



Australian  
Human Rights  
Commission

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## Guidelines: Special measures under the *Sex Discrimination Act 1984 (Cth)*

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AUSTRALIAN HUMAN RIGHTS COMMISSION • 2018

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# Guidelines: Special measures under the *Sex Discrimination Act 1984* (Cth)

November 2018

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## Message from Kate Jenkins, Sex Discrimination Commissioner

Over the last century, Australia has made significant progress towards achieving gender equality and creating a more inclusive society. We have seen women's increased participation in education and work, and increased prominence of women in leadership roles in many spheres of life. We have seen 'equal pay for work of equal value' enshrined in law and employers required to report on the gender pay gap.

We have enacted domestic laws honouring Australia's international commitment to work towards eliminating discrimination on the basis of sex, sexual orientation, gender identity and intersex status. More recently, Australia has legislated for marriage equality, to ensure that adult couples can marry regardless of their sex, sexual orientation, gender identity or intersex status.

The Australian Human Rights Commission (the Commission) welcomes these positive steps. However, recognising that some deeply embedded barriers to equality in certain areas of public life remain pervasive, a 'positive discrimination' mechanism known as 'special measures' was included in the *Sex Discrimination Act 1984* (Cth) (SDA) to enable individuals and organisations to take steps to correct this inequality.

The SDA recognises that some groups, including women and lesbian, gay, bisexual, transgender and intersex (LGBTI) persons, have suffered historical disadvantage and do not enjoy their human rights equally with others. The gender pay gap, the under-employment of women, barriers to leadership roles, reduced retirement savings and high rates of sexual harassment at work are examples of this continuing inequality. LGBTI persons continue to experience discrimination at work on the basis of sexual orientation, gender identity and intersex status, and experience higher than average rates of violence, harassment and bullying.

Increasingly, organisations are seeking to address this inequality by taking proactive measures.

The SDA permits individuals and organisations to take special measures for the purpose of achieving substantive equality for disadvantaged groups.

These guidelines are intended to assist organisations and individuals to understand and use the special measures provisions in the SDA. They are an important resource for organisations and individuals seeking to take positive steps to achieve gender equality and a more inclusive Australia.

A handwritten signature in black ink that reads "Kate Jenkins".

**Kate Jenkins**  
Sex Discrimination Commissioner

# Executive Summary

These guidelines provide practical guidance to organisations and individuals to encourage the implementation of special measures. They are intended to offer a means by which workplaces and education and service providers, as well as administrators of Commonwealth law and programs, can assess their own equity initiatives for consistency with the SDA.

These guidelines provide information on the relevant factors to consider when contemplating taking special measures under the SDA (**Chapter 3**) and provide examples to illustrate the types of special measures that can be implemented.

**Chapter 4** sets out the practical steps that can be taken to make it clear that a measure is intended to be a special measure under the SDA.

These guidelines are issued under section 48(ga) of the SDA, which empowers the Commission to prepare and publish guidelines for the avoidance of discrimination on the grounds of sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, breastfeeding, family responsibilities and discrimination involving sexual harassment.

The Commission does not have the power to certify special measures under the SDA and there is no certifying procedure available elsewhere.

This document is not legally binding and should be read in conjunction with the whole of the SDA. An organisation or individual will not be protected from a finding of unlawful discrimination if they claim that they conformed with, or relied on, these guidelines. The Commission considers however that, in the event of a complaint, the detailed documentation gathered in accordance with these guidelines would provide a strong basis for an employer to argue that their strategy is a special measure and therefore lawful and consistent with anti-discrimination law.

It is important to note that these guidelines are not intended to provide a definitive legal answer to the range of special measures permitted under the SDA. Organisations or individuals should seek their own independent legal advice if they have concerns regarding their compliance with the SDA or with relevant state or territory anti-discrimination legislation.

# 1 What are special measures?

Special measures are positive actions used to promote equality for disadvantaged groups.

Special measures:

- support groups of people who face, or have faced, structural or entrenched discrimination so they can have similar access to opportunities as others in the community
- recognise that, for disadvantaged groups, formal equality before the law is not always sufficient to eliminate discrimination, and treating everyone the same may instead entrench existing discrimination
- encourage people to look at structural barriers to equality or structures that reinforce systemic discrimination
- encompass a broad and diverse range of actions that are often focused on the root cause of unequal outcomes
- aim to address the underlying inequality.

Special measures may be a regulatory instrument, a policy or practice—such as an outreach program, preferential treatment, targeted recruitment and promotion, or numerical goals connected with time frames and quotas.<sup>1</sup>

An example of a special measure under the SDA might be a workplace setting a target of having 30% of women on their board to address the lack of women's representation in leadership positions.

