

EXPLANATORY STATEMENT

Select Legislative Instrument 2013 No. 197

Issued by Authority of the Attorney-General

Sex Discrimination Act 1984

*Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status)
Regulation 2013*

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.

Schedule 1 to the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (the Amending Act) amended the Sex Discrimination Act to introduce sexual orientation, gender identity and intersex status into the Sex Discrimination Act as grounds of discrimination.

The Amending Act also provides that religious organisations are not exempt from the Sex Discrimination Act in providing Commonwealth-funded aged care services. This amendment was included as there was significant feedback during the development of the exposure draft Human Rights and Anti-Discrimination Bill 2012 regarding the discrimination faced by older same-sex couples in accessing aged care services run by religious organisations, particularly when seeking to be recognised as a couple. When such services are provided with Commonwealth funding, the Government does not consider that discrimination in the provision of those services is appropriate. Commonwealth-funded aged care is defined in amended subsection 4(1) of the Sex Discrimination Act. In addition to the meaning of aged care in the *Aged Care Act 1997*, the definition allows classes of care or services to be prescribed by regulation. The Regulation prescribes various aged-care programs and services.

New subsection 40(2B) of the Sex Discrimination Act, inserted by the Amending 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 Regulation prescribes all Commonwealth, State and Territory laws as in force at 1 August 2013 for a period of one year. This will allow the laws to be reviewed for consistency with the introduction of protection on the grounds of sexual orientation, gender identity or intersex discrimination in the Sex Discrimination Act. The initial exemption for

all laws would sunset on 31 July 2014, after which only specific laws will be prescribed, provided there is a clear policy rationale for their prescription.

The Regulation also removes a redundant regulation from the *Sex Discrimination Regulations 1984*.

Consultation

The proposal to limit the religious exception in relation to Commonwealth-funded aged care formed part of the exposure draft of the Human Rights and Anti-Discrimination Bill 2012 which was released in November 2012 and referred to the Senate Legal and Constitutional Affairs Legislation Committee. The Senate Committee conducted public hearings in January 2013 and reported in February 2013.

In relation to the prescription of Commonwealth, State and Territory laws, this formed part of the Amending Act which was also the subject of inquiry by the Senate Legal and Constitutional Affairs Legislation Committee. The Committee handed down its report in June 2013.

Commencement

The amendments in the Amending Act will commence on 1 August 2013 by proclamation. 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 the later of:
 - the day after the regulation is registered; or
 - the day on which Schedule 1 to the Amending Act commences.

However, the provisions do not commence at all if the Amending Act has not commenced.

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

Statement of Compatibility with Human Rights

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

Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Regulation 2013

Overview of the Amendments

The Government introduced protections at the Commonwealth level against discrimination on the basis of sexual orientation, gender identity and intersex status through the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (the Amending Act). Following consultation with aged care providers and a recommendation from the Senate Legal and Constitutional Affairs Committee, the Government also introduced an amendment so that the provision of Commonwealth-funded aged care services run by religious organisations will no longer be exempt from the prohibition of discrimination.

The Amending Act allows for the operation of certain matters to be spelt out in more detail in regulations. This Legislative Instrument sets out further detail for:

- the limitation on the operation of a religious exemption for Commonwealth-funded aged care services, and
- an exemption from prohibited discrimination for direct compliance with prescribed laws.

Prescription of aged care services and programs

The Amending Act provided that religious organisations are not exempt from the *Sex Discrimination Act 1984* (the Sex Discrimination Act) when providing Commonwealth-funded aged care services. Commonwealth-funded aged care is defined in amended subsection 4(1) of the Sex Discrimination Act. In addition to the meaning of aged care in the *Aged Care Act 1997* (the Aged Care Act), the definition allows classes of care or services to be prescribed by regulation. This Legislative Instrument amends the *Sex Discrimination Regulations 1984* to prescribe various aged care programs and services that may not be covered by the Aged Care Act.

Prescription of Commonwealth, State and Territory laws

Subsection 40(2B), introduced by the Amending Act, provides for an exemption from Divisions 1 and 2 of Part II (prohibition of discrimination) of the Act as applying by reference to section 5A (sexual orientation), 5B (gender identity) or 5C (intersex status) of the Act. The exemption applies to things done in direct compliance with a prescribed law of the Commonwealth, a State or a Territory. This Legislative Instrument prescribes all

Commonwealth, State and Territory laws, in force at 1 August 2013, for the period of one year, for the purposes of the exemption in subsection 40(2B).

Human rights implications

By prescribing various aged care programs and services, 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 (ICESCR)
- the right to freedom of thought, conscience and religion or belief in article 18(1) of the ICCPR, and
- the right to health in article 12(1) of the ICESCR.

