



Sex and Age Discrimination Legislation Amendment Act 2011

No. 40, 2011

**An Act to amend the law relating to sex and age
discrimination, and for related purposes**

Note: An electronic version of this Act is available in ComLaw (<http://www.comlaw.gov.au/>)

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[Assented to 20 June 2011]

The Parliament of Australia enacts:

1 Short title

This Act may be cited as the *Sex and Age Discrimination
Legislation Amendment Act 2011*.

2 Commencement

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	Column 2	Column 3
Provision(s)	Commencement	Date/Details
1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day this Act receives the Royal Assent.	20 June 2011
2. Schedule 1	The day after this Act receives the Royal Assent.	21 June 2011
3. Schedule 2	A single day to be fixed by Proclamation. However, if any of the provision(s) do not commence within the period of 6 months beginning on the day this Act receives the Royal Assent, they commence on the day after the end of that period.	29 July 2011 (see F2011L01552)

Note: This table relates only to the provisions of this Act as originally enacted. It will not be amended to deal with any later amendments of this Act.

- (2) Any information in Column 3 of the table is not part of this Act. Information may be inserted in this column, or information in it may be edited, in any published version of this Act.

3 Schedule(s)

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

Schedule 1—Amendments relating to sex discrimination

Part 1—Amendment of the Sex Discrimination Act 1984

Division 1—Amendments

Sex Discrimination Act 1984

1 Title

After “potential pregnancy”, insert “, **breastfeeding**”.

2 Preamble

After “potential pregnancy” (wherever occurring), insert “, breastfeeding or family responsibilities”.

3 Paragraph 3(a)

After “Women”, insert “and to provisions of other relevant international instruments”.

4 Paragraph 3(b)

After “potential pregnancy”, insert “or breastfeeding”.

5 Paragraph 3(ba)

Omit “involving dismissal of employees on the ground of family responsibilities”, substitute “on the ground of family responsibilities in the area of work”.

6 Subsection 4(1)

Insert:

breastfeeding has a meaning affected by subsections 7AA(3) and (4).

7 Subsection 4(1) (definition of *Convention*)

Repeal the definition.

8 Subsection 4(1)

Insert:

disability has the same meaning as in the *Disability Discrimination Act 1992*.

9 Subsection 4(1)

Insert:

official record of a person's sex means:

- (a) a record of a person's sex in a register of births, deaths and marriages (however described); or
- (b) a document (however described), issued under a law of a State or Territory, the purpose of which is to identify or acknowledge a person's sex.

10 Subsection 4(1)

Insert:

relevant international instrument means:

- (a) the Convention on the Elimination of All Forms of Discrimination Against Women done at New York on 18 December 1979 ([1983] ATS 9) (a copy of the English text of which is set out in the Schedule); or
- (b) the International Covenant on Civil and Political Rights done at New York on 16 December 1966 ([1980] ATS 23); or
- (c) the International Covenant on Economic, Social and Cultural Rights done at New York on 16 December 1966 ([1976] ATS 5); or
- (d) the Convention on the Rights of the Child done at New York on 20 November 1989 ([1991] ATS 4); or
- (e) ILO Convention (No. 100) concerning Equal Remuneration for Men and Women Workers for Work of Equal Value done at Geneva on 29 June 1951 ([1975] ATS 45); or
- (f) ILO Convention (No. 111) concerning Discrimination in respect of Employment and Occupation done at Geneva on 25 June 1958 ([1974] ATS 12); or
- (g) ILO Convention (No. 156) concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers

with Family Responsibilities done at Geneva on 23 June 1981 ([1991] ATS 7); or

- (h) ILO Convention (No. 158) concerning Termination of Employment at the Initiative of the Employer done at Geneva on 22 June 1982 ([1994] ATS 4).

Note: In 2010, the text of a Convention or Covenant in the Australian Treaty Series was accessible through the Australian Treaties Library on the AustLII website (www.austlii.edu.au).

11 Subsection 4A(1)

Omit “an employee”, substitute “a person”.

12 Subsection 4A(1)

Omit “the employee” (wherever occurring), substitute “the person”.

13 Subsection 4A(2) (definition of *dependent child*)

Omit “the employee”, substitute “the person”.

14 Subsection 4A(2) (definition of *immediate family member*)

Omit “the employee” (wherever occurring), substitute “the person”.

15 Subsection 5(1A)

Repeal the subsection.

16 Subsection 7(2)

Omit “also”.

17 After section 7

Insert:

7AA Discrimination on the ground of breastfeeding

- (1) For the purposes of this Act, a person (the *discriminator*) discriminates against a woman (the *aggrieved woman*) on the ground of the aggrieved woman’s breastfeeding if, by reason of:
- (a) the aggrieved woman’s breastfeeding; or
 - (b) a characteristic that appertains generally to women who are breastfeeding; or
 - (c) a characteristic that is generally imputed to women who are breastfeeding;

the discriminator treats the aggrieved woman less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat someone who is not breastfeeding.

