

# **DISABILITY DISCRIMINATION REGULATIONS 2019**

## **EXPLANATORY STATEMENT**

Issued by authority of the Attorney-General

in compliance with section 15J of the *Legislation Act 2003*

### **PURPOSE AND OPERATION OF THE INSTRUMENT**

The *Disability Discrimination Act 1992* (the DDA) provides that discrimination (direct or indirect) on the basis of disability is unlawful in a broad range of areas of public life including employment, accommodation, education, access to premises, clubs and sports, the provision of goods, facilities, services and land, existing laws and the administration of Commonwealth laws and programs.

Subsection 132(1) of the DDA 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.

The *Disability Discrimination Regulations 1996* (DD Regulations) sunset on 1 October 2019. The purpose of the *Disability Discrimination Regulations 2019* (the Regulations) is to remake the DD Regulations with minor amendments to update or remove any obsolete or unnecessary provisions to ensure that it remains fit-for-purpose and in line with community and stakeholder expectations.

Part 2 of the DDA prohibits discrimination on the basis of a person's disability in certain identified areas of public life. Division 5 of Part 2 of the DDA sets out certain specific exemptions from the prohibitions on disability discrimination.

Section 47 of the DDA provides an exemption in relation to acts done by a person under statutory authority. Subsection 47(2) of the DDA provides an exemption in relation to anything done by a person in direct compliance with a prescribed law.

Subsection 53(1) of the DDA provides an exemption in relation to combat duties and peacekeeping services including in relation to combat duties, combat-related duties or peacekeeping service.

Subsection 53(2) of the DDA defines the terms 'combat duties' and 'combat-related duties' to mean such duties as are declared by the regulations to be combat duties or combat-related duties for the purposes of subsection 53(1).

The Regulations prescribe the following Commonwealth and State laws for the purposes of subsection 47(2) of the DDA. The reasons for prescribing these laws are set out in [Attachment A](#).

- *Broadcasting Services Act 1992* (Cth), Part 9D
- Civil Aviation Order 20.16.3 (Cth)
- *Mental Health Act 2007* (NSW)
- *Mental Health Regulation 2013* (NSW)
- *Road Transport (Driver Licencing) Regulation 2017* (NSW), regulations 56(1)(e), 60(1)(c), 60(1)(d), 60(2), 65(1)(a), 65(1)(b), 86, 96(4)(h), 122(4)
- *Firearms Act 2015* (SA), section 20
- *Motor Vehicles Act 1959* (SA), section 80
- *Education Act 1972* (SA), sections 75(3) and 75A
- *Fair Work (General) Regulations 2009* (SA), regulation 10

The Regulations also declare activities which are considered ‘combat duties’ and ‘combat-related duties’ for the purposes of subsection 53(2) of the DDA.

The Regulations do not remake section 5 of the DD Regulations. Section 5 of the DD Regulations prescribed a body for the purposes of subsection 55(1C) of the DDA. Subsection 55(1C) of the DDA was repealed through the *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009*.

Details of the Regulations are set out in [Attachment B](#).

The DDA specifies no conditions that need to be satisfied before the power to make the Regulations may be exercised.

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

The Regulations commence on 1 October 2019.

## **CONSULTATION**

The Attorney-General’s Department undertook a review of the DD Regulations which was overseen by a panel comprising the Disability Discrimination Commissioner, General Counsel from the Commission and the Assistant Secretary, Integrity Law Branch, Attorney General’s Department. The panel consulted with relevant government agencies and key stakeholders including the disability sector on the currency and fitness for purpose of the DD Regulations. The review and consultation found that the DD Regulations are necessary, fit for purpose and should be remade with minor amendments.

## REGULATION IMPACT STATEMENT

The Office of Best Practice Regulation (OBPR) has been consulted in relation to the amendments made by the Regulations. No Regulation Impact Statement is required. The OBPR reference is 25255.

## STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

### ***Disability Discrimination Regulations 2019***

This Disallowable 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 Disallowable Legislative Instrument**

The *Disability Discrimination Regulations 1996* (DD Regulations) sunset on 1 October 2019. The purpose of the *Disability Discrimination Regulations 2019* (the Regulations) is to remake the DD Regulations with minor amendments to update or remove any obsolete or unnecessary provisions to ensure that it remains fit-for-purpose and in line with community and stakeholder expectations.