By prescribing Commonwealth, State and Territory laws, the amendments to the Sex Discrimination Regulations primarily engage the right to equality and non-discrimination in articles 2 and 26 of the ICCPR and article 2(2) of the ICESCR.

Prescription of aged care services and programs

Rights to equality and non-discrimination

The rights to equality and non-discrimination provide 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’.

In particular, article 26 of the ICCPR is a ‘free standing’ bar on discrimination, prohibiting discrimination in law or in practice in any field regulated by public authorities. The list of grounds in article 26 is not exhaustive and decisions by the United Nations Human Rights Committee suggest that a clearly definable group of people linked by their common status is likely to fall within ‘other status’. ‘Other status’ has been found by the Committee to include age, sexual orientation and marital status.

The religious exemption in paragraph 23(3)(b) of the Sex Discrimination Act provides that religious organisations are exempt from the prohibition of discrimination provisions of the Act in the provision of accommodation. The religious exemption in paragraph 37(d) of the Sex Discrimination Act provides that acts or practices of religious bodies that conform to the doctrines, tenets or beliefs of that religion or are necessary to avoid injury to the religious susceptibilities of adherents to that religion are exempt from the operation of the prohibition of discrimination provisions of the Act.

The Amending Act inserts a qualification to these exemptions so that the provision of Commonwealth-funded aged care services run by religious organisations will no longer be

exempt from the prohibition of discrimination. The inclusion of this qualification promotes the rights to equality and non-discrimination in the provision of aged care services.

This Legislative Instrument adds to the definition of Commonwealth-funded aged care for the purposes of this qualification. The services and programs prescribed under regulation 4 include care or services in relation to which the Commonwealth has made, or is to make, payments for the purposes of a program referred to in under various programs listed in Schedule 1AA to the *Financial Management and Accountability Regulations 1997*. It also includes various payments under the *Veterans' Entitlements Act 1986*.

In line with the Amending Act, the prescription of aged care services to outline a comprehensive definition of Commonwealth-funded aged care will also promote the rights to equality and non-discrimination. Prescribing these services and programs makes it clear to religious providers providing aged care services in which situations they will not be permitted to rely on the religious exemptions in the Sex Discrimination Act.

Right to health

Article 12(1) of the ICESCR recognises the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. The right to health includes aged care services.

The entitlements under the right to health include the right to a system of health protection which provides equality of opportunity. By prohibiting discrimination in the provision of Commonwealth-funded-aged care services, the Amending Act promotes equal access to people in order to allow their right to health to be fulfilled. This Legislative Instrument adds to the definition of Commonwealth-funded aged care for the purposes of this qualification. Therefore, the prescription of aged care services to ensure a comprehensive definition of Commonwealth-funded aged care will also promote equal access to the right to health by specifying in which situations religious organisations must provide aged-care services on an equal basis.

Right to freedom of thought, conscience and religion or belief

Article 18(1) of the ICCPR provides:

Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom either individual or in a community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

These freedoms are expressly recognised in the exemption in paragraphs 23(2)(b) and 37(d) of the Sex Discrimination Act. The Amending Act limits the operation of the religious exemptions in paragraphs 23 (2)(b) and 37(d) so that they do not apply in the provision of Commonwealth-funded aged care services. Article 18 is not an absolute right and consequently may be subjected to permissible limitations. Those limitations must be

provided by law, pursue a legitimate objective and be necessary and proportionate to achieving that objective.

The purpose of the Amending Act was to ensure the ability of older people to access aged care services without discrimination for the purpose of promoting rights to equality and non-discrimination. The Amendments are a proportionate limitation on the right to freedom of thought, conscience and religion or belief because the qualification will only apply in the context of service provision. That is, an aged care provider can still make employment decisions which conform to the doctrines or tenets of the religion or are necessary to avoid injury to religious sensitivities of adherents of that religion.

The definition inserted in subsection 4(1) of the Amending Act defines ‘Commonwealth-funded aged care’ by reference to receipt of funding or subsidies under the Aged Care Act. It also enables the regulations to prescribe other care or services. This Legislative Instrument prescribes these other care or services, including payments made under various programs listed in Schedule 1AA to the *Financial Management and Accountability Regulations 1997*. It also includes various payments under the *Veterans’ Entitlements Act 1986*. The definition of ‘Commonwealth-funded aged care’ is specifically targeted so that in providing services that are not within the definition, aged care providers may act consistently with the doctrines, tenets and beliefs of their religion.

The prescription of aged care services to ensure a comprehensive definition of Commonwealth-funded aged care is undertaken in a targeted manner that is necessary and proportionate and supports the Amending Act in pursuing the legitimate objective of ensuring the ability of older people to access aged care services without discrimination.