Other examples include:

- specific women's legal services which support women who have been subjected to domestic/family violence and sexual assault, to ensure they have access to appropriate and accessible legal representation, legal advice and referral
- men's community-based organisations aimed at reducing men's health issues that can arise from a culture that does not necessarily encourage men to talk about their feelings and emotions, nor to take an interest in their own health and well-being.

Promoting greater equality across our community has many benefits. Diverse and inclusive communities allow people to participate equally in our society. Inclusion aims to increase equal opportunities for everyone—encouraging equal access to meaningful employment, services, connection with friends and family, and the ability to undertake activities and engage in the local community. Fundamentally, inclusion means that everyone's voice is heard equally.

# 2 What the law says

The SDA makes it unlawful to treat a person unfairly because of their sex, sexual orientation, gender identity, intersex status, relationship status, pregnancy or potential pregnancy status, breastfeeding status or family responsibilities in certain areas of public life.

While special measures might appear to be discriminatory because they involve distinctions or differential treatment made on the basis of attributes such as sex, if an organisation or individual is taking action to achieve 'substantive equality', section 7D of the SDA provides that the action might be considered a special measure and therefore not unlawful discrimination (see **Chapter 2.1** on substantive equality below).

Section 7D of the SDA does not set out the form which special measures may take. It only requires that special measures are taken for the purpose of achieving substantive equality.

**Section 7D of the SDA states:**

## **7D Special measures intended to achieve equality**

- (1) A person may take special measures for the purpose of achieving substantive equality between:
  - (a) men and women; or
  - (aa) people who have different sexual orientations; or
  - (ab) people who have different gender identities; or
  - (ac) people who are of intersex status and people who are not; or
  - (b) people who have different marital or relationship statuses; or
  - (c) women who are pregnant and people who are not pregnant; or
  - (d) women who are potentially pregnant and people who are not potentially pregnant; or
  - (e) women who are breastfeeding and people who are not breastfeeding; or
  - (f) people with family responsibilities and people without family responsibilities.
- (2) A person does not discriminate against another person under section 5, 5A, 5B, 5C, 6, 7, 7AA or 7A by taking special measures authorised by subsection (1).
- (3) A measure is to be treated as being taken for a purpose referred to in subsection (1) if it is taken:
  - (a) solely for that purpose; or
  - (b) for that purpose, as well as other purposes, whether or not that purpose is the dominant or substantial one.
- (4) This section does not authorise the taking, or further taking, of special measures for a purpose referred to in subsection (1) that is achieved.

## 2.1 What is ‘substantive equality’?

For measures to be special measures under the SDA, at least one of their purposes must be to achieve substantive equality. This does not need to be their only or dominant purpose, but it must be one purpose.<sup>2</sup>

The SDA does not define ‘substantive equality’. The Federal Court has held that ‘substantive equality’ means equality in substance, rather than ‘formal’ equality.<sup>3</sup> In other words, substantive equality means equality that actually exists, not equality that is abstract or speculative, ideal or imaginary, or only expressed informally but not implemented in practice.

If substantive equality already exists, measures cannot be special measures under section 7D(4) the SDA. There must be an existing inequality experienced by people in one of the groups set out in section 7D of the SDA.

If you are thinking about taking special measures under the SDA, it is important that you have a clear idea of the particular inequality that your action is designed to address.

### Example—supply of services to women only

A gym owner identified that there was a substantive inequality between men and women as to how each gender accessed gym classes when only mixed classes were available. A significant number of women members were reluctant to attend a gym class if men were present. He hoped that a women-only gym class would address this inequality.

The Federal Court of Australia held that the women-only gym class was non-discriminatory because it was a special measure taken for the purpose of achieving substantive equality between men and women.

(This example is based on the matter of *Walker v Cormack* [2011] FCA 861)

# 3 Factors to think about when planning to introduce special measures

## 3.1 Are you taking special measures for the purpose of achieving substantive equality?

To determine whether measures are special measures under the SDA, the Federal Court will likely look at whether an organisation or individual has been reasonable in assessing:

- the need for the special measures
- whether the special measures can achieve substantive equality.<sup>4</sup>

In undertaking this assessment, you should keep the following in mind:

- there does not have to be a prior formal finding of discrimination to justify the special measures
- implementing special measures does not mean that you are admitting that your practices are currently discriminatory
- the inequality that the special measures are designed to address does not need to affect every member of the relevant group
- special measures do not need to completely address the inequality to be considered special measures.<sup>5</sup>

