

Legislation (Public Service Instruments) Sunset-altering Declaration 2021

EXPLANATORY STATEMENT

Issued by the Assistant Minister to the Attorney General in compliance with section 15G of the *Legislation Act 2003*.

INTRODUCTION

The *Legislation (Public Service Instruments) Sunset-altering Declaration 2021* (the Declaration) is made under subsection 51A(1) of the *Legislation Act 2003*. It is a legislative instrument for the purposes of the Legislation Act and must be registered on the Federal Register of Legislation. The Declaration is subject to the disallowance provisions of the Legislation Act.

OUTLINE

Sunsetting is the automatic repeal of legislative instruments after a fixed period. The Australian Government's sunsetting framework is established under Part 4 of Chapter 3 of the Legislation Act. The purpose of the sunsetting framework is to ensure that legislative instruments are kept up to date and only remain in force for so long as they are needed.

Subsection 50(1) of the Legislation Act provides that a legislative instrument is automatically repealed on the 1 April or 1 October immediately on or following the tenth anniversary of its registration.

Under subsection 51A(1) of the Legislation Act, the Attorney-General can issue a declaration aligning the sunsetting days of two or more instruments, if satisfied on application by the rule-maker of the relevant instruments that:

- (a) all the instruments to be reviewed:
 - i) would (in the absence of a declaration made under section 51A of the Legislation Act) be repealed by section 50 or 51 of the Legislation Act; and
 - ii) are or will be the subject of a single review; and
- (b) the making of the declaration will facilitate the undertaking of the review or the implementation of its findings.

In this instance, the Assistant Minister to the Attorney-General is performing the functions of the Attorney-General under the Legislation Act.

The day specified in the sunset-altering instrument must be 1 April or 1 October of a year that is up to five years later than the earliest sunsetting day of the instruments. The instruments will then be repealed on the day specified in the declaration instead of the previously scheduled sunsetting day of each instrument. This allows instruments to continue to be in force for a further but limited period of time when they would otherwise sunset, or to sunset earlier than the originally scheduled sunsetting day.

The objective of issuing a sunset-altering declaration is to facilitate either: the undertaking of a single review into the fitness-for-purpose of two or more thematically related legislative instruments; or the implementation of such a review's findings. This reduces administrative burden as well as the possibility of legislative inconsistencies arising from reviewing and replacing related legislation at different times.

The Declaration aligns the sunseting dates of the following instruments (together, the Public Service Instruments) to 1 April 2023:

- (a) the *Australian Public Service Commissioner's Directions 2016*; and
- (b) the *Public Service Regulations 1999*.

Both instruments are made under the *Public Service Act 1999* and relate to the management of an efficient and effective Australian Public Service (APS). Aligning the sunseting dates will allow a full review of both instruments to be undertaken together, and provide the opportunity for the rule-makers to consider aligning language, drafting and policy changes consistently. This will reduce administrative burden as well as the possibility of legislative inconsistencies arising from reviewing and replacing the related legislation at different times.

PROCESS BEFORE DECLARATION WAS MADE

Regulatory impact analysis

Sunset-altering declarations are machinery of government instruments, and are therefore not subject to the regulatory impact assessment requirements set out by the Office of Best Practice Regulation (OBPR). The OBPR reference for this standing exemption is ID 19486.

Consultation before making

Before the Declaration was issued, the Assistant Minister to the Attorney-General considered the general obligation to consult imposed by section 17 of the Legislation Act.

For the purposes of section 6 of the Legislation Act, the Hon Ben Morton MP, Assistant Minister to the Minister for the Public Service and Parliamentary Secretary to the Minister for the Public Service, is the relevant rule-maker for the *Public Service Regulations 1999*, and the Australian Public Service Commissioner, Peter Woolcott AO, is the relevant rule-maker for the *Australian Public Service Commissioner's Directions 2016*. The rule-makers approved the application to the Attorney-General setting out the reasons in support of issuing the certificate.

The application stated that the Australian Public Service Commission (the Commission) has consulted with the Department of the Prime Minister and Cabinet and the Department of Parliamentary Services (which administers similar instruments under the *Parliamentary Service Act 1999*). Some non-public consultation has occurred with senior Australian Public Service (APS) human resources practitioners and specific APS agencies with a large and diverse employment footprint. Further consultation will be carried out as part of the review with human resources professionals across the APS and senior leaders in the APS.

Statutory preconditions relevant to the certificate

In order to align the sunset day of two or more instruments, the Attorney-General must be satisfied on written application from the relevant rule-maker that the statutory conditions in paragraphs 51A(1)(a) and (b) of the Legislation Act are met. The statutory conditions are that:

- (a) all the instruments to be reviewed:
 - i) would (in the absence of a declaration made under section 51A of the Legislation Act) be repealed by section 50 or 51 of the Legislation Act; and
 - ii) are or will be the subject of a single review; and
- (b) the making of the declaration will facilitate the undertaking of the review or the implementation of its findings.

In terms of process, the Legislation Act requires:

- (a) the responsible rule-maker to apply to the Attorney-General,
- (b) the Attorney-General to be satisfied of the statutory conditions, and
- (c) the Attorney-General to make a declaration, which is a legislative instrument and subject to disallowance.

As noted above, the relevant rule-makers for the Public Service Instruments approved an application to the Attorney-General seeking an alignment of the relevant sunset days. In this instance, the application was considered by the Assistant Minister to the Attorney-General. On consideration of this application and on the basis of the information contained in the statement of reasons below, the Assistant Minister to the Attorney-General was satisfied that the criteria in paragraphs 51A(1)(a) and (b) of the Legislation Act were met.

