

Defences, Exceptions & Exemptions

Definitions

- Exception: general, excludes a specific activity from compliance for indefinite period of time, requires a good justification. E.g. 15(1) RDA, & consider religious organisations & charities fall within the exceptions to some of the prohibitions against discrimination on some grounds.
- Exemption: excuses compliance for a set period of time, case by case. E.g. s44 SDA, allowing UNSW to discriminate for engineering research award to women only to increase the number of women working in the discipline.
- Genuine occupational qualification (personal privacy, veracity in entertainment e.g. SDA s30, ADA NSW s14) e.g. Cathy Freeman actress.
- No consistent approach to the placement of exceptions within the legislation.
 - RDA: ~~exception~~, exception of accommodation & employment in a private household & shared accommodation.
 - SDA: special rights [pregnancy/childbirth/breastfeeding] & GOQs [combat & sporting, where strength, stamina, physique are relevant].
 - DDA: unable to perform inherent requirements because of their disability [employments], unjustifiable hardship [educational institutions], if reasonably necessary to protect public health e.g. infectious disease.
 - ADA: unable to perform inherent requirements—includes positive discrimination.
 - ADANSW: special measures [all grounds], temporary exemptions, exceptions [single-sex educational institutions except race; registered club can discriminate (disability/age) if object is to provide benefits for persons of a particular age or to prevent the retention of different categories of memberships for different age groups].

‘Special Measures’: benefit → to overcome a disadvantage → caused by a *protected shared* attribute → “positive discrimination”.

- Usually as a defence. Delegates (a) legal capacity to decide that ‘special measures’ are necessary, (b) power to design measures—but of course, in application courts/tribunals may find they do not fit within ‘special measures’.
 - Unlawful discrimination—only few cases [*Catholic Education Office v Clarke*; *SUPRA v Minister for Transport Service*].
 - NSW contains process to seek formal clearance before a special measure is put into operation [s126A ADA (NSW)].
 - Person advocating exception has the burden of proving that exception has been made out [s104 ADA (NSW)].

RDA Section 8(1) Exceptions: (1) Not applicable to special measures except measures in relation to which subsection 10(1) applies. *Gerhardy v Brown*—

- (1) Whether it bears character of special measure;
 - (A) Law evidences a req. of protection; (B) That finding was reasonably open; (C) Sole purpose to secure adequate advancement; (D) The law is reasonably capable of being appropriate & adapted to that sole purpose [*Maloney v The Queen*].
 - Advancement of a group ≠ unwanted material benefit foisted on them [*Gerhardy v Brown*] ∴ if no genuine consultation with those affected, court may conclude that measure is not reasonably capable of being appropriate & adapted for the sole purpose it purports to serve [but not a necessary pre-condition—*Maloney v The Queen*].
- (2) Political assessments by gov. political branch must be accepted (re: need for advancement & measure would secure that).
- (3) Court can decide whether they acted reasonably in making the assessment.

SDA Section 7D: lawful discrimination if purposed to ensure equal opportunity; equal treatment & substantive equality.

- Proposed amendment: (A) special measures not discrimination—real question is whether there is discrimination at all. Moved from part which provides exemptions to an expression (~~exception~~) of equality; (B) ‘aimed at accelerating equality’, to achieve real/substantive equality...need to look at the end result of a practice, narrow/formalistic approach will not produce equality.
- Section 7D considered in *Jacomb v Australian Municipal Administrative Clerical & Services Union*: affirmative action which includes special measures, requiring people to look to structural barriers to equality or systemic discrimination (case by case)—50% must be women, unlawfully discriminative against men. Quota & not preferential treatment? Meritocracy? Women don’t see as a ‘boys club’ & are confident that there will other women. Must take action FOR that purpose.
- Measure designed to achieve equality in fact (actual/genuine/effective/substantive, not equality in law/formal equality).
- Applying s7D: (A) subjective test—achieving substantive equality doesn’t have to be only/primary purpose. (B) Objective test—(a) acted reasonably in assessing the need for the special measure; (b) capacity of the special measure to achieve the purpose of substantive equality.
- Do in order to accelerate substantive equality between male & female members. Inflexible quotas in favour of women, discontinuance of the two rules (rr5 & 9) if no longer needed. Cannot remain valid as special measures beyond the ‘exigency’ (namely the need for substantive equality between men & women) which called them forth: s7D(4).
- *Walker v Cormack*: exercise class for women only—sex discrimination in the provision of a service. S7D designed to encourage special measures for the purpose of achieving substantive equality—not to technical & difficult to comply with. So the finding of the reluctance of some women to access the services of the gym if men were present was substantive inequality. Need for female only classes, acted reasonably as there were classes open to men as well. Reasonable on an objective test. Reluctance (not just mere preference) of women to avail themselves of opportunities is sufficient. Formal equality can lead to substantive inequality because of women’s reluctance to avail themselves on the basis of formal equality. Wrong to characterise reluctance as mere preference, may stem from other causes (embarrassment e.g.), open for court to conclude there’s substantive inequality.