## 3.2 Are the measures proportionate and appropriately targeted?

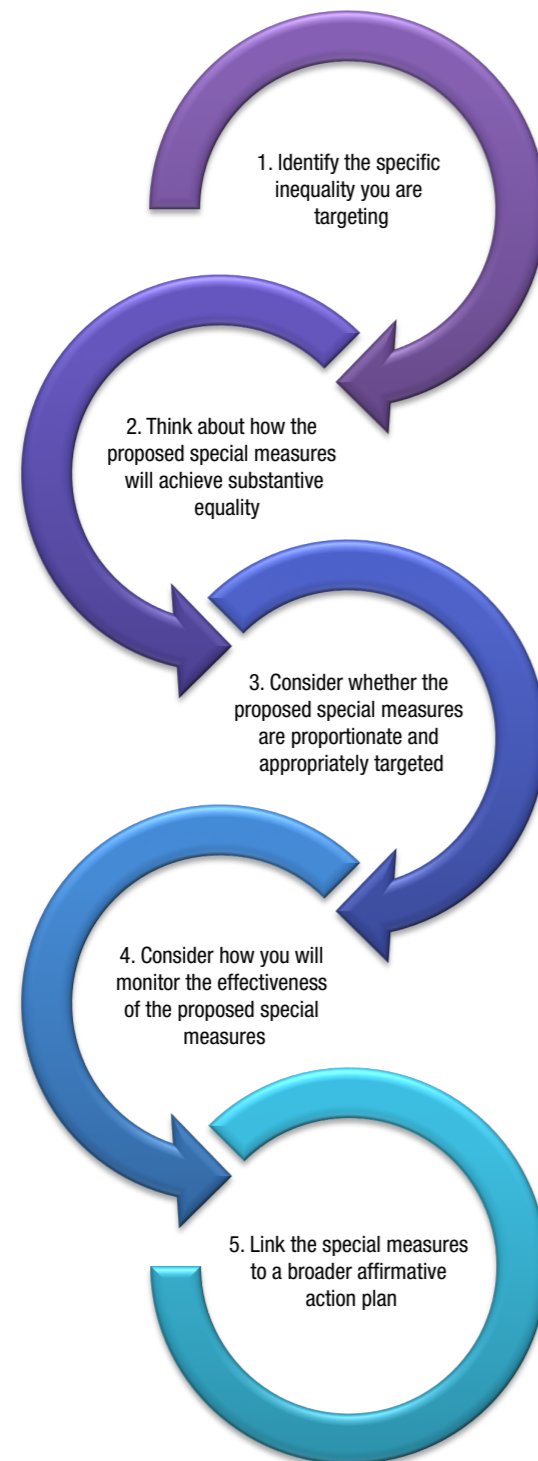
Measures are more likely to be accepted by the Federal Court as special measures if they are proportionate and appropriately targeted to address the specific inequality identified. Targeted measures should not go beyond what is necessary to achieve the purpose of achieving substantive equality.

## 3.3 Is there a process in place to assess when substantive equality is achieved?

The appropriate duration of special measures is determined by whether they have achieved their purpose, not by a set length of time. Special measures can continue until they have achieved their purpose.<sup>6</sup> As this could take an extended period, regular reviews should be used to evaluate the effectiveness of the measures and to determine whether (and when) the purpose has been achieved.



## 4 Summary of special measures



This chapter sets out practical steps that can be taken to make it clear that you intend your measures to be special measures under the SDA. Taking these steps will minimise the risk of complaints that such measures are discriminatory and will provide a basis to dispute such a claim in the event that a complaint is made. It is also good practice for individuals and organisations to clearly identify in relevant documents that their decision to take special measures has a legal basis in section 7D of the SDA.

The template provided in **Appendix 1** can be used to record the following steps in writing:

### Step 1. Identify the specific inequality that you are targeting

- Why do you consider that substantive equality between people in one of the section 7D groups has not yet been achieved?
- How was this specific inequality brought to your attention?
- Does it affect any of your employees or potential employees, patients, customers, clients or associates specifically? If so, how many?
- Is this inequality supported by evidence such as academic research or statistics from reliable sources or qualitative or quantitative data that you have collected yourself? If so, what evidence have you relied on to form your view?

### Step 2. Think about how the proposed special measures will achieve substantive equality

- Why did you select these particular special measures to address the specific inequality being targeted?
- Did you rely on any evidence or data in selecting these special measures?
- Have you consulted with individuals that the special measures are intended to assist?
- Is there evidence that similar measures have been effective in reducing inequality in this area in Australia or overseas?

### Step 3. Consider whether the proposed special measures are proportionate and appropriately targeted

Special measures are more likely to be considered proportionate and appropriately targeted if they have the following characteristics:

- They do not go beyond what is necessary to achieve substantive equality in the identified area.
- They address the particular cause of the inequality.
- They primarily benefit the people affected by the identified inequality.
- They are flexible and capable of responding to changed circumstances.
- They are not excessively unfair.