Statement of Reasons for issuing of the Certificate

For the purposes of subsection 51A(4) of the Legislation Act, this section sets out the statement of reasons for the issue of the certificate.

As outlined above, the Declaration aligns the sunseting dates for the Public Service Instruments to enable the Commission to undertake a targeted thematic review of the instruments. Both instruments are made under the *Public Service Act 1999* and relate to the management of an efficient and effective APS. A full review of both instruments, together, will allow the rule-makers to consider aligning language, drafting and policy changes. This will reduce administrative burden as well as the possibility of legislative inconsistencies arising from reviewing and replacing the related legislation at different times.

The objective of the review will consider both instruments and whether they remain fit-for-purpose in the APS employment landscape. The review will also consider best practice drafting and amendments to ensure consistency with the Public Service Act and current drafting directions. Any recent policy developments and their application to the instruments will be considered by the Commission as part of the review.

The review will be managed by the Commission's Integrity, Performance and Employment Policy Group, with additional advice as required from relevant Commission policy areas (employment policy, diversity and inclusion, workplace relations, integrity and strategic policy). Further consultation will be carried out with human resources professionals across the APS and senior leaders in the APS.

Aligning the sunseting dates of the Public Service Instruments will allow sufficient time for the review to be undertaken and for any resulting legislative package to be developed to implement the outcomes of the review. It is expected that the review will conclude mid-2021 with both instruments to be made by the end of 2021. The postponement of sunseting until 1 April 2023 will cater for unexpected contingencies.

As such, the Declaration is consistent with the policy intent of the sunseting regime that legislative instruments should be kept up to date and only remain in force so long as they are needed.

More information

Further details on the provisions of the Declaration are provided in [Attachment A](#).

The Public Service Instruments which are the subject of the Declaration, and which will now sunset on 1 April 2023 as specified in the Declaration, are available on the Federal Register of Legislation.

Further information may be requested from the Attorney-General's Department about the operation of this Declaration, and from the Commission about the Public Service Instruments to which the Declaration applies.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

The *Legislation (Public Service Instruments) Sunset-altering Declaration 2021* (the Declaration) is compatible with human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (the Human Rights Act).

Overview of the Declaration

The Declaration is made under subsection 51A(1) of the *Legislation Act 2003* (the Legislation Act). Under that subsection, the Attorney-General can align the sunseting days of two or more legislative instruments if satisfied that:

- (a) all the instruments to be reviewed:
 - i) would (in the absence of a declaration made under section 51A of the Legislation Act) be repealed by section 50 or 51 of the Legislation Act; and
 - ii) are or will be the subject of a single review; and
- (b) the making of the declaration will facilitate the undertaking of the review or the implementation of its findings.

In this instance, the Assistant Minister to the Attorney-General is performing the functions of the Attorney-General under the Legislation Act.

The day specified in the sunset-altering declaration must be 1 April or 1 October of a year that is up to five years later than the earliest sunseting day. The instruments specified in the declaration will then be repealed on the day specified in the declaration instead of the previously scheduled sunseting day. The instruments specified in the Declaration are:

- (a) the *Australian Public Service Commissioner's Directions 2016*; and
- (b) the *Public Service Regulations 1999*.

The Declaration aligns the sunseting dates of these instruments (the Public Service Instruments) to 1 April 2023. The objective of issuing the Declaration is to facilitate the undertaking of a single thematic review into the fitness-for-purpose of the Public Service Instruments.

Both instruments are made under the *Public Service Act 1999* and relate to the management of an efficient and effective Australian Public Service (APS). A full review of both instruments, together, will allow the rule-makers to consider aligning language, drafting and policy changes consistently. This will reduce administrative burden as well as the possibility of legislative inconsistencies arising from reviewing and replacing the related legislation at different times.

Human Rights Implications

The Statement of Compatibility with Human Rights for a sunset-altering declaration focuses on the effect of the aligning instrument, rather than the substantive effect of continuing the instruments that have been aligned. The Declaration itself is machinery in nature. It does not alter the arrangements in place under the Public Service Instruments, but extends the operation of the Public Service Instruments to 1 April 2023.

Before issuing the Declaration, the Assistant Minister to the Attorney-General was satisfied that all instruments specified in the Declaration would be subject to a single thematic review. A thematic review is an effective mechanism for determining whether the instruments are fit for purpose, identifying opportunities to update, streamline and clarify the operation of the instruments and, where appropriate, reducing unnecessary regulation. The human rights impact of the Public Service Instruments will be considered during the proposed review, and addressed in the Statement of Compatibility of each replacement instrument.

Conclusion

The Declaration is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights Act, as it does not raise any human rights issues.

NOTES ON THE DECLARATION

Section 1 Name

This section provides for the Declaration to be named the *Legislation (Public Service Instruments) Sunset-altering Declaration 2021*. The Declaration may be cited by that name.

Section 2 Commencement

This section provides for the Declaration to commence on the day after it is registered.

Section 3 Authority

This section provides that the Declaration is made under subsection 51A(1) of the *Legislation Act 2003*.

Section 4 Repeal of instruments to facilitate review etc.

This section provides that the following instruments are repealed by section 51A of the *Legislation Act 2003* on 1 April 2024:

- (a) the *Australian Public Service Commissioner's Directions 2016*; and
- (b) the *Public Service Regulations 1999*.

1 April 2023 is the aligned sunset day for those instruments, which would otherwise have sunset on 1 October 2026 and 1 April 2021, respectively.

Section 5 Repeal of this instrument

This section provides that the Declaration is repealed at the start of 2 April 2023.