Part 2 of the *Disability Discrimination Act 1992* (DDA) prohibits discrimination on the basis of a person's disability in certain identified areas of public life. Division 5 of Part 2 of the DDA sets out certain specific exemptions from the prohibitions on disability discrimination.

Section 47 of the DDA provides an exemption in relation to acts done by a person under statutory authority. Subsection 47(2) of the DDA provides an exemption in relation to anything done by a person in direct compliance with a prescribed law.

Subsection 53(1) of the DDA provides an exemption in relation to combat duties and peacekeeping services including in relation to combat duties, combat-related duties or peacekeeping service.

Subsection 53(2) of the DDA defines the terms 'combat duties' and 'combat-related duties' to mean such duties as are declared by the regulations to be combat duties or combat-related duties for the purposes of subsection 53(1).

The Regulations continue to prescribe the following Commonwealth and State laws for the purposes of subsection 47(2) of the DDA but updates their references where relevant, to reflect current laws:

- *Broadcasting Services Act 1992* (Cth), Part 9D
- Civil Aviation Order 20.16.3 (Cth)
- *Mental Health Act 2007* (NSW)
- *Mental Health Regulation 2013* (NSW)

- *Road Transport (Driver Licencing) Regulation 2017* (NSW), regulations 56(1)(e), 60(1)(c), 60(1)(d), 60(2), 65(1)(a), 65(1)(b), 86, 96(4)(h), 122(4)
- *Firearms Act 2015* (SA), section 20
- *Motor Vehicles Act 1959* (SA), section 80
- *Education Act 1972* (SA), sections 75(3) and 75A
- *Fair Work (General) Regulations 2009* (SA), regulation 10

The Regulations also declare activities which are considered ‘combat duties’ and ‘combat related duties’ for the purposes of subsection 53(2) of the DDA.

### **Human rights implications**

This Disallowable Legislative Instrument engages the following rights:

- Right to equality and non-discrimination in Article 26 of the International Covenant on Civil and Political Rights (ICCPR) and Article 5 of the Convention on the Rights of Persons with Disabilities (CRPD)
- Right to an effective remedy in Article 2(3) of the ICCPR
- Right to education in Article 24 of the CRPD
- Right to work in Article 27 of the CRPD

#### *Right to equality and non-discrimination*

Article 26 of the ICCPR and Article 5 of the CRPD provides 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.

#### *Right to an effective remedy*

Article 2(3) of the ICCPR provides that State Parties must ensure that any persons whose rights or freedoms are violated shall have an effective remedy and that a competent authority shall determine and enforce that remedy.

#### *Right to education*

Article 24 of the CRPD provides that State Parties must recognise the rights of persons with disabilities to education and must ensure that persons with disabilities are not excluded from the general education system on the basis of their disability.

#### *Right to work*

Article 27 of the CRPD provides that States Parties must recognise the right of persons with disabilities to work, on an equal basis with others.

### ‘Combat duties’ and ‘combat-related duties’

The Disallowable Legislative Instrument declares activities which are considered ‘combat duties’ and ‘combat-related duties’ for the purposes of subsection 53(2) of the DDA. Combat duties are defined as those duties which require a person to commit an act of violence in the event of armed conflict. Such duties are those which are generally understood to be undertaken by combatants directly engaged in armed conflict, whether they be members of the Army, Navy or Air Force. Combat-related duties are duties which require a person to undertake training or preparation for combat duties. They also include duties which require a person to work in support of a person performing combat duties such as logistics, administration, intelligence, catering, legal, communications, investigations, health and human resources.

Individuals undertaking combat-related duties are usually in the same conflict zone as individuals on combat duties or could be sent with little notice from a support base into a forward base. In order to perform their duties in this environment, they must meet the required physical and mental fitness standards, be medically fit to function safely with limited or no medical support and be trained and competent in the use of personal weapons.

Declaring these activities has the effect of limiting a person’s right to work and right to equality and non-discrimination. However these limitations are permissible as the declaration of such activities is necessary in order for the Australian Defence Force to maintain an operationally capable force to meet their operational requirements.