### Step 4. Consider how you will monitor the effectiveness of the proposed special measures

- If substantive inequality persists, special measures can continue indefinitely.
- However, it is advisable that there is a process in place to periodically review the operation of the special measures.
- It needs to be clear in the documents that the special measures will cease once substantive equality is achieved.

### Step 5. Link the special measures to a broader affirmative action plan

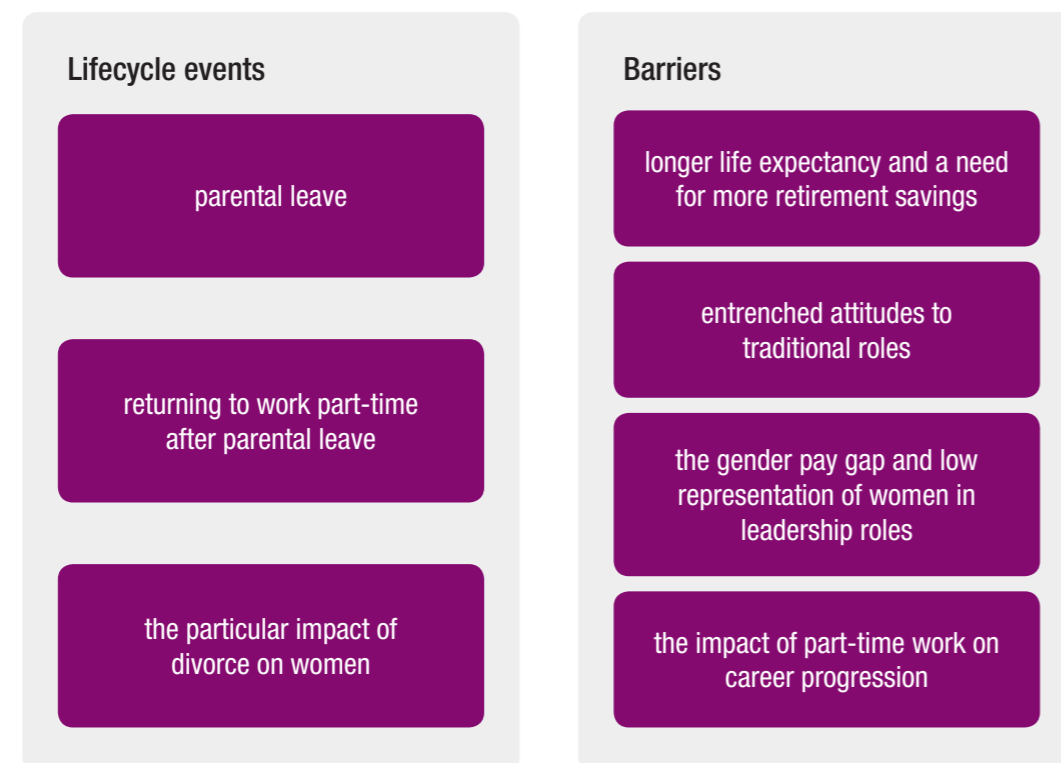
- An existing diversity and inclusion plan can provide useful context and support for a decision to implement special measures under the SDA.
- Linking the special measures to a plan makes it clear that there is a commitment to pursuing substantive equality for the groups identified in section 7D of the SDA.

# 5 Practical examples of special measures

## 5.1 Example—addressing the retirement savings gap between men and women

### Step 1—Identify the specific inequality that you are targeting

An organisation conducted a review and identified two key factors that led to a retirement savings gap between its male and female employees—lifecycle events and barriers:



### Step 2—How will the special measures achieve substantive equality?

The organisation identified some possible solutions to address the retirement savings gap between men and women and introduced a policy to implement the following measures:

1. Paid parental leave for up to 20 weeks.
2. An additional 2% superannuation payment for women while employed at the organisation, including periods of maternity leave.
3. Additional support for parental leave, including:
  - a. regular keep-in-touch days during the paid parental leave
  - b. long service leave accrual throughout paid parental leave
  - c. superannuation payments to employees on paid parental leave for up to one year.
4. Flexible working conditions (which the organisation encouraged all employees to take advantage of), including:
  - a. job-sharing and part-time opportunities for all roles
  - b. access to working-from-home options for all roles
  - c. flexible working hours for all roles.
5. Investigation of other strategies to address the gender pay gap in the organisation, and particularly as a result of an employee's period of parental leave.

The organisation also identified that the above measures would assist in addressing the inequality between men's and women's employment participation and retention following the birth of a child.

*Note: The Commission recognises that some of the above measures may also be requirements and/or conditions under an Award or Enterprise Agreement.*

### Step 3—Are the special measures proportionate and appropriately targeted?

The measures are tailored to the problem, addressing the specific causes of the gap in retirement savings between men and women, taking into account the career breaks that women disproportionately experience when having children and the ongoing impact this has on their career progression and income.

