

EXPLANATORY STATEMENT

Issued by the Attorney-General in accordance with section 15G of the *Legislation Act 2003*

Sex Discrimination Act 1984

Sex Discrimination Regulations 2018

Outline

The *Sex Discrimination Act 1984* (the Sex Discrimination Act) prohibits discrimination on the grounds of sex, marital or relationship status, pregnancy or potential pregnancy, breastfeeding, sexual orientation, gender identity or intersex status. It also prohibits discrimination on the ground of family responsibilities in the area of work and prohibits sexual harassment. The Act also promotes the principle of gender equality and requires the appointment of a Sex Discrimination Commissioner.

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

The *Sex Discrimination Regulations 1984* (the 1984 Regulations), which sunset on 1 April 2018, prescribe:

- classes of care or services that are ‘Commonwealth-funded aged care’ for the purposes of the Sex Discrimination Act; and
- a declaration of the duties that are ‘combat duties’ for the purposes of the combat duties exemption in section 43 of the Sex Discrimination Act.

The purpose of the *Sex Discrimination Regulations 2018* (the Regulations) is to remake the 1984 Regulations to continue to prescribe classes of care or services which are ‘Commonwealth-funded aged care’ for the purposes of the Sex Discrimination Act.

Prescribing classes of Commonwealth-funded aged care

Sections 23 and 37 of the Sex Discrimination Act apply the definition of ‘Commonwealth-funded aged care’ to ensure that religious bodies and bodies established for religious purposes (religious organisations) in receipt of such funding are subject to the prohibitions on unlawful discrimination in the Act in providing that care.

Subsection 4(1) of the Sex Discrimination Act defines ‘Commonwealth-funded aged care’ for the purposes of the Act to mean:

- aged care within the meaning of the *Aged Care Act 1997* (the Aged Care Act), where it is provided by an approved provider and in relation to approved provider responsibilities under the Aged Care Act
- care or services in relation to which a grant has been paid under Chapter 5 of the Aged Care Act, or
- care or services of a class prescribed by the regulations.

The Regulations prescribe payments made or proposed to be made by the Commonwealth (administered through the Department of Health and the Department of Veterans' Affairs) relating to a range of aged care, home support, respite care and treatment and support schemes for veterans. It is necessary for the Regulations to prescribe these additional care and services schemes as they may not otherwise be covered by the Aged Care Act.

Under the Sex Discrimination Act, religious organisations are subject to the prohibitions on unlawful discrimination in the Act in their work connected to providing Commonwealth-funded aged care.

There is no change to the scope of the care or services that were prescribed under the 1984 Regulations. Only minor typographical and formatting amendments are reflected in the Regulations, to ensure consistency with current drafting practices.

Repeal of the declaration of 'combat duties'

The Regulations do not include the declaration of duties that are 'combat duties' provided in the 1984 Regulations, as this is no longer required.

Section 43 of the Sex Discrimination Act provides that it is not unlawful discrimination for a person to discriminate against a woman on the ground of her sex in connection with employment, engagement or appointment in a position involving 'combat duties' in the Australian Defence Force (ADF). Regulation 3 of the 1984 Regulations provides that 'duties requiring a person to commit, or to participate directly in the commission of, an act of violence against an adversary in time of war' are relevant duties declared to be 'combat duties' for the purposes of section 43.

As of 1 January 2016, the Australian Government's policy to remove all gender restrictions from combat roles took full effect. Consistent with this policy, a measure to repeal section 43 of the Sex Discrimination Act, contained in the Civil Law and Justice Legislation Amendment Bill 2017, is currently before the Parliament. It is not necessary to remake regulation 3 in the Regulations as the ADF no longer apply gender restrictions to combat roles.

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

A Statement of Compatibility with Human Rights is at [Attachment A](#).

Details of the Regulations are at [Attachment B](#).

Consultation

The Australian Human Rights Commission, Department of Defence, Department of Health and Department of Veterans' Affairs were consulted during the development of the Regulations.

Regulation Impact Statement

The Office of Best Practice Regulation has confirmed that a Regulation Impact Statement is not required (OBPR ID: 23347).

Commencement

The Regulations commence on the day after registration on the Federal Register of Legislation.

Statement of Compatibility with Human Rights

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

Sex Discrimination Regulations 2018

This legislative instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the legislative instrument

Subsection 50(2) of the *Legislation Act 2003* provides that legislative instruments registered on 1 January 2005 and made in a year in the decade starting on 1 January 1980, sunset on 1 April 2018. The *Sex Discrimination Regulations 1984* (the 1984 Regulations) sunset on 1 April 2018 in accordance with this provision.

Subsection 4(1) of the *Sex Discrimination Act 1984* (the Sex Discrimination Act) defines ‘Commonwealth-funded aged care’ for the purposes of the Act to mean:

- aged care within the meaning of the *Aged Care Act 1997* (the Aged Care Act), where it is provided by an approved provider and in relation to approved provider responsibilities under the Aged Care Act
- care or services in relation to which a grant has been paid under Chapter 5 of the Aged Care Act, or
- care or services of a class prescribed by the regulations.

