against Women*;
- Eliminate, as far as possible, discrimination against persons on the ground of sex, marital status, pregnancy, potential pregnancy or family responsibilities, including discrimination involving sexual harassment; and
- Promote recognition and acceptance within the community of the principle of the equality of men and women.

If an exemption is sought that would allow conduct that is inconsistent with, or would undermine, the objects of the Sex Discrimination Act, this will be a significant reason not to grant an exemption.

In considering this issue, the Commission will have regard to:

- The reasonableness of the exemption sought – the Commission will weigh up the nature and extent of the discriminatory effect against the reasons advanced in favour of an exemption;
- Whether the circumstances, while not falling precisely within any of the permanent exemptions to the Sex Discrimination Act, bear a close resemblance to any of those exemptions so as to be within the spirit or broad scheme of those exemptions; and
- Whether an exemption could be granted subject to terms and conditions which further the objects of the Sex Discrimination Act (see below).

Where an exemption is sought for reasons wholly unrelated to the objects of the Sex Discrimination Act (such as to gain commercial advantage), this may be a factor weighing against the grant of an exemption.

(c) *Is it appropriate to grant an exemption subject to terms and conditions?*

The Commission will consider whether it is appropriate to make an exemption subject to terms and conditions or to limit the application of an exemption to

particular circumstances or activities.

In particular, the Commission will consider whether an exemption could be granted subject to terms and conditions which require action to be taken by the applicant during the term of the application that will:

- Reduce or remove the discriminatory practice or circumstance; and/or
- Further the objects of the Sex Discrimination Act.

The Commission can only grant an exemption for a limited period (up to a maximum of five years).

*(d) What are the views of persons or organisations who are interested in or who may be affected by the outcome of an application?*

The Commission will consider submissions from interested parties.

#### **4 How does the Commission process exemptions?**

The Commission can only grant an exemption when it has received an application seeking an exemption.

The Commission will seek to give interested parties an opportunity to participate in decisions regarding applications for exemption.

The process for deciding applications for exemptions will depend on the circumstances.

The Commission may take any of the following actions in deciding whether to grant an exemption:

1. Publish the application on the Commission's website with a call for public comments;
2. Seek further information from the Applicant;
3. Invite persons who may be affected by the Commission's decision to make written submissions commenting on the application;
4. Hold discussions with the Applicant and any other interested parties to negotiate the terms and conditions on which an exemption is granted; and
5. Make proposed decisions on applications available to interested parties for comment before the Commission makes a final decision.

State and Territory Anti-Discrimination Boards and Equal Opportunity Commissions will also be notified that a temporary exemption application has been made and invited to comment on the application.

In reaching its decision, the Commission will seek the recommendation of the Sex Discrimination Commissioner.

The Sex Discrimination Act requires publication in the Commonwealth Government Gazette, within one month after a decision on an exemption application, of a notice:

- Setting out the Commission's findings on the relevant facts;
- Referring to the evidence on which those findings were based; and
- Giving the reasons for the making of the decision.

## **5 How do I apply for an exemption?**

### *(a) Who may apply for an exemption?*

An application for an exemption may be made:

- By persons on their own behalf or on behalf of themselves and others; and/or
- On behalf of a class of persons.

### *(b) What activities can be the subject of an exemption?*

Temporary exemptions under the Sex Discrimination Act may be granted from any of the provisions of the Age Discrimination Act which make discrimination unlawful in relation to:

- Employment, superannuation, commission agents, contract workers, partnerships, qualifying bodies, registered industrial organisations and employment agencies (sections 14-20);
- Education (section 21);
- Goods, services and facilities (section 22);
- Accommodation and land (sections 23-24);
- Clubs (section 25);
- Administration of Commonwealth laws and programs (section 26);
- Application forms (section 27);
- Insurance (section 41(1)(e)); and
- Existing superannuation fund conditions (section 41B(1)(b)).

### *(c) What activities cannot be the subject of an exemption?*

The Commission cannot grant exemptions from:

- Sexual harassment (Part II, Division 3 of the Sex Discrimination Act); or
- Offences under the Sex Discrimination Act, such as victimisation of a person because he or she has made a complaint or advertising that indicates an intention to do an act that is unlawful under the Sex Discrimination Act.

(d) *How should applications for exemption be made?*

Applications should be submitted electronically to [legal@humanrights.gov.au](mailto:legal@humanrights.gov.au).

(e) *What information should an application include?*

Applicants should read these guidelines carefully before preparing an application. Applications should address the Commission's exemption criteria.

In particular, applications should include the following information:

(i) Who is seeking the exemption?

The application should state who is seeking the exemption: i.e. the person, persons or class of persons.

If the application is made on behalf of a corporation or organisation, the application should include information about the nature of the Applicant. E.g. is it a trading corporation or a voluntary organisation?

(ii) How long is the exemption sought for?

The application should state how long the exemption is sought for. Exemptions can be granted for up to five years.

(iii) What circumstances or activities are to be covered by the exemption?

The application should identify what circumstances or activities are to be covered by the proposed exemption.

The application should also identify what provision or provisions of the Sex Discrimination Act the exemption relates to (see section (b) above).

(iv) Who will be affected by the application?

The application should identify any specific persons, corporations or organisations that may be affected by the outcome of the application.

(f) *Is an exemption necessary?*

The application should state why an exemption is necessary to prevent a breach of the Sex Discrimination Act. In particular, applicants should consider whether:

- The proposed activity is covered by a permanent exemption and therefore lawful. The Sex Discrimination Act provides for a wide range of permanent exemptions in Division 4, Part II (sections 30-43); or
- The proposed activity falls within the positive discrimination provision and is therefore lawful. Section 7D of the Sex Discrimination Act provides for the taking of 'special measures' for the purpose of achieving equality between:

- Men and women;
- People of different marital status; or
- Women who are pregnant or potentially pregnant and those who are not.

*(g) Why should an exemption be granted?*

The application should set out the reasons why the exemption is required. It should also include any evidence that supports these reasons.

The application should, where possible, explain:

- How the proposed exemption fits within the objects and scheme of the Sex Discrimination Act;
- Why immediate compliance with the Sex Discrimination Act is not possible or should not be required in this case;
- Any things done or planned by the applicant which seek to achieve the objects of the Sex Discrimination Act;
- Any terms or conditions which further the objects of the Sex Discrimination Act and which the applicant is prepared to meet as a condition of being granted the exemption;
- The results of any consultations undertaken by the applicant with people who may be affected by the proposed activity and their representative organisations;
- The financial or other hardship which will be incurred if the exemption is not granted; and
- Measures proposed to minimise or reduce any hardship which may be faced by people affected by the proposed exemption.

The Commission may seek additional information about any other matter the Commission considers relevant to considering an exemption application.

*(h) Are there factors that may affect the processing of the application?*

The Applicant should tell the Commission if there are any factors that may affect the processing of the application. These may include:

- Reasons why the application should be processed urgently;
- Reasons why material provided in connection with the application should not be made publicly available (e.g. protection of personal information or commercial sensitivity);



- Whether the applicant has sought, or intends to seek, an exemption under any law of a State or Territory dealing with sex discrimination; and/or
- Whether there is a complaint before the Commission under the Sex Discrimination Act, or before a State or Territory authority dealing with sex discrimination, in relation to the subject of the exemption application.

## **6 Can I seek review of the Commission's decision?**

Any person whose interests are affected by a decision of the Commission regarding an application for exemption may apply to the Administrative Appeals Tribunal for a review of the decision.