

APPLICATION OF THE SEX DISCRIMINATION ACT TO THE AUSTRALIAN DEFENCE FORCE

INTRODUCTION

1. The Sex Discrimination Act 1984 came into force on 1 August 1984. The objects of the Act are to:
- a. give effect to certain provisions of the UN Convention on the Elimination of All Forms of Discrimination Against Women;
 - b. eliminate, so far as is possible, discrimination against persons on the ground of sex, marital status or pregnancy in the areas of work, accommodation, education, the provisions of land, the activities of clubs and the administration of Commonwealth laws and programmes;
 - c. eliminate, so far as is possible, discrimination involving sexual harassment in the workplace and in educational institutions; and
 - d. promote recognition and acceptance within the Community of the principle of the equality of men and women.

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2. The aim of this instruction is to:
- a. outline the scope of the Act and its application to the Defence Force,
 - b. define the Defence Force's policy on discrimination, and
 - c. provide guidelines for the handling of discrimination problems.

INTERPRETATION

3. The term 'discrimination' when used in this instruction refers collectively to discrimination on the grounds of sex, marital status and pregnancy unless otherwise stated. It does not refer to discrimination involving sexual harassment because this form of discrimination is dealt with in a separate instruction (DI(G) PERS 35-1).
4. For the purposes of this instruction, 'marital status' means the status or condition of being either single, married, married but living separately and apart from one's spouse, divorced, widowed, or a de facto spouse.

SCOPE OF THE ACT

Discrimination

5. The Act covers both direct and indirect discrimination:
- a. Direct Discrimination. Direct discrimination occurs when there is a specifically directed policy or action which treats one person less favourably than another by reason of:
 - (1) the sex, marital status or pregnancy of that other person; or
 - (2) a characteristic that appertains generally to or is generally imputed to persons of that sex or marital status or persons who are pregnant, eg a woman may not be considered for technical work because 'women don't understand technical matters.

However, it is not unlawful under the Act to treat one person less favourably than another if the circumstances of the treatment of the persons are materially different, or if, in the case of a pregnant person, the less favorable treatment is reasonable. For example, failing to consider a pregnant woman for a six month training course when her pregnancy would prevent her from being available for five of the six months would not constitute discrimination.

- b. Indirect Discrimination. Indirect discrimination occurs when a policy or practice, which on the face of it appears to be neutral or non-discriminatory, by its operation results in discrimination against a person or a particular group of persons. It happens when a rule or requirement says nothing about sex, marital status or pregnancy but is in practice very difficult for people of one sex, or particular marital status, or who are pregnant, to meet. If such a requirement or is unreasonable in the circumstances, it is discriminatory within the meaning of the Act and unlawful. An example of indirect discrimination is where there is a minimum height requirement, which some women may be unable to satisfy, which is irrelevant to the performance of the job.

EXEMPTIONS

6. The Act provides for a number of exemptions. One exemption concerns pregnancy and childbirth. It is not unlawful to discriminate against a man on the ground of his sex by reason only of the fact that a woman is granted rights or privileges in connection with pregnancy or childbirth.

7. An exemption also applies where there is a genuine need for a person of a particular sex, eg where the duties of a position involve the searching of people of the same sex, or their clothes.

8. A matter of particular relevance to the Defence Force is the exemption concerning employment of women in the Defence Force. provides that it is not unlawful for a person to discriminate against a woman on the ground of her sex in connection with employment, engagement or appointment in the Defence Force in a position involving performance of *combat* or combat-related duties. Details of this exemption are outlined in DI(G) PERS 32-1 - Employment of Women in the Defence Force.

DEFENCE FORCE POLICY

9. Subject to the exemptions contained in the Act, discrimination is prohibited in the Defence Force. Defence Force personnel managers have a duty to ensure that all Service personnel for whom they are responsible are considered for career development, training, higher duties and promotion opportunities solely on the basis of merit, regardless of their sex, marital status or, where appropriate, pregnancy.

10. Commanding officers are to take a personal interest in promoting an awareness at unit level of the Defence Force policy.

PROCEDURES FOR HANDLING CASES OF DISCRIMINATION

11. Members are encouraged to approach their superior officer in the first instance or, if appropriate, the next senior superior. The superior officer is to respond promptly, seriously and with sensitivity. Informal action involves hearing all parties objectively and assessing the validity of the complaint. This may be sufficient to resolve the situation satisfactorily. Should it not be possible to resolve the problem informally, the member may submit a formal redress of grievance. While it is preferable that Defence Force action be taken to resolve the problem in the first instance, members should be aware that they also have the right

to make a complaint to the Human Rights Commission (see paragraphs 16-19). Civilian staff who wish to raise a complaint involving Service personnel should refer to Departmental Personnel Instruction 5/84 - Sex Discrimination Act 1984.

INVESTIGATIONS

12. If a formal redress of grievance is submitted, the Commanding Officer is to decide whether an inquiry is necessary (see DI(G) ADMIN 34-1 Inquiries into Matters Affecting the Defence Force). An inquiry would normally be required *where* the complaint of discrimination involves the behaviour of another member and there is some doubt about the facts and/or the validity of the claim of discrimination.

13. The Service Offices are to inform DGSP (Defence Central) when a formal redress of grievance is submitted.

RESOLUTION OF COMPLAINT

14. In cases of proven complaints of discrimination involving the behaviour of another member, the following action is to be taken:

- a. steps are to be taken by the Commanding Officer to ensure there is no recurrence of the discrimination or victimization of either party;
- b. the offender is to be acquainted with the problems caused by his or her behaviour and counseled to seek an improvement in his or her behaviour; and
- c. the offender is to be informed, if appropriate, that his or her suitability for retention in the Service will be reviewed.

15. In cases of discrimination involving general management practices or policies, action is to be taken at the appropriate level to remove the discriminatory aspects.

COMPLAINTS TO HUMAN RIGHTS COMMISSION

16. A complaint of discrimination (which must be in writing) made to the Human Rights Commission will be referred to the Sex Discrimination Commissioner, who will examine the complaint and try to settle it through the process of conciliation.

17. The powers of the Commissioner are delegated as follows so that complaints may be made and handled at State level:

QLD, WA, TAS, NT - the State Office of the Human Rights Commission

NSW - the New South Wales Anti-Discrimination Board

VIC - the Victorian Equal Opportunities Board

SA - the South Australian Equal Opportunities Board

ACT - the Sex Discrimination Commissioner

18. The First Assistant Secretary, Personnel Administration and Policy (FASPAP) (Defence Central) is the first point of contact for the Sex Discrimination Commissioner in respect of complaints made in the ACT. In all other cases the Defence Regional Secretary of the relevant State is the first point of contact by the appropriate organization shown in paragraph 17.

19. FASPAP or the Regional Secretary, as appropriate, will then establish direct liaison with the Service concerned. Every endeavour is to be made to resolve the matter at a regional level. However, complaints which cannot be settled regionally, or which are of a policy nature, are to be referred to FASPAP.

20. Victimization of a member who has made or proposes to make a complaint is prohibited. Victimization which occurs in respect of a complaint made, or proposed to be made, to the Human Rights Commission, is a criminal offence with a penalty of \$2,500 or imprisonment for three months, or both.

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