Therefore, to the extent that these rights are limited by the inclusion of activities which are considered ‘combat duties and ‘combat-related duties’ for the purposes of subsection 53(1) of the DDA, these limitations are reasonable, necessary and proportionate to achieving a legitimate objective.

### Broadcasting Services Act 1992 (Cth)

Part 9D of the *Broadcasting Services Act 1992 (Cth)* (BSA) provides captioning obligations for television broadcasters to improve access to television programs and emergency warnings for people with hearing impairments. It provides that television broadcasters are subject to a single set of regulatory requirements through the Australian Communications and Media Authority (ACMA) as the responsible body.

Prescribing Part 9D of the BSA may limit the right to an effective remedy as it removes the ability for a person to make a complaint under the DDA through the Australian Human Rights Commission (the Commission). However, these limitations are permissible as prescribing the law achieves the objective of providing clarity that the ACMA, and not the Commission, is the responsible body for ensuring broadcasters meet their captioning obligations. This is a simplified complaints mechanism for individuals with hearing impairments as they are able to make complaints directly to broadcasters and then, if not satisfied, to the ACMA. The ACMA can take appropriate action, including enforcing new television captioning requirements which are a condition of certain licenses. Removing the

Commission as an additional complaints mechanism is therefore reasonable and necessary as it achieves the legitimate objective of simplifying the complaints process.

Additionally, prescribing the law does not affect the operation of other anti-discrimination legislation or the operation of the DDA in relation to non-captioning matters. Individuals may still make complaints to the Commission if they believe their human rights have been breached. Consequently, the measure is proportionate and no more restrictive than it needs to be in order to achieve the legitimate objective.

#### Civil Aviation Order 20.16.3 (Cth)

Civil Aviation Order (CAO) 20.16.3 restricts people with a disability from occupying emergency exit row seating in airplanes for safety reasons. CAO 20.16.3 ensures the safety of everyone on board an aircraft by requiring that anyone seated in an emergency exit row is capable of operating the exit and assisting in the event of an emergency.

Prescribing CAO 20.16.3 may limit the right to an effective remedy as it protects airlines and airline operators, when acting in direct compliance with the prescribed CAO, from a claim of unlawful discrimination.

However, the limitation is permissible as CAO 20.16.3 exists to achieve the objective of public safety. Requiring that anyone seated in an emergency exit row must be capable of operating the exit and assisting in the event of an emergency is a reasonable, necessary and proportionate way of achieving the objective of ensuring safety of everyone aboard an aircraft. Further, providing certainty that airlines and airline operators, when acting in direct compliance with the prescribed CAO, are protected from a claim of unlawful discrimination, is also reasonable, necessary and proportionate in achieving the objective of ensuring safety of everyone on board an aircraft.

#### Mental Health Act 2007 (NSW) and the Mental Health Regulation 2013 (NSW)

The objectives of the *Mental Health Act 2007* (NSW) (Mental Health Act) are:

- a) to provide for the care and treatment of, and to promote the recovery of, persons who are mentally ill or mentally disordered, and
- b) to facilitate the care and treatment of those persons through community care facilities, and
- c) to facilitate the provision of hospital care for those persons on a voluntary basis where appropriate and, in a limited number of situations, on an involuntary basis, and
- d) while protecting the civil rights of those persons, to give an opportunity for those persons to have access to appropriate care and, where necessary, to provide for treatment for their own protection or the protection of others, and
- e) to facilitate the involvement of those persons, and persons caring for them, in decisions involving appropriate care and treatment.

The *Mental Health Regulation 2013* (NSW) (Mental Health Regulation) provides procedural and administrative requirements to be followed for mental health inquiries, proceedings, facilities and patients for the purposes of the Mental Health Act.

Prescribing these laws may limit the right to an effective remedy as it protects clinicians providing care to involuntary mental health patients from claims of unlawful discrimination. However, this limitation is permissible as the provisions exist to ensure the safety of the patient and the safety of the public. Involuntary mental health patients are often unaware of the danger they pose to themselves and to others. It is therefore in the interests of public safety to prescribe these laws as it gives clinicians certainty that the provision of treatment to involuntary patients will not attract an unlawful discrimination complaint. This will also allow involuntary mental health patients to receive the appropriate care. This limitation is therefore reasonable, necessary and proportionate to achieving the legitimate objective.

