

AUSTRALIAN HUMAN RIGHTS COMMISSION 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 *Australian Human Rights Commission Act 1986* (the AHRC Act) establishes the Australian Human Rights Commission (the Commission) and regulates the processes for making and resolving complaints relating to unlawful discrimination, human rights and equal opportunity in employment.

Section 50 of the AHRC 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.

The *Australian Human Rights Commission Regulations 1989* (the AHRC Regulations) sunset on 1 October 2019. The purpose of the *Australian Human Rights Commission Regulations 2019* (the Regulations) is to remake the AHRC Regulations with amendments to ensure that it remains fit-for-purpose and in line with community and stakeholder expectations.

Paragraph 31(b) of the AHRC Act requires the Commission to inquire into, and attempt to conciliate, any act or practice (including systemic practice) that may constitute discrimination in employment. Discrimination for the purposes of these functions is defined in subsection 3(1) of the AHRC Act as any distinction, exclusion or preference that has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation. These functions apply to discrimination on a number of attributes listed in subsection 3(1). Subparagraph (b)(ii) of the definition of discrimination in subsection 3(1) of the AHRC Act provides that the Attorney-General may declare, by regulation, additional grounds which constitute discrimination for the purposes of the equal opportunity in employment function.

Section 4 of the AHRC Regulations declares an additional 10 attributes for the purposes of subparagraph (b)(ii) of the definition of discrimination in subsection 3(1) of the AHRC Act. These 10 attributes are age; medical record; criminal record; impairment; marital or relationship status; mental, intellectual or psychiatric disability; nationality; physical disability; sexual orientation; and trade union activity. These attributes are not defined in the AHRC Regulations.

The Regulations replace the three disability-related grounds with a single ground of ‘disability’. This aligns the treatment of disability discrimination issues with the more contemporary concepts and

terminology adopted in the *Disability Discrimination Act 1992* (DDA) and with community and stakeholder expectations that appropriate and inclusive disability-related concepts are reflected in legislation. The Regulations define ‘disability’ to have the same meaning as in the DDA.

The Regulations replace the ‘criminal record’ attribute with ‘an irrelevant criminal record’. The inclusion of the relevance factor provides further guidance to employers and prospective employees about when job applications can be rejected from people with criminal records — striking a better balance between allowing those with criminal records to find employment, while ensuring employers can refuse to employ someone where their criminal record makes them unsuitable in the position for which they have applied.

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

The AHRC Act specifies no conditions that need to be satisfied before the power to make the proposed 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 AHRC 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 and representative employers’ and workers’ organisations on the currency and fitness for purpose of the AHRC Regulations. The review and consultation found that the AHRC 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 however OBPR advised that given the significance of the AHRC Regulations in providing a broader coverage of protections for workplace discrimination that is not available under Commonwealth discrimination laws, a certification letter would need to be prepared in accordance with OBPR’s Guidance Note on *Sunsetting Legislative Arrangements*. In accordance with OBPR’s Guidance Note, the Attorney-General’s Department wrote to OBPR certifying that the department has reviewed and assessed the AHRC Regulations and found them to be operating effectively and efficiently. 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

Australian Human Rights Commission 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 *Australian Human Rights Commission Regulations 1989* (the AHRC Regulations) sunset on 1 October 2019. The Disallowable Legislative Instrument remakes the AHRC Regulations with amendments to ensure that it remains fit for-purpose and in line with community and stakeholder expectations.

Paragraph 31(b) of the *Australian Human Rights Commission Act 1986* (the AHRC Act) requires the Australian Human Rights Commission (the Commission) to inquire into, and attempt to conciliate, any act or practice (including systemic practice) that may constitute discrimination in employment. Discrimination for the purposes of these functions is defined in subsection 3(1) of the AHRC Act as any distinction, exclusion or preference that has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation. These functions apply to discrimination on a number of attributes listed in subsection 3(1). Subparagraph (b)(ii) of the definition of discrimination in subsection 3(1) of the AHRC Act provides that the Attorney-General may declare, by regulation, additional grounds which constitute discrimination for the purposes of the equal opportunity in employment function.

Section 4 of the AHRC Regulations declares an additional 10 attributes for the purposes of subparagraph (b)(ii) of the definition of discrimination in subsection 3(1) of the AHRC Act. These 10 attributes are age; medical record; criminal record; impairment; marital or relationship status; mental, intellectual or psychiatric disability; nationality; physical disability; sexual orientation; and trade union activity. These attributes are not defined in the AHRC Regulations.

