



Guidelines

for exemptions to the NSW Anti-Discrimination Act

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Why would I need an exemption?

You may need an exemption to the Anti-Discrimination Act 1977 (NSW)(ADA) if you want to favour a particular group of people in situations where that would otherwise be unlawful under the ADA.

The ADA has a three-part structure:

- it makes certain types of discrimination unlawful in certain situations;
- it sets out exceptions where discrimination is justified; and
- in situations not covered by an exception, it provides a method for gaining an individual exemption from the Act.

What types of discrimination are unlawful?

The ADA says that it is generally against the law to discriminate against people because of their:

- race;
- sex (including pregnancy, breastfeeding and sexual harassment);
- marital status or domestic status;
- disability;
- homosexuality;
- age;
- transgender status (transsexuality);
- carer's responsibilities (in employment only).

It is generally against the law to discriminate against people in the following areas:

- employment, including recruitment, terms and conditions, access to training and other benefits, and termination;
- state education, including admission to a state educational institution and access to services while at the institution;
- provision of goods and services;
- rental accommodation;
- registered clubs (which are clubs that serve alcohol or have gambling machines).

This means that generally all jobs, services, rental accommodation, and so on, must be available to people of all races, both sexes, all types of marital or domestic status, and so on. So it is generally against the law to target jobs or services towards people of one particular race, sex, and so on.

What are the exceptions where discrimination is justified?

There are some (largely commonsense) exceptions listed in the ADA where it is OK to target jobs or services towards a particular group. For example, the Act specifically states that it is OK to advertise a job for one sex only, if being of that sex is clearly an essential requirement of the job – such as recruiting a woman to clean female toilets or a man to clean male toilets, if the cleaning is to be done when the toilets are in use.

The ADA also specifically states that a service provider can provide services or facilities to meet the “special needs” of a particular race or age group – for example, English

language classes that are only for people from non-English speaking backgrounds.

Specific exceptions like these allow you to favour a particular group in particular situations, and therefore exclude and discriminate against other groups. There is no need for you to apply for an exemption in these circumstances.

In many other circumstances, you must obtain an exemption under the ADA if you want to favour one particular group, and therefore discriminate against other groups.

Does an exception apply to my circumstances?

The following information and examples may assist you in deciding whether an exception could apply to your situation – if you are unsure, please contact the Board’s Legal Officer.

Jobs or services targeted towards people of one SEX only

You won’t need an exemption

- where being the particular sex is a “genuine occupational qualification” essential for doing a job, as specified under s 31 of the ADA. For example:
 - the job involves working in toilets, showers or change rooms, or performing body searches, and it should be done by a person of a particular sex to maintain decency or privacy.
 - the job involves providing personal welfare or education services to only men or only women, and most men or women would object to those services being carried out by a person of the opposite sex.

If being of a particular sex is a genuine occupational qualification, your advertisement should say: “[Name of employer] considers being a woman/man is a genuine occupational qualification for this position under s 31 of the Anti-Discrimination Act 1977 (NSW).”

- if you are a state public sector agency and the job or program you want to target is specifically listed in your agency’s EEO management plan as reported to the Office of the Director of Equal Opportunity in Employment. See “State public sector EEO management plans” on page 8 for more information.

- where you’re providing equivalent single sex services for each sex. For example, it would be OK for a gym to have a “women only” day once a week as long as they are providing equivalent services for the group that is excluded, in this case men.

The services must be equivalent in quality and length or you will be discriminating – if the gym had men only days for four days each week and a women only day only once a week, they would be discriminating against women.

You will need an exemption

- in situations where being of a particular sex isn’t essential to do the job – for example, a mechanic or a child care worker. To get an exemption you will need to show that targeting the job for a particular sex will help redress past or present discrimination experienced by that sex in that occupation or area of employment.
- when you want to provide any service or special needs program for one sex only, for example, a women’s only gym or a men’s only counselling group. Again, to get an exemption you will need to show how targeting your service or program will help provide equal opportunity.