- (2) For the purposes of this Act, a person (the *discriminator*) discriminates against a woman (the *aggrieved woman*) on the ground of the aggrieved woman's breastfeeding if the discriminator imposes, or proposes to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging women who are breastfeeding.
- (3) To avoid doubt, a reference in this Act to *breastfeeding* includes the act of expressing milk.
- (4) To avoid doubt, a reference in this Act to *breastfeeding* includes:
 - (a) an act of breastfeeding; and
 - (b) breastfeeding over a period of time.
- (5) This section has effect subject to sections 7B and 7D.

19 Subsection 7B(1)

Omit "or 7(2)", substitute ", 7(2) or 7AA(2) or section 7A".

20 At the end of subsection 7D(1)

Add:

- ; or (e) women who are breastfeeding and people who are not breastfeeding; or
- (f) people with family responsibilities and people without family responsibilities.

21 Subsection 7D(2)

Omit "or 7", substitute ", 7, 7AA or 7A".

22 Section 8

Omit "or 7(1) or section 7A", substitute ", 7(1) or 7AA(1) or section 7A".

23 Subsection 9(9)

After "done by" (wherever occurring), insert "or in relation to".

24 Subsections 9(10) and (10A)

Repeal the subsections, substitute:

- (10) The prescribed provisions of Part II, and the prescribed provisions of Division 3 of Part II, have effect to the extent that the provisions give effect to a relevant international instrument.

25 Subsection 9(11)

After “or by”, insert “or in relation to”.

26 Subsection 9(12)

After “done, by”, insert “or in relation to”.

27 Subsection 9(13)

After “or by”, insert “or in relation to”.

28 Subsection 9(14)

After “done, by”, insert “or in relation to”.

29 At the end of section 9

Add:

- (21) The prescribed provisions of Division 3 of Part II have effect in relation to acts done using a postal, telegraphic, telephonic or other like service (within the meaning of paragraph 51(v) of the Constitution).

30 Subsection 10(1)

Omit “or (10A)”.

31 Subsection 10(2)

Omit “or discrimination on the ground of pregnancy or potential pregnancy”, substitute “, discrimination on the ground of pregnancy or potential pregnancy, discrimination on the ground of breastfeeding or discrimination on the ground of family responsibilities”.

32 Subsection 11(2)

Omit “or discrimination on the ground of pregnancy or potential pregnancy”, substitute “, discrimination on the ground of pregnancy or potential pregnancy, discrimination on the ground of breastfeeding or discrimination on the ground of family responsibilities”.

33 Subsection 11(3)

Omit “the Convention”, substitute “a relevant international instrument”.

Note: The heading to section 11 is altered by omitting “**Convention**” and substituting “**relevant international instruments**”.

34 Paragraph 11(4)(a)

Omit “the Convention”, substitute “a relevant international instrument”.

35 Paragraph 11(5)(a)

Omit “the Convention”, substitute “a relevant international instrument”.

36 Section 11A

Repeal the section.

37 Subsections 14(1) and (2)

After “potential pregnancy”, insert “, breastfeeding or family responsibilities”.

38 Subsection 14(3A)

Repeal the subsection.

39 Subsections 15(1) and (2)

After “potential pregnancy”, insert “, breastfeeding or family responsibilities”.

40 Section 16

After “potential pregnancy”, insert “, breastfeeding or family responsibilities”.

41 Subsections 17(1), (2) and (3)

After “potential pregnancy”, insert “, breastfeeding or family responsibilities”.

42 Section 18

After “potential pregnancy”, insert “, breastfeeding or family responsibilities”.

43 Subsections 19(1) and (2)

After “potential pregnancy”, insert “, breastfeeding or family responsibilities”.

44 Section 20

After “potential pregnancy”, insert “, breastfeeding or family responsibilities”.

45 Subsections 21(1) and (2)

After “potential pregnancy”, insert “, or breastfeeding”.

46 Subsection 22(1)

After “potential pregnancy”, insert “, or breastfeeding”.

47 Subsections 23(1) and (2)

After “potential pregnancy”, insert “, or breastfeeding”.

48 Subsection 24(1)

After “potential pregnancy”, insert “, or breastfeeding”.

49 Subsections 25(1) and (2)

After “potential pregnancy”, insert “, or breastfeeding”.

50 Subsection 26(1)

After “potential pregnancy,”, insert “or breastfeeding.”.

51 Paragraph 27(1)(b)

After “potential pregnancy”, insert “, breastfeeding or family responsibilities”.