The Disallowable Legislative Instrument replaces the three disability-related grounds of disability with a single ground of ‘disability’. This aligns the treatment of disability discrimination issues with the more contemporary concepts and terminology adopted in the *Disability Discrimination Act 1992* (DDA) and with community and stakeholder expectations that appropriate and inclusive disability-related concepts are reflected in legislation. The Disallowable Legislative Instrument defines ‘disability’ to have the same meaning as in the DDA.

The Disallowable Legislative Instrument replaces the criminal record attribute with ‘an irrelevant criminal record’. The inclusion of the relevance factor provides further guidance to employers and prospective employees about when job applications can be rejected from people with criminal records — striking a better balance between allowing those with criminal records to find employment, while ensuring employers can refuse to employ someone where their criminal record makes them unsuitable in the position for which they have applied.

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 equality and non-discrimination

Article 26 of the ICCPR 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.

Article 5 of the CRPD provides for the right to equality and non-discrimination and that State Parties are required to recognise that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and benefit of the law.

Replacing the three disability-related grounds with a single ground of ‘disability’ to align the treatment of disability issues with the more contemporary concepts and terminology adopted in the *Disability Discrimination Act 1992* (DDA) promotes the rights to equality and non-discrimination because the inclusion of a single ground of disability ensures that all forms of disability are captured without distinguishing between different types of disability. This removes unnecessary complexity and removes the risk of debate in determining whether a person with a disability fits within a particular type of disability further ensuring that all persons are treated equally and are not discriminated against on the basis of their disability.

The attribute of ‘an irrelevant criminal record’ engages the right to equality and non-discrimination as it may limit a person’s right to effective protection against discrimination if it is determined that the relevance of a person’s criminal record means they are unable to perform the inherent requirements of

the job. However this limitation is reasonable, necessary and proportionate in achieving a legitimate objective as the relevance factor strikes a better balance between allowing those with criminal records to find employment, while ensuring employers can refuse to employ someone where their criminal record makes them unsuitable for the position they have applied for.

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.

This right is engaged by the Commission's equal opportunity in employment functions. These functions differ from the other mechanisms that exist to resolve workplace discrimination, such as complaints to the Commission under federal anti-discrimination legislation and the actions under the *Fair Work Act 2009* in that no enforceable remedies are available for such complaints. If conciliation is unsuccessful and the Commission considers that discrimination has occurred, the Commission may report to the Attorney-General, and include non-enforceable recommendations, but the complainant may not pursue their complaint in the Federal Court or Federal Circuit Court.

The Commission's equal opportunity in employment functions promote the right to an effective remedy because they provide a broader coverage of protections for workplace discrimination that is not available under Commonwealth discrimination laws, for example volunteers are not explicitly covered in the DDA, the *Sex Discrimination Act 1984* or the *Age Discrimination Act 2004* but are covered under the Commission's equal opportunity in employment functions.

Conclusion

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

NOTES ON SECTIONS

Part 1 – Preliminary

Section 1 – Name

Section 1 states that the name of the instrument is the *Australian Human Rights Commission 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 *Australian Human Rights Commission Act 1986* (AHRC Act).

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 *Australian Human Rights Commission Act 1986*.

Disability is defined to have the same meaning as in the *Disability Discrimination Act 1992*. In that Act, disability means:

- a) total or partial loss of the person's bodily or mental functions; or
- b) total or partial loss of a part of the body; or
- c) the presence in the body of organisms causing disease or illness; or
- d) the presence in the body of organisms capable of causing disease or illness; or
- e) the malfunction, malformation or disfigurement of a part of the person's body; or
- f) a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or
- g) a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour;

and includes a disability that:

- h) presently exists; or
- i) previously existed but no longer exists; or
- j) may exist in the future (including because of a genetic predisposition to that disability); or
- k) is imputed to a person.

To avoid doubt, a disability that is otherwise covered by this definition includes behaviour that is a symptom or manifestation of the disability.

Marital or relationship status is defined to have the same meaning as in the *Sex Discrimination Act 1984*. In that Act, marital or relationship status means a person's status of being any of the following:

- a) single;
- b) married;
- c) married, but living separately and apart from his or her spouse;
- d) divorced;
- e) the de facto partner of another person;
- f) the de facto partner of another person, but living separately and apart from that other person;
- g) the former de facto partner of another person;
- h) the surviving spouse or de facto partner of a person who has died.

Part 2 – Declared discrimination

Section 6 – Other distinctions, exclusions or preferences that constitute discrimination

Section 6, paragraph (a)

For the purposes of subparagraph (b)(ii) of the definition of discrimination in subsection 3(1) of the AHRC Act, paragraph (a) of section 6 declares the following attributes to constitute discrimination.