Jobs or services targeted towards people of one particular RACE or ETHNIC GROUP

You won't need an exemption

- when being of a particular race or ethnic background is a "genuine occupational qualification" as specified under section 14 of the ADA. For example:
 - where a person of a specific race/ethnic background is required to provide authenticity for a dramatic performance, modelling, or working in an ethnic specific restaurant, or
 - where the job involves providing welfare services to a specific race/ethnic group, and those services can be provided most effectively by a person of the same race.

If being of a particular race/ethnic group is a genuine occupational qualification, your job advertisement should say: "[Name of the employer] considers that being [particular race] is a genuine occupational qualification under s 14 of the Anti-Discrimination Act 1977 (NSW)."

- to provide people of a particular race with equal or improved access to facilities, services or

opportunities to meet their special needs – for example, providing English classes for people of a particular race. This is allowed under s 21 of the ADA.

- if you are a state public sector agency and the job or program you want to target is specifically listed in your agency's Equal Employment Opportunity (EEO) management plan as reported to the Office of the Director of Equal Opportunity in Employment. See "State public sector EEO management plans" on page 8 for more information.

You will need an exemption

- in situations where being of a particular race isn't essential to do the job – for example, a general clerical or manager's position. To get an exemption you will need to show that targeting the job for a particular group will help redress past or present discrimination experienced by the group in a specific occupation or area of employment.

Jobs or services targeted towards a particular AGE group

You won't need an exemption

- if you want to target a job for a person under the age of 21 working under junior terms and conditions. This is allowed under s 49ZYI of the ADA.
- where being within a particular age group is a "genuine occupational qualification" essential for doing the job, as specified under s 49ZYJ of the ADA. For example:
 - where a person of a specific age group is required to provide authenticity for a dramatic performance or entertainment
 - where the job involves providing welfare or education services to a specific age group and those services can be provided most effectively by a person of the same age group, such as a youth worker.

If being of a particular age group is a genuine occupational qualification, your advertisement should say: "[Name of employer] considers being

a [particular age] is a genuine occupational qualification for this position under s 49ZYJ of the Anti-Discrimination Act 1977 (NSW)."

- where in providing services you want to provide benefits or concessions for people in a particular age group "in good faith" – for example, discounts for children or pensioners, or holiday tours for people of a certain age. This is allowed under s 49ZYN(2) of the ADA.
- where you want to provide people of a particular age or age group with equal or improved access to facilities, services or opportunities to meet their special needs – for example a young people's drop-in centre. This is allowed under s 49ZYR of the ADA.

You will need an exemption

- in all other situations. In general, to get an exemption you will need to show that targeting the job, service or program will help redress past or present discrimination experienced by the particular age group.

Jobs or services targeted towards GAY MEN or LESBIANS

You won't need an exemption

- if you want to target a job, service or program to gay men and lesbians. This is because it is not against the law to discriminate against people who are not homosexual – it is only against the law to discriminate against people who are homosexual.

However, under federal law if you want to target a job in this way you will need to show that being homosexual is an inherent requirement of the job. For more information about this, contact the Australian Human Rights Commission on (02) 9284 9600 or www.hreoc.gov.au.

You will need an exemption

- if you want to target a job towards gay men only or lesbians only. It would be sex discrimination to do this without an exemption. To get an exemption you will need to be able to show that being a gay man or a lesbian is necessary because of the nature of the job, for example, a gay male counsellor in a gay men's counselling service.
- if you want to target a service or special needs program towards gay men only or lesbians only. Again, it would be sex discrimination to do this without an exemption. To get an exemption you will need to show why it is essential for the service to be targeted in this way.

Jobs or services targeted towards people who are TRANSGENDER

You won't need an exemption

- if you want to target a job, service or program towards all people who are transgender. This is because it is not against the law to discriminate against people who are not transgender – it is only against the law to discriminate against people who are transgender.

You will need an exemption

- if you want to target a job, service or program towards female to male transgender people only, or towards male to female transgender people only. In general, it would be sex discrimination to do this without an exemption.

To get an employment exemption you will need to be able to show that being a male to female transgender person or a female to male transgender person is necessary for doing the job – for example a male to female transgender counsellor in a male to female transgender counselling service.

To get a service delivery exemption you would similarly need to show that it is essential for the service to be delivered to male to female transgender people or female to male transgender people only.