### Step 4—How will the special measures be reviewed and monitored?

The measures will be regularly monitored to assess if they are achieving their purpose.



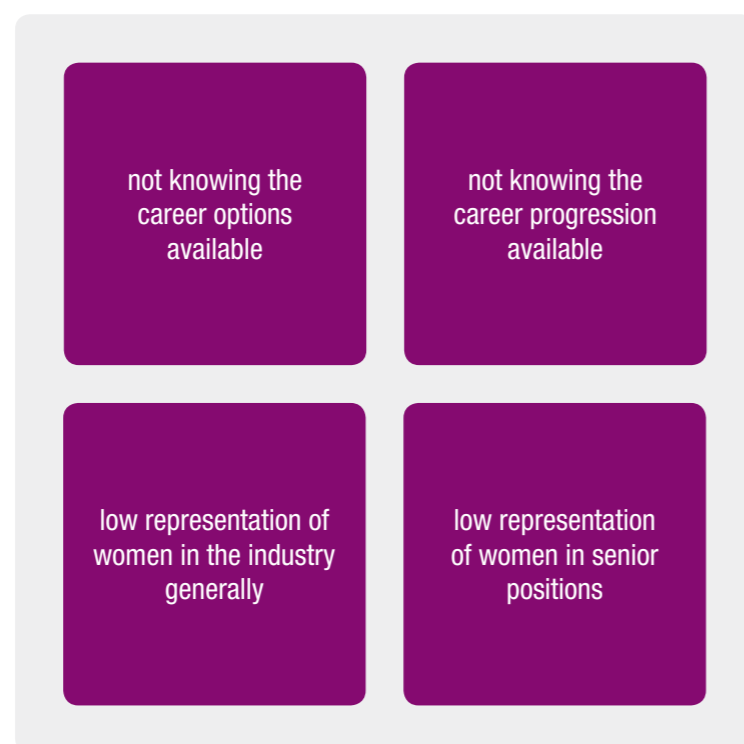
### Step 5—Link the special measures to a broader affirmative action plan

The suite of special measures implemented by the organisation formed part of the organisation's broader diversity and inclusion strategy.

## 5.2 Example—increasing the percentage of women in an organisation or sector

### Step 1—Identify the specific inequality that you are targeting

A medium-sized management consulting firm reviewed its historical uptake rate by female graduates and discovered a low trend of female graduates choosing a career in management consulting. It identified several barriers that discouraged female graduates, including:



### Step 2—How will the special measures achieve substantive equality?

The firm decided to implement a scholarship to encourage women studying at university to consider a career in management consulting. The scholarship was to be offered once per year to female applicants Australia-wide and provided the following benefits for recipients:

1. A 12 week summer internship opportunity at one of the firm's national offices.
2. The opportunity to be considered for full-time employment with the firm following completion of the internship.
3. Mentorship from a senior female consultant during their final year of study and during their internship.
4. An invitation to suitable events during their final year of study.

The firm also introduced a number of other measures to attract and retain women including:

1. Providing sponsorships to student organisations that focus on gender equality.
2. Hosting targeted female recruitment events.
3. Establishing a dedicated women's employment group in the firm.
4. Promoting flexible work arrangements.
5. Offering varied professional development and career progression pathways.

### Step 3—Are the special measures proportionate and appropriately targeted?

The measures were tailored to the problem and sought to address the specific reasons as to why women were not drawn to join the management consulting sector. This took into account measures for women currently studying at university, prospective employees, as well as women already employed by the firm.

### Step 4—How will the special measures be reviewed and monitored?

The measures will be regularly monitored to assess if they are achieving their purpose and regular reports will be made on workplace diversity.

