

QUESTION TAKEN ON NOTICE

BUDGET ESTIMATES HEARING: 27 MAY 2009

IMMIGRATION AND CITIZENSHIP PORTFOLIO

(16) Program : Internal Product

Senator Fifield (L&CA 91) asked:

Does anti-discrimination legislation as a whole not apply to the visa decision making by the department? What aspects of the discrimination legislation apply or do not apply to the visa decision making in the portfolio?

Answer:

There are partial exemptions for the Migration Act 1958 ("the Migration Act") and various other migration and citizenship portfolio legislation in the Disability Discrimination Act 1992 ("DDA") and the Age Discrimination Act 2004. The Migration Act itself provides for a partial exemption from the Sex Discrimination Act 1984. There is no exemption from the Racial Discrimination Act 1975 for the migration and citizenship portfolio.

Disability

Currently section 52 of the DDA exempts the Migration Act, all regulations made under that Act and anything done by a person in relation to the administration of that Act from most of the anti-discrimination provisions of the DDA.

This exemption is designed to protect the operation of the migration health requirements. These allow a visa to be refused where a person's condition is likely to result in a significant cost to the Australian community or prejudice the access of Australian citizens or permanent residents to health care or community services. The health requirements are based on legitimate, objective and reasonable criteria.

Section 52 of the DDA provides that neither Division 1 nor 2 of the DDA:

- (a) affect discriminatory provisions in the Migration Act or any regulation made under that Act; or
- (b) render unlawful anything done by a person in relation to the administration of that Act or those regulations.

Division 1 of the DDA covers discrimination in work and Division 2 covers discrimination in other areas such as education and accommodation. The Migration Act is not exempt from discrimination on the basis of disability involving harassment, which is covered in Division 3 of the DDA.

In 2004 the Productivity Commission recommended that the Migration Act exemption in the DDA be amended so as to be as narrow as possible. The Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008 seeks to

put the Productivity Commission's recommendation into effect by amending section 52.

Proposed new section 52 will exempt from the DDA only the Migration Act and Migration Regulations themselves and administrative acts which they require or authorise. While this amendment has been designed to preserve the operation of the health requirements, it clarifies that incidental administrative processes are not exempted from Parts 1 and 2 of the DDA. It would allow, for example, a person to allege unlawful discrimination under the DDA if, during the administration of a process provided for in the Migration Act, information was not provided in accessible formats.

The proposed amendment will also create new Division 2A covering disability standards. The Migration Act will be exempt from this new division by virtue of the amended exemption in the same Bill.

The Bill has been passed by the House and is currently before the Senate.

The Joint Standing Committee on Migration will inquire into the migration health requirement this year. Terms of reference were announced by the Minister for Immigration and Citizenship, Senator Evans, and the Parliamentary Secretary for Disabilities and Children's Services, the Hon Bill Shorten, on 15 May this year.

A copy of this announcement can be found at:
www.minister.immi.gov.au/media/media-releases/2009/ce09039.htm

Age

Section 43 of the Age Discrimination Act 2004 ("ADA") provides exemptions from Part 4 of that Act, which governs unlawful age discrimination, for the Migration Act, the Immigration (Guardianship of Children) Act 1946, and any regulations made under these Acts. In addition, anything done in compliance with the Australian Citizenship Act 2007 or the Immigration (Education) Act 1971, is also exempt from Part 4 of the ADA.

Each visa class is designed to meet a particular policy requirement and age is a relevant factor in relation to some policies. For example, the Work and Holiday visa, which provides that the applicant must be at least 18 years of age but must not have turned 31. Certain other visas, for example the Aged Parent visa and Aged Dependent Relative visa have as a condition for most applicants that they be old enough to receive the age pension under the Social Security Act 1991.

These age requirements are based on legitimate, objective and reasonable criteria. They help to ensure that these visas lead to the policy outcomes they are designed to produce. For example, various permanent skilled visas have an upper age limit of 45, which reflects the level of productive benefit to the Australian work force and economy expected of persons entering Australia in this visa category. The Working Holiday visa is aimed at promoting international understanding through helping young people experience the culture of another society.

Sex discrimination

Section 507 of the Migration Act provides an exemption from the Sex Discrimination Act 1984 in the following terms:

507 Marital status

(1) The Sex Discrimination Act 1984, to the extent that it applies to the status or condition of being married or being the de facto spouse of another person, does not operate in relation to:

(a) regulations, or the making of regulations, that, for the purposes of dealing with an application for a visa, specify:

- i. the nature and incidents of the relationship between a person and another person; or
- ii. the period for which a relationship of a specified kind must have existed between a person and another person; before the person is taken to be the de facto spouse of the other person; or

(b) the performance of any function, the exercise of any power or the fulfilment of any responsibility, in connection with the administration of any such regulation.

Australian Human Rights Commission

There is no exemption from the Human Rights and Equal Opportunity Commission Act 1986 for the migration and citizenship portfolio. DIAC co-operates fully with the Australian Human Rights Commission.