Prescription of Commonwealth, State and Territory laws

The Amending Act introduced an exemption applying to things done in direct compliance with a prescribed law of the Commonwealth, a State or a Territory. The exemption recognises that there may be laws which appropriately make distinctions on the new grounds of sexual orientation, gender identity and intersex status.

Rights to equality and non-discrimination

Discrimination is impermissible differential treatment between persons or groups that results in a person or a group being treated less favourably than others, based on one of the prohibited grounds for discrimination. However, the international human rights law principle of ‘legitimate differential treatment’ enables particular groups of people to be treated differently in certain circumstances.

This differential treatment must be aimed at achieving a legitimate objective, be based on reasonable and objective criteria and be proportionate to the objective to be achieved.

The Sex Discrimination Act recognises that differing treatment may be permissible in certain circumstances by providing a range of exceptions (defences) to the prohibition on unlawful discrimination. The Amending Act provides for an exemption from the prohibition of

discrimination in the Sex Discrimination Act as applying by reference to section 5A (sexual orientation), 5B (gender identity) or 5C (intersex status) of the Act. The exemption applies to things done in direct compliance with a prescribed law of the Commonwealth, a State or a Territory. The exemption recognises that there may be some laws of the Commonwealth, State or Territory that appropriately make distinctions on these grounds.

This Legislative Instrument prescribes all Commonwealth, State and Territory laws, in force at 1 August 2013, for the period of one year, for the purposes of the exemption.

The exemption for conduct that would otherwise be discrimination on the grounds of sexual orientation, gender identity or intersex status if the conduct is in direct compliance with a Commonwealth, State or Territory law prescribed by regulations seeks to achieve the legitimate objective of allowing a short-term period transitional period during which the Commonwealth, State and Territory governments can actively review laws to assess whether they comply with the Amending Act. 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.

Following an audit of Commonwealth legislation, in 2009 the Australian Government introduced several reforms. The reforms amended eighty-five Commonwealth laws to eliminate discrimination against same-sex couples and their children in a wide range of areas. Consequently, all Commonwealth laws should already have been amended to eliminate any discrimination on the basis of 'sexual orientation'.

The limited time period of the prescription, and the fact that it will be limited to laws in force as at 1 August 2013, means that prescribing all laws in this way is reasonable, necessary and proportionate to the objective. It allows a short period in which to ensure there are no unintended consequences for Commonwealth, State and Territory laws as a result of the new protections. The regulation also ensures that the laws that are prescribed can be clearly identified based on a point in time as well as ensuring that any new laws made after this date will be required to be compliant with the Act.

Conclusion

The Legislative Instrument is compatible with human rights because it advances the protection of human rights, particularly the rights to equality and non-discrimination and the right to health. To the extent that the Legislative Instrument limits rights, those limitations are reasonable, necessary and proportionate to achieving a legitimate aim.

Details of the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Regulation 2013*

Section 1 – Name of regulation

This section provides that the name of the regulation is the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Regulation 2013*.

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 the later of:
 - the day after the regulation is registered; or
 - the day on which Schedule 1 to the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (the Amending Act) commences.

However, the provisions do not commence at all if the Amending Act has not commenced.

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 this 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 – list of care or services that are Commonwealth-funded aged care and prescription of Commonwealth, State and Territory laws

Regulation 4 – care or services that are Commonwealth-funded aged care

Existing Regulation 4 is repealed as it is redundant. Regulation 4 of the *Sex Discrimination Act Regulations 1984* makes provision for payment of fees in respect of appearances before the Australian Human Rights Commission under subsection 75A(1) of the Sex Discrimination Act. Section 75A of the Sex Discrimination Act was repealed in 1999 in the aftermath of the High Court's decision in *Brandy v HREOC* 183 CLR 245 and it is unlikely that there are any outstanding claims that would engage existing Regulation 4.

New subregulation 4(1) specifies classes of care or services that are Commonwealth-funded aged care for the purposes of the Amending Act. The first two components of that definition define Commonwealth-funded aged care with reference to the *Aged Care Act 1997*. The third component enables the regulations to prescribe other care or services.

The consequence of prescribing a class of care or services is that a religious body that provides that kind of care or services, or accommodation in connection with providing that kind of care or services, will not be able to rely on the exemptions in paragraphs 23(3)(b) and 37(1)(d) of the Sex Discrimination Act.

Subregulation 4(2) prescribes care or services in relation to which the Commonwealth has made, or is to make, payments for the purposes of a program referred to in under various programs listed in Schedule 1AA to the *Financial Management and Accountability Regulations 1997*. These are:

- 415.016 Access and information

Objective: To provide equitable and timely access to aged care assessments and make it easier to find aged care services.

