

EXPLANATORY STATEMENT

Select Legislative Instrument No. 109, 2014

Issued by Authority of the Attorney-General

Sex Discrimination Act 1984

Sex Discrimination Amendment (Exemptions) Regulation 2014

Overview

Section 116 of the *Sex Discrimination Act 1984* (the 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 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 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. The Regulation prescribes all State and Territory laws as in force at 1 August 2013 for another year and removes the prescription of Commonwealth laws. A review of Commonwealth laws found these laws are consistent with the new protections against discrimination on the grounds of sexual orientation, gender identity or intersex status. Therefore, Commonwealth laws will no longer need to be prescribed. The Regulation allows States and Territories time to complete their reviews of laws for consistency with the new grounds of protection against discrimination.

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

Consultation

In relation to the prescription of Commonwealth, State and Territory laws, this formed part of the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* which was the subject of inquiry by the Senate Legal and Constitutional Affairs Legislation Committee. The Committee handed down its report in June 2013.

The Regulation simply extends the existing prescription for a further period of one year for States and Territories. Consultation on the need to extend this period was undertaken with States and Territories.

Commencement

Section 2 – Commencement

The Regulation provides for the commencement of each section as follows:

- Sections 1 to 4 and other sections not elsewhere covered by the table commence the day after the Regulation is registered.
- The amendments in Schedule 1 commence on:
 - Item 1 – 1 August 2014
 - Item 2 – 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 2014

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.

In 2013, the *Sex Discrimination Regulations 1984* were amended to prescribe all Commonwealth, State and Territory laws as in force at 1 August 2013 for the purposes of subsection 40(2B) until 31 July 2014 to allow time for Commonwealth, States and Territories to review their laws to assess whether they comply with the new protections against discrimination.

This Legislative Instrument amends the 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 2015. The amendments also remove the exemption for all Commonwealth laws.

Human rights implications

The right to equality and non-discrimination

By extending the prescription of State and Territory laws and removing the prescription for Commonwealth laws, 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 (ICCPR) 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 until 31 July 2014 through prescription in the Sex Discrimination Regulations.

This Legislative Instrument amends the Regulations to remove the prescription of all Commonwealth laws, which means that from 1 August 2014, conduct under all Commonwealth laws will be subject to the new protections against discrimination. This amendment protects the right to equality and non-discrimination for lesbian, gay, bisexual, transgender and intersex people.

The Legislative Instrument also extends the prescription of State and Territory laws for a further 12 months. This means that anything done by a person in direct compliance with a State or Territory law will not be subject to the protection from discrimination on the grounds of sexual orientation, gender identity or intersex status in the Act during this period.

The extension of the prescription of State and Territory laws for a further twelve months is necessary to enable States and Territories to complete a review of laws for consistency with the new protections from discrimination on the grounds of sexual orientation, gender identity and intersex status in the Sex Discrimination Act. The amendment is therefore aimed at achieving the legitimate objective of providing additional time for States and Territories to complete the review of their laws. Steps have been taken to ensure the amended Regulations are no more restrictive than required to achieve the aim of allowing States and Territories adequate time to review their laws for consistency. Whether there are specific laws which need to be prescribed in the long term, provided there is a clear policy rationale for their prescription, will be determined during this period, in consultation with State and Territory governments. 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.

The Australian 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 2014*

Section 1 – Name of regulation

This section provides that the name of the Regulation is the *Sex Discrimination Amendment (Exemptions) Regulation 2014*.

Section 2 – Commencement

This section provides for the commencement of each section as follows:

- Sections 1 to 4 and other sections not elsewhere covered by the table commence the day after the Regulation is registered.
- The amendments in Schedule 1 commence on:
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Section 3 – Authority

This section specifies that the Regulation is made under the *Sex Discrimination Act 1984* (the Sex Discrimination Act).

Section 4 – Schedule(s)

This section specifies that each instrument that is specified in the Schedule to the Regulation is amended or repealed as set out in the applicable items in the Schedule, and any other item in the Schedule to this regulation has effect according to its terms.

Schedule 1 – Amendments

Item 1

Item 1 amends subregulation 5(1) to omit “the Commonwealth”. A review of Commonwealth laws has determined that these laws can apply consistently with the new grounds of protection against discrimination on the grounds of sexual orientation, gender identity or intersex status so there is no longer any need to prescribe these laws for the purposes of the exemption in subsection 40(2B) of the Sex Discrimination Act. State and Territory laws will continue to be prescribed.

Item 2

Item 2 amends the date so that the prescription of State and Territory laws now ends on 31 July 2015.