#### *Road Transport (Driver Licencing) Regulation 2017* (NSW)

Regulations 56(1)(e), 60(1)(c), 60(1)(d), 60(2), 65(1)(a), 65(1)(b), 86, 96(4)(h), 122(4) of the *Road Transport (Driver Licencing) Regulation 2017* (NSW) relate to driver licensing and the circumstances around when a licence can be issued, cancelled, suspended or varied.

The Authority's decision to refuse to issue a licence or to cancel, suspend or vary a licence, including the decision-making process, is based on whether the Authority is satisfied that a person is 'fit and proper' to hold a driver licence and whether the Authority is satisfied that a person meets the medical standards contained in the Assessing Fitness to Drive standards applicable to the driver licence. When the Authority makes these decisions, there is a risk that a person could argue they were treated less favourably due to their disability. Prescribing these regulations may therefore limit the right to an effective remedy as it protects the Authority from an unlawful discrimination complaint based on their decision regarding the issue, cancellation, suspension or variation of a driver licence.

However, this limitation is permissible on the basis that the regulations exist to achieve the legitimate objective of public safety. Requiring driver licence holders to meet certain standards required to drive a vehicle protects the safety of everyone on the roads. Additionally, prescribing these regulations provides the Authority with certainty that they can appropriately make decisions regarding the issue, cancellation, suspension or variation of a licence without risk that an unlawful discrimination complaint could be made against them. Therefore, to the extent that the right to an effective remedy is limited by the prescription of these regulations, the limitation is reasonable, necessary and proportionate to achieving the legitimate objective.

#### *Firearms Act 2015* (SA)

Section 20 of the *Firearms Act 2015* (SA) (Firearms Act) relates to the cancellation, variation and suspension of a licence where, amongst other factors, a Registrar is satisfied that the holder of a licence is not a fit and proper person to hold the licence or where it would be

contrary to the public interest for the holder of a licence to continue to possess and use firearms.

The Registrar's decision to refuse to issue a licence or decision to cancel, suspend or vary a licence, including decision-making processes, is based on whether the Registrar is satisfied that a person is 'fit and proper' to hold the licence, including when the person is a person who has a 'physical or mental illness, condition or disorder, or in relation to whom other circumstances exist, that would make it unsafe for him or her to possess a firearm or ammunition', provided for under subsection 7(2) of the Firearms Act. In making these decisions, there is a risk that a person could argue they were treated less favourably on the ground of their disability. Prescribing section 20 of the Firearms Act may limit the right to an effective remedy as it protects the Registrar from an unlawful discrimination complaint based on their decision about a firearm licence.

The requirement to meet the 'fit and proper' standards is reasonable, necessary and proportionate in achieving the legitimate objective of public safety. Additionally, it provides the Registrar with certainty that they can appropriately make decisions regarding the cancellation, variation or suspension of a firearms licence without risk that an unlawful discrimination complaint could be made against them. Therefore, to the extent that the right to an effective remedy is limited by the prescription of this provision, the limitation is reasonable, necessary and proportionate to achieving the legitimate objective.

#### Motor Vehicles Act 1959 (SA)

Section 80 of the *Motor Vehicles Act* (SA) (Motor Vehicles Act) authorises the Registrar of Motor Vehicles, in reliance on medical information or the results of tests, to suspend, or refuse to issue or renew, a driver licence.

A Registrar's decision to refuse to issue or renew a licence or decision to suspend a licence, including the processes that led to the decision, is based on whether the Registrar is satisfied that a person is competent to drive a motor vehicle. When the Registrar makes these decisions, there is a risk that a person could argue they were treated less favourably on the ground of their disability. Prescribing section 80 of the Motor Vehicles Act may limit the right to an effective remedy as it protects the Registrar from an unlawful discrimination complaint based on their licencing decision.

However, this limitation is permissible on the basis that section 80 exists to achieve the objective of public safety. Requiring all licence holders to be competent to operate motor vehicles ensures the safety of people on the road. Additionally, it provides the Registrar with certainty that they can appropriately make decisions about whether a person is competent to hold a licence without risk that an unlawful discrimination complaint could be made against them. Therefore, to the extent that the right to an effective remedy is limited by the prescription of this provision, the limitation is reasonable, necessary and proportionate to achieving the legitimate objective.