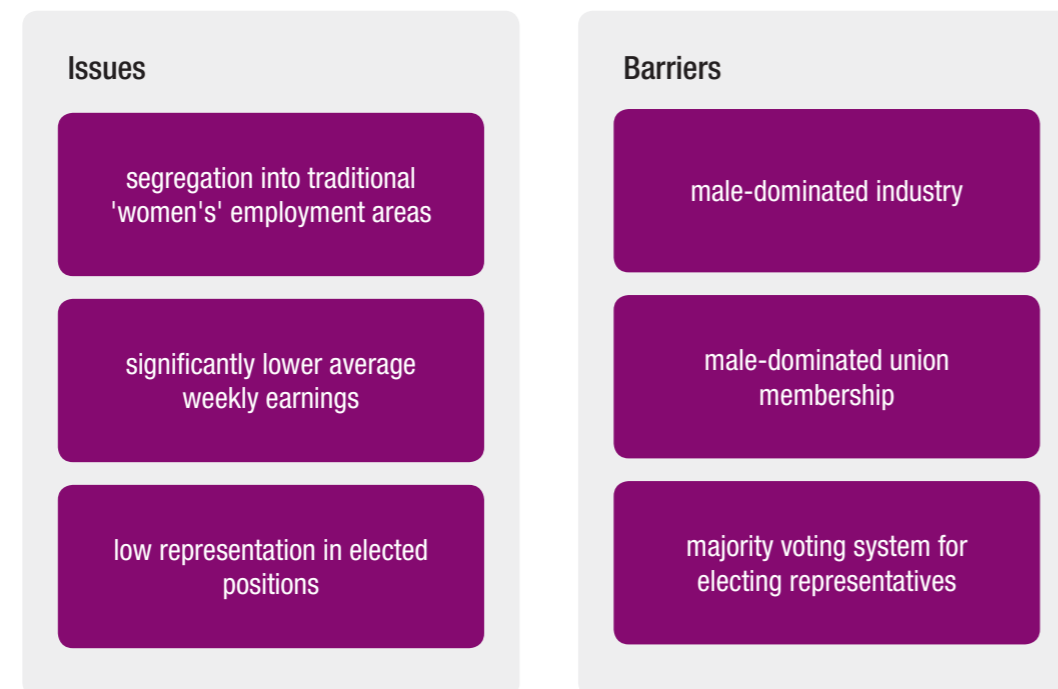
### Step 5—Link the special measures to a broader affirmative action plan

The management consulting firm incorporated the special measures into a broader organisational diversity and inclusion strategy.

### 5.3 Example—increasing the percentage of women in leadership and/or executive positions

#### Step 1—Identify the specific inequality that you are targeting

A union<sup>7</sup> reviewed the representation of women in its organisation and discovered that they only comprised 10% of a particular division and were not represented in elected senior leadership positions. The union identified a number of issues and barriers that affected this inequality:



#### Step 2—How will the special measures achieve substantive equality?

The union identified possible solutions to address the low representation of women in the division and senior elected positions and introduced a policy to implement the following measures:

1. Equal access for women to all areas of employment and education in the union, through identification of existing barriers and affirmative action strategies.
2. Improving wages and working conditions of women through enterprise bargaining.
3. Ensuring issues significant to women specifically were addressed, through a review of union policy to reflect the priorities of women members.
4. Recruiting more women, following the investigation of affirmative action strategies.
5. Ensuring women held at least a proportionate number of all elected and appointed positions through the introduction of a quota for women in certain elected leadership positions.
6. Ensuring employment practices actively encouraged the employment of women, for example, through the identification of affirmative action strategies.

To develop targeted strategies to achieve the above measures, the union:

1. Established a Women's Officer.
2. Established a National Women's Consultative Committee.

#### Step 3—Are the special measures proportionate and appropriately targeted?

The measures are tailored to the problem, addressing the specific reasons why women are under-represented in certain areas of the union. The measures were specifically chosen as other previous policies had not succeeded in achieving better representation.

#### Step 4—How will the special measures be reviewed and monitored?

The measures will be regularly monitored to assess if they are achieving their purpose, in particular the extent to which senior positions are held by women.

The quotas implemented will be discontinued once substantive equality between men and women in the union has been achieved.

#### Step 5—Link the special measures to a broader affirmative action plan

The special measures were introduced under the framework of a gender equality plan, which encompassed all of the above measures.

## 5.4 Example—providing a specialist legal advice and court assistance service to lesbian, gay, bisexual, transgender, gender diverse and intersex persons experiencing domestic and family violence

### Step 1—identify the specific inequality that you are targeting

A community legal centre, in collaboration with other organisations and academics, undertook research into lesbian, gay, bisexual, transgender, gender diverse and intersex (LGBTI) experiences of domestic and family violence.

The research identified that the existing mainstream legal and support services were not meeting the particular needs of LGBTI people experiencing domestic and family violence. Identified barriers for LGBTI people accessing mainstream support and information services include:

- misconceptions surrounding domestic and family violence and specifically LGBTI domestic violence
- the limited existence and promotion of specialist LGBTI services
- the ongoing discrimination and marginalisation of LGBTI communities.

### Step 2—How will the special measures achieve substantive equality?

The community legal centre established a specialist (free) legal assistance service for LGBTI people experiencing domestic and family violence.

The specialist service:

- employs lawyers who have the requisite skills, experience and knowledge to respond to the varying and unique issues that can arise when domestic and family violence occurs in LGBTI relationships
- delivers education programs to lawyers about the particular needs of LGBTI people experiencing domestic and family violence
- provides targeted and culturally specific information about its legal services to LGBTI people, as well as information about the existence of domestic and family violence, especially within LGBTI relationships
- provides free legal advice and court assistance to LGBTI people in applying for an Apprehended Violence Order
- provides a dedicated safe room for LGBTI clients at court.

