



Equal Opportunity Act 2010

> Special measures

Substantive equality

The *Equal Opportunity Act 2010* allows people to take positive steps to help disadvantaged groups. These are called 'special measures'. The law makes clear that these actions are allowed and are not unlawful discrimination.

Substantive equality is about levelling the playing field to give everyone a fair go. It recognises the need for different approaches to overcome the practical effects of disadvantage and discrimination. Some groups that have been disadvantaged by discrimination in the past may need special assistance to address that disadvantage, rather than simply being treated equally or the same in a formal sense.

What is a special measure?

Under the Act, it is not discrimination for a person (or body) to take a special measure that promotes substantive equality for a group of people who have one (or more than one) protected attributes, for example race, sex, disability.

Section 12 of the *Equal Opportunity Act 2010* sets out the rules and relevant criteria for special measures. A person seeking to establish a special measure to promote the rights of a group of people should consider the steps they propose to take against the criteria in section 12.

Special measures have some essential characteristics. They must:

- be undertaken in good faith to help promote or achieve substantive equality for members of the group
- be reasonably likely to achieve this purpose
- be a proportionate way of achieving the purpose, and
- be justified because the members of the group have a particular need for advancement or assistance.

Purpose of the actions to be taken

To qualify as a special measure under the *Equal Opportunity Act 2010*, an action or program needs to be done in good faith for the remedial purpose of promoting or realising substantive equality. This means that a person setting up a special measure does so for the purpose of promoting equality for a group – rather than for another dominant reason, such as promoting commercial interests.

In some cases, a person can set up a measure for two purposes: one of which is the remedial purpose of addressing discrimination and promoting equality for a group. In this case though, it is important to think about what elements of the program or measure are for a remedial purpose, and how you could explain what the measure does for the protected group.

Is it a necessary and proportionate step?

To be a special measure under the Act, a measure also needs to be appropriate, proportionate, and justified. The measure must also be 'reasonably likely' to achieve its remedial purpose. This means that you do not have to prove that the measure will, in all circumstances, promote substantive equality for a group – rather that it is likely to do so. A good way of determining this is to look critically at your reason for the measure, and ask whether the measure or action you are taking is matched to the need for assistance.

When does a special measure stop being a special measure?

The *Equal Opportunity Act 2010* does not permit a special measures program or service to continue after substantive equality has been achieved, unless removal of it would result in the target group again becoming disadvantaged. This means that special measures are a balancing mechanism designed to facilitate equality but not to unfairly advance one group over another once the playing field is even.

Do I need to make an application for a special measure?

No. You do not need to apply or get approval from the VCAT for a special measure like you do for an exemption from the Act. But you will need to consider whether the proposed actions meet the test for a special measure and whether everything you propose to do falls within this test. If a discrimination complaint is made against your measure you will need to be prepared to give good reasons to explain how and why what you're doing is a special measure. If what you propose to do is not a special measure you may need to reconsider your approach or apply for an exemption.

Contact the Commission

For more information about special measures, please email legal@veohrc.vic.gov.au or call 1300 891 848.

If a measure is a special measure, do I still need to apply for an exemption under the Equal Opportunity Act 2010?

No. Where a measure or action is a special measure it will not constitute discrimination. This means that a person taking a special measure to promote substantive equality for a particular group will not need to apply for an exemption under section 89 of the *Equal Opportunity Act 2010* to exempt it from the operation of the Act.

Application forms to apply for an exemption under the *Equal Opportunity Act 2010* are available from the Victorian Civil and Administrative Tribunal website: vcat.vic.gov.au.

Case studies

1. The Ian Potter Museum of Art wanted to advertise for and employ an Indigenous person in the role of Vizard Foundation assistant curator. VCAT found that the purpose of the activity was to increase the number of Indigenous people employed by the Museum. VCAT held that the measure was proportionate, as the number of Indigenous staff was dramatically lower than the number of Indigenous people in the wider population.

(The Ian Potter Museum of Art (Anti-Discrimination Exemption) [2011] VCAT 2236)

2. Parks Victoria wanted to advertise for and employ Indigenous people to care for Wurundjeri country. VCAT found that the purpose of the activity was to provide employment opportunities to Indigenous people, to increase the number of Indigenous people employed by Parks Victoria, to provide opportunities for connection and care for the Wurundjeri country by its traditional owners, and also for the maintenance of the culture associated with the country. VCAT was satisfied that the measure was proportionate because at the time the application was made only 7.6 per cent of Parks Victoria's workforce were Indigenous. (Parks Victoria (Anti-Discrimination Exemption) [2011] VCAT 2238.)

3. Darebin City Council Youth Services sought an exemption from the Equal Opportunity Act 2010 so that it could host two women's-only events, targeted towards young women within the Darebin community who, due to cultural and religious reasons, wouldn't otherwise have the opportunity to attend mixed gender events. The council also sought an exemption to employ women only for the duration of the two events. VCAT found that the proposed conduct amounted to a special measure for the purposes of section 12 of the Equal Opportunity Act 2010 and the conduct therefore was not discrimination. The Tribunal dismissed the application for an exemption as it was not necessary. In addition, VCAT made a declaration that the council's conduct was a special measure.

(Darebin City Council Youth Services v Victorian Equal Opportunity and Human Rights Commission (Anti-Discrimination) [2011] VCAT 1693.)



**Victorian Equal Opportunity
& Human Rights Commission**

Need more information?

Contact the Commission:

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We welcome your feedback!

Were these resources useful? Easy to use? Would you like to see something else included? Please email us at communications@veohrc.vic.gov.au.

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