Jobs or services targeted towards PEOPLE WITH DISABILITIES

You won't need an exemption

- if you want to target a job, service or program to all people with disabilities. This is because it is not against the law to discriminate against people who don't have a disability – it is only against the law to discriminate against people who do have a disability.
- if you are a state public sector agency and the job or program you want to target is specifically listed in your agency's EEO management plan as reported

to the Office of the Director of Equal Opportunity in Employment. See "State public sector EEO management plans" on page 8 for more information.

You may need an exemption

- if you want to target a job, service or program towards people with a specific type of disability – for example if you want to employ someone with cerebral palsy, or you want to run a job-seeking skills class for people with an intellectual disability.

Jobs or services targeted towards people on the ground of MARITAL or DOMESTIC STATUS

You won't need an exemption

- if you want to target a married couple for a "double job", for example, proprietors of a motel. This is allowed under s 46 of the Anti-Discrimination Act.

You will need an exemption

- in any other situation relating to employment – for

example if you want to employ a divorced person to provide counselling for divorced people.

- when providing any service or special needs program for people of one type of marital status only – for example a counselling group for people who are divorced.

What are the types of exemptions?

There are two separate ways to apply for an exemption. The first is to apply to the President of the Anti-Discrimination Board under s 126 of the ADA. Under this section, the President can grant an exemption to allow discrimination on any ground and in any area covered by the Act.

The second way is to apply to the Minister (currently the Attorney General) under s 126A of the ADA for a certificate that a special needs program or activity can operate in a discriminatory manner. The Minister cannot grant a certificate for race or age discrimination.

What is the difference between a s 126 and a s 126a exemption?

Section 126 exemptions

Section 126 exemptions generally relate to employment and recruitment, for example targeted jobs or recruitment programs for a particular group covered by the ADA.

Since 1 January 2009, the President of the Anti-Discrimination Board grants exemptions under s 126. He or she must make a decision on a s 126 application within 60 days after the application is made.

In deciding whether to grant an exemption, there are a number of factors which the President must take into account. These factors are set out in the Anti-Discrimination Regulation 2004 (the Regulation). For more information about the factors see under "If you are applying for a s 126 exemption" on page 6.

These factors are not necessarily the only things that the President will take into account in considering an application under s 126. He or she may consider any other relevant issues as well – for example, he or she may consult with bodies or persons that may be appropriate in the circumstances.

An exemption under s 126 can be granted for a maximum period of 10 years, but can be renewed or varied if you

reapply. Most current exemptions have been granted for periods of less than ten years.

In some circumstances an applicant or an affected person may apply to the Administrative Decisions Tribunal for a review of the decision of President in relation to an exemption.

Section 126A exemptions

Section 126A exemptions apply to special needs programs, activities or facilities which promote access for certain groups of people affected by unlawful discrimination. These groups are identified under Parts 3-4C of the ADA as people covered on the grounds of their:

- sex (including pregnancy, breastfeeding and sexual harassment);
- marital status or domestic status;
- disability;
- homosexuality ;
- transgender (transsexuality);
- carer's responsibilities (in employment only).

Programs to meet the "special needs" of a particular race or age group will not usually require an exemption because the ADA specifically provides an exception for such programs (see "What are the exceptions where discrimination is justified?" on page 1).

Section 126A exemptions are currently certified by the NSW Attorney General. He or she grants a s 126A exemption where he or she is satisfied that the primary purpose of the special needs program or activity is the promotion of equal or improved access for members of a group affected by discrimination on one of the grounds listed above. The Attorney General usually seeks the advice of the Anti-Discrimination Board before granting a s 126A exemption.

There is no maximum time limit for s 126A exemptions specified in the ADA. They may be granted for a specific period or for an indefinite period.

An applicant under s 126A can apply to the Administrative Decisions Tribunal for a review of the decision of the Attorney General on their application.

For more details of how to apply for an exemption under s 126 or s 126A, see "How do we apply for an exemption" on page 6.

When is an exemption likely to be granted?

In general, an exemption is likely to be granted when you are still upholding the principles of anti-discrimination and promoting equal opportunity between all people. Many exemptions are granted where the purpose of the targeted job or service is to give the particular group an opportunity that was previously unavailable to them, in order to help redress past disadvantage or discrimination. Generally to get an exemption you need to provide evidence that this is the case.