- 415.017 Home support

Objective: To provide aged care services at home and in the community, match funding to care needs, and provide greater choice and control to consumers, care recipients and their carers.

- 415.018 Residential and flexible care

Objectives: To provide funding to aged care providers and financial assistance to aged care housing residents, to improve aged care services for older Indigenous Australians, and to provide aged care through other service models.

- 415.019 Workforce and quality

Objectives: To provide funding to ensure the availability of a skilled aged care workforce, and develop programs to empower consumers and promote quality aged care.

- 415.020 Ageing and service improvement

Objectives: To provide financial support for people living with dementia, to provide aged care services to meet the needs of diverse communities, to improve links to the health system, and to promote healthy and active ageing.

Subregulation 4(3) specifies that aged care or services (or similar care or services) that are provided under any of the various instruments listed, and in relation to which the Commonwealth has made, or is to make, payments to the provider of the care or services, are Commonwealth-funded aged care services for the purpose of the Amending Act.

The instruments listed are as follows.

- a) the *Treatment Principles* made under section 90 of the *Veterans' Entitlements Act 1986* (Veterans' Entitlements Act).

The *Treatment Principles* is a legislative instrument and sets out the circumstances in which the Commonwealth (through the Repatriation Commission) may accept financial responsibility for treatment provided to veterans or their dependants. Relevant principles include:

- principle 7.3 (community nursing)
- principle 7.3A (veterans' home care)
- principle 9.3 (nursing-home-type care)
- principle 9.5 (convalescent care)
- Part A of Part 10 (residential care)
- Part B of Part 10 (residential care (respite))
- Part C of Part 10 (respite not involving residential care)
- principle 11.1 (rehabilitation appliances)
- principle 11.9 (provision of aids and appliances for accident prevention and personal safety), and
- principle 12.5 (veterans' home services).

- b) those *Treatment Principles* as modified by the *Treatment Principles (Australian Participants in British Nuclear Tests) 2006* made under section 16 of the *Australian Participants in British Nuclear Tests (Treatment) Act 2006*.

Relevant principles include:

- principle 9.3 (nursing-home-type care)
- principle 9.5 (convalescent care)
- Part A of Part 10 (residential care)
- Part B of Part 10 (residential care (respite))
- Part C of Part 10 (respite not involving residential care), and
- principle 11.9 (provision of aids and appliances for accident prevention and personal safety)

- c) the *MRCA Treatment Principles* made under section 286 of the *Military Rehabilitation and Compensation Act 2004*.

These Treatment Principles provide for eligibility for particular kinds or classes of treatment. Relevant principles include:

- principle 7.3A (MRCA home care program)
- principle 9.3 (nursing-home-type care)
- principle 9.5 (convalescent care)
- Part A of Part 10 (residential care)
- Part B of Part 10 (residential care (respite))
- Part C of Part 10 (respite not involving residential care), and
- principle 11.9 (provision of aids and appliances for accident prevention and personal safety).

Subregulation 4(4) specifies that aged care or services (or similar care or services) that are provided under an arrangement made under Part V of the Veterans' Entitlements Act, and in relation to which the Commonwealth has made, or is to make, payments to the provider of the care or services, are prescribed.

Part V of the Veterans' Entitlements Act includes payments for medical and other treatment.

Regulation 5 – exemption for things done in direct compliance with prescribed laws

Subsection 40(2B) of the Sex Discrimination Act, inserted by the Amending 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.

Subregulation 5(1) prescribes all Commonwealth, State and Territory laws as in force at 1 August 2013 for a period of one year. This will allow the laws to be reviewed for consistency with the introduction of protection on the grounds of sexual orientation, gender identity or intersex discrimination in the Sex Discrimination Act.

Following an audit of Commonwealth legislation, in 2009 the Australian Government introduced several reforms. The reforms amend eighty-five Commonwealth laws to eliminate discrimination against same-sex couples and their children in a wide range of areas. Consequently, all Commonwealth laws should already have been amended to eliminate any discrimination on the basis of 'sexual orientation'.

Subregulation 5(2) states that the initial exemption for all laws will sunset on 31 July 2014, after which only specific laws will be prescribed, provided there is a clear policy rationale for their prescription.

The coverage of laws prescribed is intended to be broad, consistent with the types of instruments specified in the definition of ‘Commonwealth law’ in subsection 4(1) of the Sex Discrimination Act. This definition includes an Act, or a regulation, rule, by-law or determination made under or pursuant to an Act, and an ordinance of a Territory.

Item 2 – Schedule

Item 2 repeals the Schedule to the Regulations is it is relevant only to existing regulation 4, which is repealed and replaced by this amending regulation.