

## **EXPLANATORY STATEMENT**

### **Select Legislative Instrument No. 115, 2015**

Issued by Authority of the Attorney-General

*Sex Discrimination Act 1984*

*Sex Discrimination Amendment (Exemptions) Regulation 2015*

#### **Overview**

Section 116 of the *Sex Discrimination Act 1984* (Sex Discrimination Act) provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to the Act.

In 2013, the Sex Discrimination Act was amended by the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* to provide protection against discrimination on the basis of sexual orientation, gender identity and intersex status. At the same time, subsection 40(2B) was inserted to provide an exemption for conduct that would otherwise be discrimination on the grounds of sexual orientation (section 5A), gender identity (section 5B) or intersex status (section 5C) if the conduct is in direct compliance with a Commonwealth, state or territory law prescribed by regulations.

All Commonwealth, state and territory laws as in force at 1 August 2013 were initially prescribed by regulation 5 of the *Sex Discrimination Regulations 1984* (Sex Discrimination Regulations) until 31 July 2014 to allow time for jurisdictions to review their laws and assess compliance with the new protections against discrimination.

A review of Commonwealth laws found these laws are able to operate consistently with the new protections against discrimination on the grounds of sexual orientation, gender identity or intersex status. Consequently, no Commonwealth laws have been prescribed since 1 August 2014.

To allow states and territories additional time to review their laws, regulation 5 was amended by the *Sex Discrimination Amendment (Exemptions) Regulation 2014* to extend the sunset date applying to the prescription of all states and territories laws to 31 July 2015. During this time, a working group of Commonwealth, state and territory officials have identified some potentially discriminatory state and territory laws which may require amendment to comply with the new protections against discrimination.

The proposed Regulation extends the sunset date applying to the prescription of all state and territory laws for a further 12 months until 31 July 2016. The purpose of this extension is to facilitate the amendment of discriminatory state and territory laws by jurisdictions as required. A lesser period may not be sufficient for this purpose. The Government does not propose any further extensions of this exemption after 31 July 2016.

The proposed Regulation also includes a technical update to the title of a cross-referenced regulation.

The proposed Regulation is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

### **Consultation**

The introduction of subsection 40(2B) into the Sex Discrimination Act by the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* was the subject of an inquiry by the Senate Legal and Constitutional Affairs Legislation Committee. The Committee handed down its report in June 2013.

This Regulation simply extends the sunset date for the prescription of all state and territory laws for a further period of one year. The decision to extend the sunset date follows consultation with states and territories.

### **Commencement**

#### Section 2 – Commencement

The Regulation provides for the whole of the instrument to commence on the day after the Regulation is registered.

## **Statement of Compatibility with Human Rights**

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

### ***Sex Discrimination Amendment (Exemptions) Regulation 2015***

#### **Overview of the Amendments**

In 2013, the *Sex Discrimination Act 1984* was amended to provide protection against discrimination on the basis of sexual orientation, gender identity and intersex status. At the same time, new subsection 40(2B) was inserted to provide an exemption for conduct that would otherwise be discrimination on the grounds of sexual orientation (section 5A), gender identity (section 5B) or intersex status (section 5C) if the conduct is in direct compliance with a Commonwealth, state or territory law prescribed by regulations.

All Commonwealth, state and territory laws as in force at 1 August 2013 were prescribed for an initial period of one year to allow time for the Commonwealth, states and territories to review their laws to assess whether they comply with the new protections against discrimination.

In 2014, a review of Commonwealth laws found that these laws are able to operate consistently with the new protections against discrimination on the grounds of sexual orientation, gender identity and intersex status. Consequently, Commonwealth laws have not been prescribed since 1 August 2014.

In order to allow states and territories time to complete a review of laws for consistency with the new grounds of protection, the initial 12 month prescription of all state and territory laws was extended for 12 months until 31 July 2015. During this time, a working group of Commonwealth, state and territory officials have progressed this review of laws. However, states and territories have requested that the prescription be extended for another 12 months, as an interim measure, to finalise a longer-term approach for discriminatory state and territory laws.

This Legislative Instrument amends the *Sex Discrimination Regulations 1984* (Sex Discrimination Regulations) to extend the prescription of all state and territory laws in force at 1 August 2013 for a further 12 months until 31 July 2016.

#### **Human rights implications**

The amendments engage the right to equality and non-discrimination.

##### ***The right to equality and non-discrimination***

By extending the prescription of all state and territory laws for another year, the amendments to the Sex Discrimination Regulations engage the right to equality and non-discrimination in

articles 2 and 26 of the *International Covenant on Civil and Political Rights* and article 2(2) of the *International Covenant on Economic, Social and Cultural Rights*.