## Education Act 1972 (SA)

Section 75(3) of the *Education Act 1972 (SA)* (Education Act) provides that where in the opinion of the Director-General it is in the best interests of a child that he or she be enrolled at a special school, the Director-General may direct that the child be enrolled at a special school nominated in the direction. Where such direction has been given, the child must be enrolled at that special school.

Section 75A provides that:

1. The Director-General may, subject to the regulations, if satisfied that a child has disabilities or learning difficulties such that it would be in the best interests of the child to do so, direct that the child be enrolled at a special school or some other particular Government school nominated in the direction.
2. Where a direction is given under subsection (1) in respect of a child, the child shall not be enrolled at any Government school other than the school nominated in the direction.
3. The Director-General may give a direction under this section, or vary or revoke a direction under this section
  - a. on the application of a parent of the child; or
  - b. at the Director-General's initiative, but, in either case, after taking reasonable steps to consult each parent of the child.

The refusal of an educational authority to accept a student's application for admission to their particular school in accordance with a direction under section 75A could constitute discrimination (as per paragraph 22(1)(a) of the DDA). Directions in accordance with these provisions may also breach the *Disability Standards in Education 2005* which require that education providers must take reasonable steps to ensure that a prospective student is able to seek admission, or apply for enrolment, in an institution on the same basis as a prospective student without a disability (Standard 4.2(1)). These provisions may have the effect of limiting the right to education and the right to equality and non-discrimination.

As a result, prescribing these provisions may also have the effect of limiting these rights. Additionally, prescribing these provisions may also limit the right to an effective remedy as educational authorities acting in accordance with a decision of the Director-General to refuse a student's application for enrolment are protected from an unlawful discrimination complaint. However, these limitations are permissible as these requirements exist to protect the best interests of the child. Sections 75(3) and 75A ensure that children attend a school that is able to cater to their needs and that is most suitable for them.

Prescribing these provisions also provides certainty to educational authorities that acting in accordance with a decision of the Director-General to refuse a student's application for enrolment will not attract an unlawful discrimination complaint.

Additionally, parents who believe that an educational authority has not acted in accordance with the Education Act may appeal a decision through the South Australian Administrative

and disciplinary Division of the District Court. The opportunity to appeal a decision is an effective safeguard which makes the measure proportionate to achieving the legitimate objective.

Therefore, to the extent that the right to an effective remedy is limited by the prescription of this provision, the limitation is reasonable, necessary and proportionate to achieving the legitimate objective.

#### *Fair Work (General) Regulations 2009 (SA)*

Regulation 10 of the *Fair Work (General) Regulations 2009 (SA)* (Fair Work (General) Regulations) excludes wages and salaries payable to 'assisted persons' from regulation by award (pursuant to section 113 of the *Fair Work Act 1994 (SA)* (Fair Work Act)) while at the same time excluding penalty rates, shift premiums, overtime and allowances from the meaning of 'wages or salary'.

Regulation 10 provides for lower rates of pay for individuals with a disability who are employed by recognised organisations for the purposes of section 113 of the Fair Work Act, which in the absence of prescription, would be considered discriminatory under the DDA. Prescribing regulation 10 may therefore limit the right to work and the right to equality and non-discrimination. Prescribing regulation 10 may also have the effect of limiting the right to an effective remedy as it protects organisations acting in accordance with regulation 10 from an unlawful discrimination complaint.

However this limitation is permissible as it achieves the legitimate objective of providing employment to people with disabilities. Individuals affected by regulation 10 are those who have an intellectual or other disability such that they are unlikely to find work in the wider workforce and need substantial support to maintain paid employment. The recognised organisations provide support and offer the individual the dignity of paid work as well as providing respite to their carers.

Additionally, these recognised organisation are non-profit associations and could not afford to pay their workers with disabilities full award wages. If regulation 10 was not prescribed, these organisations would be closed in South Australia, to the detriment of the people employed and their families. Therefore, to the extent that the right to work, the right to equality and non-discrimination and the right to an effective remedy is limited, the limitation is reasonable, necessary and proportionate to achieving the legitimate objective.

#### **Conclusion**

The Disallowable Legislative Instrument is compatible with human rights. To the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.