DDA Section 45—most extensive special measures: objective assessment must be made of conduct which discriminates in favour of people with a particular disability. ‘reasonably intended to achieve a specified outcome’.

- *Catholic Education Office v Clarke*: accepted Clarke as a student but refused to provide him with Auslan assistance (mode of communication). Reasonably intended to afford Jacob access to services? Two points should be made about s45: (A) interpret consistently with the objectives, (B) ‘reasonably intended to achieve certain objectives’ differs from *Colyer v Victoria* (designed refers to the subjective plan/intent of the DM). Incorporates an objective criterion which requires court to assess the suitability of the measure. RUDE!!! Providing a disadvantage ‘learn how to integrate’. It was an offer of a place subject to a term/condition that Jacob participates & receives classroom instruction without an interpreter. Withdrawal of Auslan support would cause Jacob distress & he wouldn’t receive an effective education.

State—ADA (NSW)

- State measures similar, so broadly worded that it isn’t clear whether the subjective intent of the perpetrator is sufficient to draw the activity within exception OR whether the activity must ALSO be objectively evaluated by a tribunal. Duration?
- Permitted without prior approval if race/age for any ground [s126A]. One relying on this needs to prove they provide facilities/ services/opportunities to people of a particular race/age which were not provided to people of a different race/age with the intention of meeting special needs which those people had, or with the intention of promoting equal/improved access to those facilities for people of that race/age.
- *SUPRA v Minister for Transport Services*: refusing to allow fee paying overseas university students the same concessional fares on public transport as those that were available to Australian students amounted to discrimination on the ground of race. Section 21 intended to permit affirmative action in order to meet the special needs of people, overcome past & present disadvantage—person relying needs to evidence disadvantage (matter of fact—Aust students not disadvantaged) & evidence of their state of mind in acting as they did; does not fit within s 21—discriminatory.
- *Central North Adelaide Health Service v Atkinson (SASR)*: medical services to a limited group of people, 77 yo English man was refused request for services as they were seeking to overcome disadvantage suffered by some racial groups & meet the needs of young people.

126A Exemption for special needs programs & activities (1) Nothing in Parts 3-4C renders unlawful anything done by a person in good faith for the purposes of or in the course of any program or activity for which certification is in force under this section as a special needs program or activity. (2) The Minister may certify a program or activity to be a special needs program or activity if satisfied that its purpose or primary purpose is the promotion of access, for members of a group of persons affected by any form of unlawful discrimination to which this Act applies in an area of discrimination to which this Act applies, to facilities, services or opportunities to meet their special needs or the promotion of equal or improved access for them to facilities, services & opportunities. (4) Certification for a program or activity remains in force for the period specified in the certification or (if no period is specified) until the certification is withdrawn. (5) Certification may be withdrawn by the Minister at any time by giving notice in writing to the person who appears to the Minister to be the person who is in charge of the program or who has responsibility for the activity concerned. (6) A person who is in charge of a program or activity may apply to the Tribunal for an administrative review under the Administrative Decisions Review Act 1997 of a decision of the Minister under this section concerning the certification of the program or activity.

- Only ADANSW permits a person to seek formal approval before implementing measure—s126A: responsible Minister to certify ‘special needs program’ to become lawful. *Chapman v Women’s Legal Resources*: man declined because of gender, complained. Denied because program was certified under s126A & is a complete defence.^{557...}