A list of all current exemptions can be found on the Board's website. Examples of exemptions granted include:

- to provide health services for women;

- to run a support group project for men;
- to designate positions for Aboriginal or Torres Strait Islander people;
- to recruit women bus drivers;
- to run a recruitment/employment assistance service for older people;
- to run the women's domestic violence court assistance scheme;
- to provide crisis accommodation for women experiencing domestic violence;
- to designate a position at a health service for a person with HIV/AIDS.

How long does it take to get an exemption?

Decisions on s 126 exemptions will be made within 60 days from the date the application is received by the Anti-Discrimination Board.

Section 126A exemptions are usually finalised within 10 weeks after receipt. This may vary depending on the complexity of the application.

Examples

Service delivery

Exemption likely to be granted:

A welfare agency wants to provide a counselling service for women who have experienced domestic violence. In its s 126A exemption application the agency provides evidence that women who have experienced domestic violence can recover their self-esteem more effectively in an environment where only women are present.

A counselling service wants to provide training in family skills for men only. In its s 126A exemption application the service provides evidence that the issues relating to learning family skills are very different for men and women, and that men find it difficult to deal with self-esteem issues in a mixed group. The evidence provided shows that it is not appropriate to conduct the training for both men and women together, and that classes for men only would meet the special needs of men who wish to learn about family skills.

Exemption unlikely to be granted:

A tertiary college wants to provide women only cooking classes. The college states in its exemption

application that it wants to do this because it thinks that women would enjoy attending a class without men.

Employment

Exemption likely to be granted:

An organisation wishes to set aside several positions for Aboriginal and Torres Strait Islander people because their research shows that they are traditionally under-represented in the particular industry. In its s 126 exemption application the organisation shows that it intends to provide training and ongoing support for new recruits and has ensured that there will be career opportunities for them in the future.

Exemption unlikely to be granted:

An employer wants to employ more men to work in their organisation as they feel there are enough women in their workforce and that staff get on better when there is a gender balance.

How do I apply for an exemption?

Step 1: Contact the Board

Contact Anti-Discrimination Board's Legal Officer to discuss whether you need an exemption and to find out what kind of exemption you need to apply for.

Step 2: Lodge your application

If you are applying for a s 126 exemption

Section 126 applications should be sent in writing to the President of the Anti-Discrimination Board (the address is on page 8). You should include the following information in your application:

- the name and address of your organisation and the name and phone number of a contact person;
- the section of the ADA you want the exemption from (the Anti-Discrimination Board can advise you about the section or sections that will apply);
- what your organisation does;
- what you would like the exemption for;
- how the particular position, program or service fits within the organisation's structure;
- how the employment opportunity, program or service will operate (for example, if it's a program, how often the service will be provided, what the hours of operation are, who will run it, etc);
- how you think targeting the position, service or program would further equal employment opportunity in your workplace or why the program or service would benefit the group you are targeting;
- how long you would like the exemption for and the reasons for that length of time;
- if you believe that your application is urgent and the reasons for this.

When you are applying for a s 126 exemption, you should also address each of the six factors in the Regulation which the President must take these into account in deciding whether to grant you an exemption. This will save time in processing your application.

The factors are as follows:

- (a) whether the proposed exemption is appropriate or reasonable;
- (b) whether the proposed exemption is necessary;
- (c) whether there are any non-discriminatory ways of achieving the objects or purposes for which the proposed exemption is sought;
- (d) whether the proponent of the proposed exemption

has taken reasonable steps, or is able to take any reasonable steps, to avoid or reduce the adverse effect of a particular act or action before seeking the exemption;

- (e) the public, business, social or other community impact of the granting of the proposed exemption;
- (f) any conditions or limitations to be contained in the proposed exemption.

You should take care to provide all the required information in your application, and to respond quickly to requests for further information. The President only has 60 days to make his or her decision, and may not be in a position to grant your application if he or she does not have enough information from you at an early stage in the application process.