1. *Broadcasting Services Act 1992* (Cth), Part 9D

Part 9D of the *Broadcasting Services Act 1992* (Cth) (BSA) provides captioning obligations for television broadcasters to improve access to television programs and emergency warnings for people with hearing impairments.

Prescribing Part 9D of the BSA ensures that a television broadcaster acting in direct compliance with their obligations under the BSA cannot be liable for unlawful discrimination under the *Disability Discrimination Act 1992* (DDA). Prescribing this law also provides clarity that television broadcasters are subject to a single set of regulatory requirements through the Australian Communications and Media Authority as the responsible body, rather than the Australian Human Rights Commission.

2. Civil Aviation Order 20.16.3 (Cth)

Civil Aviation Order (CAO) 20.16.3 restricts people with disability from occupying emergency exit row seating in aeroplanes for safety reasons. CAO 20.16.3 ensures the safety of everyone aboard an aircraft by requiring that anyone seated in an emergency exit row is capable of operating the exit and assisting in the event of an emergency.

Prescribing CAO 20.16.3 gives certainty to airlines and airline operators that, when acting in direct compliance with the prescribed CAO, they would be protected from a claim of unlawful discrimination.

3. *Mental Health Act 2007* (NSW) and the *Mental Health Regulation 2013* (NSW)

The objectives of the *Mental Health Act 2007* (NSW) (Mental Health Act) are:

- a. to provide for the care and treatment of, and to promote the recovery of, persons who are mentally ill or mentally disordered, and
- b. to facilitate the care and treatment of those persons through community care facilities, and
- c. to facilitate the provision of hospital care for those persons on a voluntary basis where appropriate and, in a limited number of situations, on an involuntary basis, and
- d. while protecting the civil rights of those persons, to give an opportunity for those persons to have access to appropriate care and, where necessary, to provide for treatment for their own protection or the protection of others, and
- e. to facilitate the involvement of those persons, and persons caring for them, in decisions involving appropriate care and treatment.

The *Mental Health Regulation 2013* (NSW) (Mental Health Regulation) provides procedural and administrative requirements to be followed for mental health inquiries, proceedings, facilities and patients for the purposes of the Mental Health Act.

The definition of disability in the DDA could arguably include mental illnesses as subsection 4(1) of the DDA includes the ‘total or partial loss of the person’s mental functions’ as well as ‘a disorder, illness or disease that affects a person’s thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour’. Further, the care and treatment provided to patients under the Mental Health Act and the Mental Health Regulation could be considered services for the purposes of section 24 of the DDA.

Section 24 of the DDA makes it unlawful for a person who, whether for payment or not, provides goods or services, or makes facilities available, to discriminate against another person on the ground of the other person’s disability:

- a. by refusing to provide the other person with those goods or services or to make those facilities available to the other person; or
- b. in the terms or conditions on which the first- mentioned person provides the other person with those goods or services or makes those facilities available to the other person; or
- c. in the manner in which the first- mentioned person provides the other person with those goods or services or makes those facilities available to the other person.

Section 4 of the DDA defines a ‘service’ to include services of the kind provided by a government, government authority or local government body.

Prescribing these laws provides certainty to clinicians that, when providing care and treatment to patients with mental illness in direct compliance with the Mental Health Act and the Mental Health Regulation, they would be protected from a claim of unlawful discrimination.

4. *Road Transport (Driver Licencing) Regulation 2017* (NSW), regulations 56(1)(e), 60(1)(c), 60(1)(d), 60(2), 65(1)(a), 65(1)(b), 86, 96(4)(h), 122(4)

Regulations 56(1)(e), 60(1)(c), 60(1)(d), 60(2), 65(1)(a), 65(1)(b), 86, 96(4)(h), 122(4) of the *Road Transport (Driver Licencing) Regulation 2017* (NSW) relate to driver licensing and the circumstances around when a licence can be issued, cancelled, suspended or varied.

As discussed above, the decision of the Authority in relation to the issue, suspension, variation or cancellation of a licence could be considered a service for the purposes of section 24 of the DDA. The decision-making process leading to the act of issuing, cancelling, suspending or varying a licence could also be regarded as part of the service provided and the terms and conditions applied and

manner in which that decision is made is subject at least to subsections 24(b) and (c) of the DDA (and though less likely, potentially also to section 24(a)).