The right to equality and non-discrimination provides that all persons are equal before the law and entitled, without any discrimination, to the equal protection of the law. As a result, laws should prohibit discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or 'other status'. The United Nations Human Rights Committee has found that 'other status' includes sexual orientation.

The right to equality and non-discrimination is subject to the international human rights law principle of 'legitimate differential treatment'. This principle allows particular groups of people to be treated differently where the treatment is aimed at achieving a legitimate objective, is based on reasonable and objective criteria and is proportionate to the objective to be achieved.

When the new protections against discrimination on the grounds of sexual orientation, gender identity and intersex status were put in place in August 2013, all Commonwealth, state and territory laws were exempted for an initial 12 month period until 31 July 2014 through prescription in regulation 5 of the Sex Discrimination Regulations.

A review of Commonwealth laws found that these laws are able to operate consistently with the new protections against discrimination on the grounds of sexual orientation, gender identity or intersex status. Consequently, no Commonwealth laws have been prescribed since 1 August 2014.

The prescription of state and territory laws was extended until 31 July 2015 to allow states and territories additional time to review their laws for consistency with the protections from discrimination on the new grounds. The Legislative Instrument extends the prescription of state and territory laws for a further 12 months, until 31 July 2016. This means that anything done by a person in direct compliance with a state or territory law will be exempted from the protection from discrimination on the grounds of sexual orientation, gender identity or intersex status in the Act during this period.

During the past 12 months, a working group of Commonwealth, state and territory officials have identified some potentially discriminatory state and territory laws which may require amendment to comply with the new protections against discrimination. However, states and territories have indicated that a further extension of time is required to facilitate the amendment of these laws. The amendment is therefore aimed at achieving the legitimate objective of providing additional time for states and territories to amend laws to ensure consistency with the new grounds of protection against discrimination.

The limitation is also based on reasonable and objective criteria as it only extends to state and territory laws in force at 1 August 2013, which ensures any states and territory laws passed after that date must comply with the new protections from discrimination on the grounds of sexual orientation, gender identity and intersex status. The limitation is proportionate as it is

for a short time period, and steps have been taken to ensure it is no more restrictive than required. A period of less than 12 months may not be sufficient to allow states and territories time to amend their laws. The Government does not propose any further extensions of this exemption after 31 July 2016.

The Government believes all people are entitled to respect, dignity and legal protection regardless of their sexual orientation, gender identity or intersex status and will work with states and territories over the prescription period, with a view to full application of the new protections against discrimination.

### **Conclusion**

The Legislative Instrument is compatible with human rights because the limitations it places on the right to equality and non-discrimination are reasonable, necessary and proportionate to achieving a legitimate aim.

## **Details of the Sex Discrimination Amendment (Exemptions) Regulation 2015**

### **Regulation 1 – Name of Regulation**

This section provides that the name of the Regulation is the Sex Discrimination Amendment (Exemptions) Regulation 2015.

### **Regulation 2 – Commencement**

This section provides for the commencement for the whole of the instrument on the day after the Regulation is registered.

### **Regulation 3 – Authority**

This section specifies that the proposed Regulation is made under the Sex Discrimination Act 1984.

## **Schedule 1 – Amendments**

### **Item 1 – change of name – *Financial Management and Accountability Regulations 1997***

#### *Subregulation 4(2) – care or services that are Commonwealth-funded aged care*

Subsection 4(1) of the Sex Discrimination Act contains a definition of ‘Commonwealth-funded aged care’ which allows care or services to be prescribed by regulations. Subregulation 4(2) of the *Sex Discrimination Regulations 1984* prescribes a number of programs by reference to the *Financial Management and Accountability Regulations 1997* to fall within the definition of ‘Commonwealth-funded aged care.’

The Regulation amends subregulation 4(2) to update the reference to the *Financial Management and Accountability Regulations 1997* to reflect its name change to *Financial Framework (Supplementary Powers) Regulations 1997*.

### **Item 2 – prescription of state and territory laws**

#### *Subregulation 5(2) – exemption for things done in direct compliance with prescribed laws*

Subsection 40(2B) of the Sex Discrimination Act provides an exemption for conduct that would otherwise be discrimination on the grounds of sexual orientation (section 5A), gender identity (section 5B) or intersex status (section 5C) if the conduct is in direct compliance with a Commonwealth, state or territory law prescribed by regulations.

The proposed Regulation amends subregulation 5(2) so that the prescription of all state and territory laws as in force on 1 August 2013 will now sunset on 31 July 2016.