### Step 3—Are the special measures proportionate and appropriately targeted?

The special measures are tailored to the particular inequality identified—the service is grounded in an awareness of the unique context of domestic and family violence within LGBTI relationships and the particular barriers they face in accessing mainstream legal and support services.

### Step 4—How will the special measures be reviewed and monitored?

The specialist legal advice service will be reviewed regularly to ensure that it continues to meet the needs of LGBTI people experiencing domestic and family violence, including the barriers they face in accessing mainstream services.

The special measures will stop if the community legal centre identifies that there is no longer a need for the provision of their specialist legal service, and that mainstream services are adequately meeting the needs of LGBTI people experiencing domestic and family violence.

### Step 5—Link the special measures to a broader affirmative action plan

The delivery of the specialist legal advice service is the foundation of the community legal centre's vision to provide access to justice for all vulnerable people, and particularly those who identify as LGBTI, and is delivered alongside the legal centre's broader community legal education, law reform and community partnership work.

## 5.5 Example—increasing the representation of women employed in a male-dominated industry

### Step 1—Identify the specific inequality that you are targeting

A manufacturing business has identified the low representation of women employed at the business and, in particular, low levels of women applying for advertised roles. The business identified several barriers that discouraged women from applying for positions, including:

- lack of family members who are role models and/or other female role models that have taken up a career in the manufacturing business
- perception of a masculine workplace culture that is not inclusive of women—for example, not offering workplace facilities and uniforms that are suitable for women
- lack of awareness of the opportunities and the career paths that are available in this manufacturing business.

## Step 2—How will the special measures achieve substantive equality?

The manufacturing business identified a number of targeted strategies to address the barriers to the employment of women in the business. The strategies introduced were:

- A high school work experience program for up to ten students per year, which is only available to women. This will assist to educate young women in high school about the potential careers in this manufacturing business.
- Revising job advertisements to ensure they use diverse images, inclusive language and other visual cues in order to attract women to apply for roles in this business.
- Setting targets for the employment of women in each line role across the business.
- Investigating other ways to attract women (other than graduates and/or early career) to apply for roles in the business.

## Step 3—Are the special measures proportionate and appropriately targeted?

The special measures are targeted to the specific inequality identified, to increase the number of women employed in the manufacturing business.

These measures were specifically chosen as existing recruitment and/or retention strategies had not succeeded in achieving better representation of women across all areas of the business.

## Step 4—How will the special measures be reviewed and monitored?

The measures will be regularly monitored to assess if they are achieving their purpose and regular reports will be made on the representation of women across the workforce.

## Step 5—Link the special measures to a broader affirmative action plan

The special measures were introduced under the framework of a broader gender equality plan, which encompassed the above measures.

# 6 Frequently Asked Questions

## 6.1 Can the Australian Human Rights Commission certify special measures?

The Commission does not have the power to certify special measures under the SDA and there is no certifying procedure available elsewhere.

Using the considerations outlined in these guidelines, each individual and/or organisation must satisfy themselves that the special measures are being taken for the purpose of achieving substantive equality, that the special measures proposed will reasonably further this purpose, and are appropriately targeted.

## 6.2 What is the relationship between special measures and exemptions under the SDA?

Section 44 of the SDA gives the Commission the power to grant temporary exemptions from certain provisions of the SDA. The effect of a temporary exemption is that discrimination covered by the exemption is not unlawful under the SDA while the exemption remains in force.

In practice, this means that the activities or circumstances falling within an exemption cannot be the subject of a successful complaint under the SDA.

If measures are special measures under the SDA, it is not necessary to apply to the Commission for an exemption. This is because special measures are lawful under the SDA and exemptions are concerned with potentially unlawful conduct.

The Commission has developed criteria and procedures to guide it in exercising its statutory discretion regarding exemptions under the SDA.

These guidelines are available at: <https://www.humanrights.gov.au/temporary-exemptions-under-sex-discrimination-act-1984-cth>.



### 6.3 How do special measures under the SDA interact with other federal anti-discrimination legislation?

Special measures are also permitted under the *Age Discrimination Act 2004* (Cth) (ADA),<sup>8</sup> *Disability Discrimination Act 1992* (Cth) (DDA)<sup>9</sup> and *Racial Discrimination Act 1975* (Cth) (RDA).<sup>10</sup>

While it is possible for an individual or an organisation to implement special measures under more than one federal anti-discrimination Act, the individual or organisation would need to ensure that the measures comply with all relevant legislative requirements.

For example, if an organisation would like to increase the number of Aboriginal and Torres Strait Islander women employed in their organisation, the organisation would need to ensure that any special measures initiatives comply with the requirements of both the SDA and the RDA.