The Authority's decision to refuse to issue a licence or decide to cancel, suspend or vary a licence, including decision-making process, is based on whether the Authority is satisfied that a person is 'fit and proper' to hold a driver licence and whether the Authority is satisfied that a person meets the medical standards contained in the Assessing Fitness to Drive standards applicable to the driver licence. In the Authority making these decisions, there is a risk that a person could argue they were treated less favourably on the ground of their disability. However it could be argued that the requirement to meet these standards is reasonable on the basis that the standards exist to ensure public safety.

Prescribing these regulations provides the necessary protections to ensure the Authority could appropriately make decisions regarding the issue, cancellation, suspension or variation of a driver licence held by certain persons in the interests of public safety without risk that an unlawful discrimination complaint could be made against them.

#### 5. *Firearms Act 2015* (SA), section 20

Section 20 of the *Firearms Act 2015* (SA) (Firearms Act) relates to the cancellation, variation and suspension of licence where, amongst other factors, a Registrar is satisfied that the holder of a licence is not a fit and proper person to hold the licence or where it would be contrary to the public interest for the holder of a licence to continue to possess and use firearms.

For the same reasons as discussed above, the decision and decision-making process of the Registrar in relation to the cancellation, variation and suspension of a firearms licence could be considered a service for the purposes of section 24 of the DDA.

The Registrar's decision to refuse to issue a licence or decide to cancel, suspend or vary a licence, including decision-making process, is based on whether the Registrar is satisfied that a person is 'fit and proper' to hold the licence, including when the person is a person who has a 'physical or mental illness, condition or disorder, or in relation to whom other circumstances exist, that would make it unsafe for him or her to possess a firearm or ammunition', provided for under subsection 7(2) of the Firearms Act. In making these decisions, there is a risk that a person could argue they were treated less favourably on the ground of their disability. However it could be argued that the requirement to meet the 'fit and proper' standards is reasonable on the basis that the standards exist to ensure public safety.

Prescribing section 20 of the Firearms Act provides the necessary protections to ensure a Registrar could appropriately make decisions regarding the cancellation, variation or suspension of a firearms licence held by certain persons in the interests of public safety without risk that an unlawful discrimination complaint could be made against them.

#### 6. *Motor Vehicles Act 1959 (SA)*, section 80

Section 80 of the *Motor Vehicles Act 1959 (SA)* (Motor Vehicles Act) authorises the Registrar of Motor Vehicles, in reliance on medical information or the results of tests, to suspend, or refuse to issue or renew, a driver's licence.

For the same reasons as discussed above, the decision and decision-making process of the Registrar of Motor Vehicles in relation to the issue, renewal or suspension could be considered a service for the purposes of section 24 of the DDA.

A Registrar's decision to refuse to issue or renew a licence or decide to suspend a licence, including the processes that led to the decision, is based on whether the Registrar is satisfied that a person is competent to drive a motor vehicle. In the Registrar making these decisions, there is a risk that a person could argue they were treated less favourably on the ground of their disability. However it could be argued that the competence requirement to is reasonable on the basis that it exists to ensure public safety.

Prescribing section 80 of the Motor Vehicles Act provides the necessary protections to ensure a Registrar could appropriately make decisions regarding the issue, renewal or suspension of a licence held by certain persons in the interests of public safety without risk that an unlawful discrimination complaint could be made against them.

#### 7. *Education Act 1972 (SA)*, sections 75(3) and 75A

Section 75(3) provides that where in the opinion of the Director-General it is in the best interests of a child that he be enrolled at a special school, the Director-General may direct that the child be enrolled at a special school nominated in the direction and, where such direction has been given, the child must be enrolled at that special school.

Section 75A provides that:

1. The Director-General may, subject to the regulations, if satisfied that a child has disabilities or learning difficulties such that it would be in the best interests of the child to do so, direct that the child be enrolled at a special school or some other particular Government school nominated in the direction.

2. Where a direction is given under subsection (1) in respect of a child, the child shall not be enrolled at any Government school other than the school nominated in the direction.
3. The Director-General may give a direction under this section, or vary or revoke a direction under this section
  - a. on the application of a parent of the child; or
  - b. at the Director-General's initiative, but, in either case, after taking reasonable steps to consult each parent of the child.