52 After subparagraph 27(1)(c)(iii)

Insert:

- or (iv) who are not breastfeeding; or
- (v) without family responsibilities;

53 Subsection 28A(1)

After “anticipated”, insert “the possibility”.

54 After subsection 28A(1)

Insert:

- (1A) For the purposes of subsection (1), the circumstances to be taken into account include, but are not limited to, the following:
- (a) the sex, age, marital status, sexual preference, religious belief, race, colour, or national or ethnic origin, of the person harassed;
 - (b) the relationship between the person harassed and the person who made the advance or request or who engaged in the conduct;
 - (c) any disability of the person harassed;
 - (d) any other relevant circumstance.

55 Subsection 28B(6)

After “workplace of”, insert “either or”.

56 Paragraph 28F(2)(a)

Omit “an adult”, substitute “a”.

57 After subsection 28F(2)

Insert:

- (2A) It is unlawful for a person (the *first person*) who is a member of the staff of an educational institution (the *first educational institution*) to sexually harass a person who is a student at another educational institution if the sexual harassment occurs in connection with the first person being a member of staff of the first educational institution.
- (2B) It is unlawful for a person (the *first person*) who is an adult student at an educational institution (the *first educational institution*) to sexually harass:
- (a) a person who is a student at another educational institution;
or
 - (b) a member of the staff of another educational institution;
if the sexual harassment occurs in connection with the first person being a student at the first educational institution.

58 Section 28G

Omit “It”, substitute “(1) It”.

Note: The heading to section 28G is altered by omitting “**Provision of goods**” and substituting “**Goods**”.

59 At the end of section 28G

Add:

- (2) It is unlawful for a person to sexually harass another person in the course of seeking, or receiving, goods, services or facilities from that other person.

60 Section 31

Omit “or childbirth”, substitute “, childbirth or breastfeeding”.

Note: The heading to section 31 is altered by omitting “**or childbirth**” and substituting “, **childbirth or breastfeeding**”

61 Section 39

Omit “or pregnancy”, substitute “, pregnancy, breastfeeding or family responsibilities”.

62 After subsection 40(4)

Insert:

- (5) Nothing in Division 2 renders it unlawful to refuse to make, issue or alter an official record of a person’s sex if a law of a State or Territory requires the refusal because the person is married.

63 Paragraph 41A(1)(a)

Omit “or marital status”, substitute “, marital status or family responsibilities”.

64 Subparagraph 41A(1)(b)(iii)

Omit “or marital status”, substitute “, marital status or family responsibilities”.

65 Subsection 41A(2)

Repeal the subsection, substitute:

- (2) For the purposes of this section:

- (a) discrimination on the ground of a person's sex is taken to be indirect if paragraph 5(1)(b) or (c) or subsection 5(2) applies to the discrimination; and
- (b) discrimination on the ground of a person's marital status is taken to be indirect if paragraph 6(1)(b) or (c) or subsection 6(2) applies to the discrimination; and
- (c) discrimination on the ground of a person's family responsibilities is taken to be indirect if section 7A applies to the discrimination.

66 Paragraph 41B(3)(a)

Omit "or marital status", substitute ", marital status or family responsibilities".

67 Subparagraph 41B(4)(b)(i)

Omit "or marital status", substitute ", marital status or family responsibilities".

68 Paragraphs 48(1)(g), (ga) and (gb)

After "potential pregnancy", insert ", breastfeeding or family responsibilities".

Division 2—Application of amendments

69 Application of amendments

The amendments of the *Sex Discrimination Act 1984* made by this Part apply in relation to acts or omissions occurring after the commencement of this Part.

Part 2—Consequential amendment

Equal Opportunity for Women in the Workplace Act 1999

70 Subsection 3(1) (definition of *discrimination*)

Omit “or 7”, substitute “, 7, 7AA or 7A”.

Schedule 2—Amendments relating to age discrimination

Part 1—Amendment of the Age Discrimination Act 2004

Age Discrimination Act 2004

1 Section 4

After:

- Functions are given to the Commission (see Part 6).

insert:

- The Age Discrimination Commissioner is established (see Part 6A).

2 Section 5

Insert:

Commissioner means the Age Discrimination Commissioner appointed under section 53A.

3 After Part 6

Insert:

Part 6A—Age Discrimination Commissioner

53A Age Discrimination Commissioner

- (1) There is to be an Age Discrimination Commissioner, who is to be appointed by the Governor-General by written instrument.

Note: The Age Discrimination Commissioner is eligible for reappointment: see the *Acts Interpretation Act 1901*.

- (2) A person may only be appointed as the Age Discrimination Commissioner if the Minister is satisfied that the person has appropriate qualifications, knowledge or experience.