### 6.4 How do special measures under the SDA interact with State and Territory anti-discrimination laws?

The following laws operate at a state and territory level, with state and territory equal opportunity and anti-discrimination agencies having statutory responsibilities under them:

- Australian Capital Territory—*Discrimination Act 1991*
- New South Wales—*Anti-Discrimination Act 1977*
- Northern Territory—*Anti-Discrimination Act 1996*
- Queensland—*Anti-Discrimination Act 1991*
- South Australia—*Equal Opportunity Act 1984*
- Tasmania—*Anti-Discrimination Act 1998*
- Victoria—*Equal Opportunity Act 2010*
- Western Australia—*Equal Opportunity Act 1984*.

Organisations and individuals need to comply with both federal and the relevant state or territory anti-discrimination laws. It is important to check that any special measures comply with the relevant state or territory laws as well as federal laws, because they may not be the same.

#### Example

Using the above example of the management consulting firm (operating in NSW)—even though the introduction of a targeted scholarship to encourage women studying at university to consider a career in management consulting is likely to be considered as special measures under the SDA, the firm would still need to confirm that the scholarship complies with the *Anti-Discrimination Act 1977* (NSW), to implement the special measures in NSW.

State or territory equal opportunity and anti-discrimination agencies or commissions might be able to offer guidance about special measures and discrimination laws in their jurisdictions. However, it is best to get legal advice if in any doubt.

## Appendix 1

### Template for record of planning and implementing special measures under the *Sex Discrimination Act 1984* (Cth)

*This template can be a useful way for organisations to record in writing the practical steps taken to implement special measures under the SDA. However, this is not a legal requirement under the SDA.*

*Documenting and recording these steps in writing will minimise the risk of complaints that such measures are discriminatory and will provide a basis to dispute such a claim in the event that a complaint is made.*

#### Description of strategy:

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- 1) What is the specific inequality that you would like to target with your special measures?
  - a. Why do you consider that substantive equality has not been achieved?
  - b. How did you become aware of this inequality?
  - c. Who in your organisation or business does this inequality affect?
  - d. What information do you have to support your view?

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- 2) How will the proposed special measures achieve substantive equality?
- a. Why have you identified these particular measures to address the inequality?
  - b. What information or evidence did you rely on to make your decision?
  - c. Have you considered consulting with individuals that the special measures are intended to assist?
  - d. Have similar measures been used effectively in Australia or overseas to address the inequality?

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- 3) Explain why you consider that your proposed special measures are proportionate and appropriately targeted.
- a. Are the measures necessary to achieve substantive equality in the area that you have identified?
  - b. Do the measures address the specific cause(s) of the inequality?
  - c. Will the measures primarily benefit the people who are affected by the inequality?
  - d. Are the measures flexible and capable of adapting to changed circumstances?

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- 4) How will you monitor the effectiveness of the special measures to ensure that they will stop once substantive equality is achieved?

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- 5) Have you considered linking the special measures to a broader affirmative action / diversity and inclusion / gender equality plan?

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## Endnotes

- 1 Committee on the Elimination of Discrimination against Women, *General recommendation No 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures*, 30<sup>th</sup> sess, (2004) 4–5 [22]. See also, Julie O'Brien, 'Affirmative Action, Special Measures and the Sex Discrimination Act' (2004) 27 *UNSW Law Journal* 840, 846.
- 2 Section 7D(3) provides: A measure is to be treated as being taken for a purpose referred to in subsection (1) if it is taken: solely for that purpose; or for that purpose as well as other purposes, whether or not that purpose is the dominant or substantial one. See also, *Jacomb v Australian Municipal Administrative Clerical and Services Union* (2004) 140 FCR 149, 163 [44].
- 3 *Jacomb v Australian Municipal Administrative Clerical and Services Union* (2004) 140 FCR 149, 168 [60].
- 4 *Jacomb v Australian Municipal Administrative Clerical and Services Union* (2004) 140 FCR 149, 168 [62].
- 5 *Walker v Cormack* (2011) 196 FCR 574, 585 [35], where the Federal Court found that, even though it was still possible for men to see into a room containing a female-only exercise class, the provision of female-only exercise classes was a special measure for the purposes of s 7D of the SDA. This conclusion was reached notwithstanding the fact that the measure was not perfect in shielding women from the possibility of male attention while exercising.
- 6 See, for example, Committee on the Elimination of Discrimination against Women, *General recommendation No 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures*, 30<sup>th</sup> sess, (2004) 5[20].
- 7 This example is based on the matter of *Jacomb v Australian Municipal Administrative Clerical and Services Union* (2004) 140 FCR 149.
- 8 *Age Discrimination Act 2004* (Cth) s 33.
- 9 *Disability Discrimination Act 1992* (Cth) s 45.
- 10 *Racial Discrimination Act 1975* (Cth) s 8.

## Further Information

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