An educational authority acting in accordance with a direction under section 75A in not enrolling a student to their particular school could constitute discrimination in refusing to accept a person's application for admission as a student (in accordance with paragraph 22(1)(a) of the DDA). Directions in accordance with these provisions may also breach the *Disability Standards in Education 2005* which require that education providers must take reasonable steps to ensure that a prospective student is able to seek admission, or apply for enrolment, in the institution on the same basis as a prospective student without a disability (Standard 4.2(1)).

Prescription of these provisions provides certainty for educational authorities acting in accordance with a decision of the Director-General to refuse a student's application for enrolment as a student, a decision that may otherwise be unlawful discrimination under the DDA.

Further, prescription of these provisions do not leave an affected individual without remedy to dispute the decision as parents would have the right to appeal a decision through the South Australian Administrative and Disciplinary Division of the District Court.

#### 7. *Fair Work (General) Regulations 2009* (SA), regulation 10

Regulation 10 of the *Fair Work (General) Regulations 2009* (SA) excludes wages and salaries payable to 'assisted persons' from regulation by award (pursuant to section 113 of the *Fair Work Act 1994* (SA) (Fair Work Act)) while at the same time excluding penalty rates, shift premiums, overtime and allowances from the meaning of 'wages or salary'.

Regulation 10 provides for lower rates of pay for individuals with a disability who are employed by organisations covered by the provision, which in the absence of prescription, would be considered discriminatory under the DDA.

The policy intent of Regulation 10 is to ensure that the financial burden on organisations providing employment to people with a disability is not too onerous, noting that these organisations would be non-profit associations.

Prescription of this regulation allows these organisations to provide persons who have an intellectual or other disability with paid employment that they would unlikely be able to find in the wider workforce.



## **NOTES ON SECTIONS**

### **Part 1 – Preliminary**

#### **Section 1 – Name**

Section 1 states that the name of the instrument is the *Disability Discrimination Regulations 2019*.

#### **Section 2 – Commencement**

Section 2 provides that the instrument commences on 1 October 2019.

#### **Section 3 – Authority**

Section 3 provides that the instrument is made under the *Disability Discrimination Act 1996* (DDA).

#### **Section 4 – Schedules**

Section 4 provides that each instrument that is 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.

#### **Section 5 – Definitions**

Section 5 defines a term for the purposes of the instrument.

Act is defined to mean the *Disability Discrimination Act 1992*.

### **Part 2 – Exemptions from prohibition of disability discrimination**

#### **Section 6 – Exemption of things done in compliance with a prescribed law**

For the purposes of subsection 47(2) of the DDA, section 6 prescribes the following Commonwealth laws.

- a) Part 9D of the *Broadcasting Services Act 1992*;
- b) Civil Aviation Order 20.16.3.

For the purposes of subsection 47(2) of the DDA, section 6 prescribes the following State laws, as in force from time to time.

#### *New South Wales*

- a) *Mental Health Act 2007* (NSW);

- b) *Mental Health Regulation 2013* (NSW);
- c) paragraphs 56(1)(e), 60(1)(c) and (d), subclause 60(2), paragraphs 65(1)(a) and (b), clause 86, paragraph 96(4)(h) and subclause 122(4) of the *Road Transport (Driver Licensing) Regulation 2017* (NSW).

#### *South Australia*

- a) subsection 75(3) and section 75A of the *Education Act 1972* (SA);
- b) regulation 10 of the *Fair Work (General) Regulations 2009* (SA);
- c) section 20 of the *Firearms Act 2015* (SA);
- d) section 80 of the *Motor Vehicles Act 1959* (SA).

#### **Section 7 – Combat duties**

For the purposes of the definition of combat duties in subsection 53(2) of the DDA, section 7 declares combat duties to be duties which require, or which are likely to require, a person to commit, or participate directly in the commission of, an act of violence in the event of armed conflict.

#### **Section 8 – Combat-related duties**

For the purposes of the definition of combat-related duties in subsection 53(2) of the DDA, section 8 declares the following duties to be combat-related duties:

- a) duties which require, or which are likely to require, a person to undertake training or preparation for, or in connection with, combat duties;
- b) duties which require, or which are likely to require, a person to work in support of a person performing combat duties.

#### **Schedule 1 – Repeals**

##### **Item 1**

Item 1 repeals the *Disability Discrimination Regulations 1996*.