The *Sex Discrimination Regulations 2018* (the Regulations) prescribe classes of care or services that are ‘Commonwealth-funded aged care’ for the purposes of subsection 4(1) of the Sex Discrimination Act.

The care and services prescribed in the Regulations include a range of aged care, home support, respite care and veterans’ support schemes, which are administered through the Department of Health and the Department of Veterans’ Affairs to aged care providers. It is necessary for the Regulations to prescribe these additional care and services schemes as they may not otherwise be incorporated in the definition of ‘Commonwealth-funded aged care’ by the Aged Care Act.

Under the Sex Discrimination Act, religious bodies and bodies established for religious purposes (religious organisations) are subject to the prohibitions on unlawful discrimination in the Act in their work connected to providing Commonwealth-funded aged care. The operation of sections 23 and 37 of the Sex Discrimination Act, which establish this requirement, is outlined below.

Subsections 23(1) and (2) of the Sex Discrimination Act provide that it is unlawful for a person to discriminate against a person on the ground of the other person’s sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, or breastfeeding, in providing accommodation. Subsections 23(3) and (3A) provide that religious bodies are subject to the discrimination prohibitions in subsections 23(1) and (2) when providing accommodation in connection with Commonwealth-funded aged care.

Paragraph 37(1)(d) of the Sex Discrimination Act identifies circumstances where acts or practices of bodies established for religious purposes are exempt from the prohibitions on unlawful discrimination in Divisions 1 and 2 of Part II of the Act. Subsection 37(2) provides that this exemption does not apply if the act or practice concerned is connected with the provision of Commonwealth-funded aged care, unless it relates to the employment of persons to provide that care. The effect of this provision is that bodies established for religious purposes are subject to the prohibitions on unlawful discrimination in providing Commonwealth-funded aged care, but remain exempt in their acts or practices connected with the employment of persons to provide that care.

The Regulations do not make any change to the scope of the care or services that were prescribed under the 1984 Regulations. Only minor typographical and formatting amendments are reflected in the Regulations, to ensure consistency with current drafting practices.

Human rights implications

This legislative instrument engages the following rights and freedoms:

- the rights 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 health in Article 12(1) of the ICESCR, and
- the right to freedom of thought, conscience and religion or belief in Article 18(1) of the ICCPR.

Rights to equality and non-discrimination

Articles 2 and 26 of the ICCPR and Article 2(2) of the ICESCR together provide that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any 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 list of grounds in Article 26 of the ICCPR 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 United Nations Human Rights Committee to include age, sexual orientation and marital status.

The Regulations promote the rights to equality and non-discrimination in the delivery of Commonwealth-funded aged care. The Regulations promote these rights by ensuring, together with the Sex Discrimination Act, that religious organisations are not permitted to discriminate on the basis of a person’s sexual orientation and marital or relationship status (as well as their sex, pregnancy or potential pregnancy, breastfeeding, gender identity or intersex status) in their work connected to providing Commonwealth-funded aged care.

The 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. In General Comment No.14, the Committee on Economic, Social and Cultural Rights notes that the right to health includes the right to a system

of health protection which provides equality of opportunity and that is accessible to everyone without discrimination.

The Regulations and the Sex Discrimination Act operate to prohibit discrimination in the provision of Commonwealth-funded aged care, which includes a range of health related programs such as home support, respite and rehabilitation care and health related support schemes for veterans. In doing so, the Regulations and the Sex Discrimination Act promote the right to health and access without discrimination to health related services.

The right to freedom of thought, conscience and religion or belief

Article 18(1) of the ICCPR provides that 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 individually or in 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 exemptions for religious organisations in paragraphs 23(3)(b) and 37(1)(d) of the Sex Discrimination Act. As provided in subsections 23(3A) and 37(2), the exemptions 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. Under Article 18(3) of the ICCPR, the right to freedom of thought, conscience and religion or belief can be subject to limitations that are prescribed by law and necessary to protect the fundamental rights and freedoms of others.

The Regulations support the requirement in the Sex Discrimination Act that religious organisations may not discriminate against a person on the basis of the attributes protected by the Act in providing Commonwealth-funded aged care. This requirement achieves the legitimate objective of ensuring that aged care services funded by the Commonwealth are delivered without unlawful discrimination. The requirement is proportionate and limited to achieving this objective, for example, it is qualified to ensure that religious organisations remain free to make decisions which conform to the doctrines or tenets of the religion or are necessary to avoid injury to religious susceptibilities of adherents of that religion in connection with the employment of persons to provide Commonwealth-funded care. The Regulations do not otherwise affect the exemptions to promote freedom of thought, conscience and religion or belief in the Sex Discrimination Act.

Conclusion

This 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 it may limit the right to freedom of thought, conscience and religion or belief, that limitation is reasonable, necessary and proportionate.