If you are applying for a s 126A exemption

Section 126A applications should be sent to the NSW Attorney General. (The address is on page 8.) In your letter you should set out your reasons for wanting the exemption. Include the following information in your application:

- the name and address of your organisation and the name and phone number of a contact person;
- the section of the ADA you want the exemption from (the Anti-Discrimination Board can advise you about the section or sections that will apply);
- what your organisation does;
- what you would like the exemption for;
- how the particular position, program or service fits within the organisation's structure;
- how the position, program or service will operate (for example, if it's a program, how often the service will be provided, what the hours of operation are, who will run it, etc);
- how you think targeting the position, service or program would further equal employment opportunity in your workplace, or why the program or service would benefit the group you are targeting;
- how long you would like the exemption for and the reasons for that length of time;
- if you believe that your application is urgent and the reasons for this.

The NSW Attorney General's Department will send the application to the Anti-Discrimination Board for advice on whether or not the exemption should be granted. The Board's Legal Officer may contact you for further information.

Step 3: Notification of the decision

For s 126 exemptions

If the President of the Anti-Discrimination Board decides to grant you an exemption, you will receive a letter advising you that the exemption has been granted, what it covers and the period of the exemption.

If the President decides not to grant the exemption, you will receive a letter notifying you that the exemption has been refused.

For s 126A exemptions

The Anti-Discrimination Board will make a recommendation to the NSW Attorney General on your application, and the NSW Attorney General will make the final decision. If the Attorney General decides to grant you an exemption, you will receive a letter advising you that the exemption has been granted, what it covers and the period of the exemption.

If the Attorney General decides not to grant the exemption, you will receive a letter notifying you that the exemption has been refused.

State public sector EEO management plans

If your organisation has an EEO Management Plan, you may not need to apply for an exemption. Under Part 9A of the ADA, all State public sector agencies must have an EEO management plan that is reported to the Director of Equal Opportunity in Public Employment. Similar provisions apply to local councils under the Local Government Act 1993.

EEO Management Plans include strategies which recognise that because of past discrimination, some groups will not have equal opportunity unless special measures are taken to 'level the playing field'.

These special measures can be things like cadetships for Aboriginal and Torres Strait Islander people, management courses for women, recruitment for particular racial groups or programs for people with disabilities.

There is an exception in s 122K of the ADA which allows discrimination in employment if strategies in an EEO Management Plan comply with Part 9A of the ADA. Only some organisations and some grounds of discrimination are covered by this exception.

To determine whether you need to apply for an exemption, you should seek legal advice, contact the Workforce Planning Development and Equity Unit on (02) 9248 4444,

and/or contact the Anti-Discrimination Board's Legal Officer.

If you do not need to apply for an exemption, your advertisement should identify the group eligible to participate and state that: "[Name of group] are eligible for this [position/program] as authorised by the [name of agency]'s EEO Management Plan in accordance with Part 9A of the Anti-Discrimination Act 1977 (NSW)."

Where to send your application

Send s 126 exemption applications to

The President of the Anti-Discrimination Board of NSW
PO Box A2122, Sydney South NSW 1235
Attention: the Legal Officer

Send s 126A exemption applications to

Attorney General
NSW Attorney General's Department
Governor Macquarie Tower
1 Farrer Place, Sydney NSW 2000
Attention: ADB Exemptions Officer, Community Relations
Division.

The Anti-Discrimination Board of NSW (open weekdays 9am-5pm)

Sydney

Level 4, 175 Castlereagh Street, Sydney NSW 2000
PO Box A2122, Sydney South NSW 1235
Phone (02) 9268 5555 • Fax (02) 9268 5500
TTY (02) 9268 5522

Wollongong

84 Crown St, Wollongong NSW 2500
PO Box 67, Wollongong NSW 2520
Phone (02)4224 9960 • Fax (02) 4224 9961
TTY (02) 4224 9967

Newcastle

Level 1, 414 Hunter St, Newcastle West 2302
Phone (02) 4926 4300 • Fax (02) 4926 1376
TTY (02) 4929 1489

Enquiries/ Employers Advisory Service

(02) 9268 5544

Toll free number (from regional NSW)

1800 670 812

Website

www.lawlink.nsw.gov.au/adb