- a) any distinction, exclusion or preference made on the ground of:
 - i. age; or
 - ii. a medical record; or
 - iii. an irrelevant criminal record; or
 - iv. disability; or
 - v. marital or relationship status; or
 - vi. nationality; or
 - vii. sexual orientation; or

viii. trade union activity;

i. Age

Subparagraph 6(a)(i) provides that any distinction, exclusion or preference on the basis of a person's age constitutes discrimination for the purposes of the Act where it has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation. This ground would most commonly relate to matters such as maximum and minimum hiring ages and mandatory retiring ages. However, where a particular age restriction is genuinely related to a person's capacity to perform a particular job, a distinction, exclusion or preference on that basis would not constitute discrimination to the exception in section 3 of the AHRC Act for a distinction, exclusion or preference based on the inherent requirements of the job.

ii. A medical record

Subparagraph 6(a)(ii) provides that any distinction, exclusion or preference on the basis of a person's medical record constitutes discrimination for the purposes of the Act where it has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.

iii. An irrelevant criminal record

Subparagraph 6(a)(iii) provides that any distinction, exclusion or preference on the basis of a person's irrelevant criminal constitutes discrimination for the purposes of the Act where it has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation. It is expected that this ground would most commonly relate to matters such as dismissal of, or refusal to employ or promote, a person on the basis of the person having a criminal record.

iv. Disability

Subparagraph 6(a)(iv) provides that any distinction, exclusion or preference on the basis of a person's disability constitutes discrimination for the purposes of the Act where it has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation. The term 'disability' is defined in section 5.

v. Marital or relationship status

Subparagraph 6(a)(v) provides that any distinction, exclusion or preference on the basis of a person's marital or relationship status constitutes discrimination for the purposes of the Act where it has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation. It is envisaged that this ground would most commonly relate to matters such as restriction of jobs to

only those applicants who are married or in a relationship or to single applicants only. The term ‘marital or relationship status’ is defined in section 5.

vi. Nationality

Subparagraph 6(a)(vi) provides that any distinction, exclusion or preference on the basis of a person’s nationality constitutes discrimination for the purposes of the Act where it has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.

vii. Sexual orientation

Subparagraph 6(a)(vii) provides that any distinction, exclusion or preference on the basis of a person’s sexual orientation constitutes discrimination for the purposes of the Act where it has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation. It is envisaged that this ground would most commonly relate to matters such as dismissal of or refusal to employ or promote a person on the basis of that person’s sexual orientation.

viii. Trade union activity

Subparagraph 6(a)(viii) provides that any distinction, exclusion or preference on the basis of a person’s trade union activity constitutes discrimination for the purposes of the Act where it has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation. It is envisaged that this ground would most commonly relate to matters such as the dismissal of or refusal to employ or promote a person because that person is a member of a trade union, has participated in trade union actions or has refused to join a particular union.

Section 6, paragraph (b)

Paragraph (b) of section 6 declares that any distinction, exclusion or preference made on one or more of the grounds specified in subparagraphs (a)(iii) to (viii) which existed in relation to a person but which has ceased to exist in relation to that person constitutes discrimination for the purposes of the Act where it has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation. The purpose of this paragraph is to clarify that where a person does an act by reason that a particular ground applied to another person in the past, that act constitutes discrimination for the purposes of the Act. For example, where a person is discriminated against on the ground that that person once had a particular marital status, that will constitute discrimination for the purposes of the Act even though the person is no longer of that particular marital status.

Section 6, paragraph (c)

Paragraph (c) of section 6 declares that any distinction, exclusion or preference made on the basis of the imputation to a person of any ground specified in paragraph (a) and (b) of section 6 constitutes discrimination for the purposes of the Act. The purpose of this paragraph is to make clear that any distinction, exclusion or preference on a relevant ground, even if the reason for the distinction, exclusion or preference has no basis in fact, constitutes discrimination for the purposes of the Act.

Part 3 – Application and transitional provisions

Section 7 – Application of declared discrimination

Section 7 provides that section 6 of the instrument applies in relation to distinctions, exclusions or preferences made on or after 1 October 2019.

Section 7 also provides that despite the repeal of the AHRC Regulations by Schedule 1 of the instrument, section 4 of the AHRC Regulations continues to apply on and after 1 October 2019 in relation to distinctions, exclusions or preferences made before that day.

Schedule 1 – Repeals

Item 1

Item 1 repeals the AHRC Regulations.