The Hon Christian Porter MP
Attorney-General

Details of the Regulations

Sex Discrimination Regulations 2018

Section 1 Name

This section provides that this instrument is the *Sex Discrimination Regulations 2018*.

Section 2 Commencement

This section provides that the whole of the Regulations commence on the day after this instrument is registered.

Section 3 Authority

This section provides that the instrument is made under the *Sex Discrimination Act 1984* (the Sex Discrimination Act).

Section 4 Schedules

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

Schedule 1 specifies that the *Sex Discrimination Regulations 1984* (1984 Regulations) are repealed in full.

Section 5 Care or services that are Commonwealth-funded aged care

Section 5 provides the classes of care or services that are prescribed for the purposes of the definition of ‘Commonwealth-funded aged care’ in subsection 4(1) of the Sex Discrimination Act.

Section 5 does not implement any change to the scope of the care or services that were prescribed under the 1984 Regulations. Only minor typographical and formatting amendments are reflected in the Regulations, to ensure consistency with current drafting practices.

Subsection 4(1) of the Sex Discrimination Act defines ‘Commonwealth-funded aged care’ for the purposes of the Act to mean:

- aged care within the meaning of the *Aged Care Act 1997* (the Aged Care Act), where it is provided by an approved provider and in relation to approved provider responsibilities under the Aged Care Act
- care or services in relation to which a grant has been paid under Chapter 5 of the Aged Care Act, or
- care or services of a class prescribed by the regulations.

‘Commonwealth-funded aged care’ is referenced in two provisions in the Sex Discrimination Act, being sections 23 and 37, to ensure that providers in receipt of such funding are subject to the prohibitions on unlawful discrimination in the Act. The operation of section 23 and 37 is addressed separately below.

Subsections 23(1) and (2) of the Sex Discrimination Act provide that it is unlawful for a person to discriminate against a person on the ground of the other person’s sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, or breastfeeding, in providing accommodation. Subsections 23(3) and (3A) provide that religious bodies are subject to the discrimination prohibitions in subsections 23(1) and (2) when providing accommodation in connection with Commonwealth-funded aged care.

Paragraph 37(1)(d) of the Sex Discrimination Act identifies circumstances where acts or practices of bodies established for religious purposes are exempt from the prohibitions on unlawful discrimination in Divisions 1 and 2 of Part II of the Act. Subsection 37(2) provides that this exemption does not apply if the act or practice concerned is connected with the provision of Commonwealth-funded aged care, unless it relates to the employment of persons to provide that care. The effect of this provision is that bodies established for religious purposes are subject to the prohibitions on unlawful discrimination in providing Commonwealth-funded aged care, but remain exempt in their acts or practices connected with the employment of persons to provide that care.

The classes of care or services that are prescribed as ‘Commonwealth-funded aged care’ in section 5 operate as part of the definition of this phrase in the sections of the Sex Discrimination Act outlined above. Prescribing classes of care or services by regulation enables specific types of programs and payment schemes relevant to aged care to be identified as constituting ‘Commonwealth-funded aged care’. It is necessary for the Regulations to prescribe these additional care and services schemes as they may not otherwise be covered by the Aged Care Act.

Subsection 5(1) provides that section 5 sets out the classes of care or services which are prescribed for the purposes of the definition of ‘Commonwealth-funded aged care’ in subsection 4(1) of the Sex Discrimination Act.

Subsection 5(2) provides that 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 the following items in Part 4 of Schedule 1AA of the *Financial Framework (Supplementary Powers) Regulations 1997* are prescribed:

- 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.

Subsection 5(2) has the effect that care or services delivered through the programs funded by the Commonwealth under these items constitute ‘Commonwealth-funded aged care’. The Department of Health is responsible for administering relevant payments under the prescribed items.

Subsection 5(3) provides that aged care or services (or similar care or services) provided under the following instruments and in relation to which the Commonwealth has made, or is to make, payments, are prescribed:

- 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 care not involving residential care)
 - principle 11.1 (rehabilitation appliances), and
 - principle 12.5 (veterans’ home services)

- those *Treatment Principles* as modified by the *Australian Participants in British Nuclear Tests and British Commonwealth Occupation Force (Treatment) (Modifications of the Treatment Principles) Instrument 2013* made under section 16 of the *Australian Participants in British Nuclear Tests and British Commonwealth Occupation Force (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)), and
 - Part C of Part 10 (respite care not involving residential care)
- 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).

Subsection 5(3) has the effect that aged care or services delivered under the identified Treatment Principles and in relation to which the Commonwealth has or is to make payments, constitute ‘Commonwealth-funded aged care’. The Department of Veterans’ Affairs is responsible for administering relevant payments under the prescribed instruments.

Subsection 5(4) provides 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. This may include payments for the treatment of veterans in nursing homes, medical centres, rehabilitation centres or outpatient clinics. The Department of Veterans’ Affairs is responsible for administering relevant payments to providers.

Schedule 1 Repeals

Item 1 – The whole of the instrument

This item provides that the whole of the *Sex Discrimination Regulations 1984* is repealed.