53B Terms and conditions of appointment

- (1) The Commissioner holds office for the period specified in the instrument of appointment. The period must not exceed 7 years.
- (2) The Commissioner holds office on a full-time basis.
- (3) The Commissioner holds office on the terms and conditions (if any), in relation to matters not covered by this Act, that are determined by the Governor-General.

53C Remuneration of Commissioner

- (1) The Commissioner is to be paid the remuneration that is determined by the Remuneration Tribunal. If no determination of that remuneration by the Tribunal is in operation, the Commissioner is to be paid the remuneration that is prescribed by the regulations.
- (2) The Commissioner is to be paid the allowances that are prescribed by the regulations.
- (3) This section has effect subject to the *Remuneration Tribunal Act 1973*.

53D Leave of absence

- (1) The Commissioner has the recreation leave entitlements that are determined by the Remuneration Tribunal.
- (2) The Minister may grant the Commissioner leave of absence, other than recreation leave, on the terms and conditions as to remuneration or otherwise that the Minister determines.

53E Outside employment

The Commissioner must not engage in paid employment outside the duties of his or her office without the Minister's approval.

53F Resignation

- (1) The Commissioner may resign his or her appointment by giving the Governor-General a written resignation.
- (2) The resignation takes effect on the day it is received by the Governor-General or, if a later day is specified in the resignation, on that later day.

53G Termination of appointment

- (1) The Governor-General may terminate the appointment of the Commissioner for misbehaviour or physical or mental incapacity.
- (2) The Governor-General must terminate the appointment of the Commissioner if:
 - (a) the Commissioner:
 - (i) becomes bankrupt; or
 - (ii) applies to take the benefit of any law for the relief of bankrupt or insolvent debtors; or
 - (iii) compounds with his or her creditors; or
 - (iv) makes an assignment of his or her remuneration for the benefit of his or her creditors; or
 - (b) the Commissioner is absent, except on leave of absence, for 14 consecutive days or for 28 days in any 12 months; or
 - (c) the Commissioner engages, except with the Minister's approval, in paid employment outside the duties of his or her office (see section 53E).

53H Acting Commissioner

- (1) The Minister may, by written instrument, appoint a person to act as Commissioner:
 - (a) during a vacancy in the office of Commissioner (whether or not an appointment has previously been made to the office); or
 - (b) during any period, or during all periods, when the Commissioner:
 - (i) is absent from duty or from Australia; or
 - (ii) is, for any reason, unable to perform the functions of the office.

- (2) Anything done by or in relation to a person purporting to act under an appointment is not invalid merely because:
- (a) the occasion for the appointment had not arisen; or
 - (b) there was a defect or irregularity in connection with the appointment; or
 - (c) the appointment had ceased to have effect; or
 - (d) the occasion to act had not arisen or had ceased.

Note: See sections 20 and 33A of the *Acts Interpretation Act 1901*.

4 Paragraph 55(a)

Repeal the paragraph, substitute:

- (a) the Commissioner or another member of the Commission; or

5 Subsection 58(1)

Omit “a member of the Commission” (wherever occurring), substitute “the Commissioner or another member of the Commission.”

6 Subsection 60(6) (paragraph (a) of the definition of *person bound by this section because of office, employment or authorisation*)

Repeal the paragraph, substitute:

- (a) the Commissioner or another member of the Commission; or

Part 2—Consequential amendments

Division 1—Amendments

Australian Human Rights Commission Act 1986

7 Subsection 3(1)

Insert:

Age Discrimination Commissioner means the Age Discrimination Commissioner appointed under the *Age Discrimination Act 2004*.

8 Paragraph 8(1)(d)

Repeal the paragraph, substitute:

- (d) the Sex Discrimination Commissioner; and
- (e) the Age Discrimination Commissioner; and

9 Subsection 8(7)

After “Sex Discrimination Commissioner”, insert “, Age Discrimination Commissioner”.

10 At the end of subsection 46PV(3)

Add:

; and (f) the Age Discrimination Commissioner.

Fair Work Act 2009

11 Section 12

Insert:

Age Discrimination Commissioner means the Age Discrimination Commissioner appointed under the *Age Discrimination Act 2004*.

12 Paragraph 161(2)(a)

Omit “the Australian Human Rights Commission”, substitute “the Age Discrimination Commissioner”.

13 Paragraph 218(2)(a)

Omit “the Australian Human Rights Commission”, substitute “the Age Discrimination Commissioner”.

Division 2—Application of amendments

14 Amendment made by item 10

The amendment made by item 10 applies in relation to proceedings:

- (a) that commence on or after the commencement of that item;
or
- (b) that commenced before the commencement of that item, and that had not been completed by that commencement.

*[Minister’s second reading speech made in—
House of Representatives on 30 September 2010
Senate on 28 October 2010]*

(207/10)