

AGE DISCRIMINATION REGULATIONS 2020
REPLACEMENT EXPLANATORY STATEMENT

Issued by the authority of the Attorney-General

PURPOSE AND OPERATION OF THE INSTRUMENT

The *Age Discrimination Regulations 2020* (the Regulations) are made under the *Age Discrimination Act 2004* (Age Discrimination Act) and relate to amendments of that Act by the *Statute Update (Regulations References) Act 2020* (Statute Update (Regulation References) Act).

The Regulations prescribe particular regulations and provisions of regulations under the *Airports Act 2006* (Airports Act) and the *Defence Act 1903* (Defence Act) for the purposes of establishing exemptions from the Age Discrimination Act. Anything done by a person in direct compliance with an Act or regulation prescribed under Schedule 1, or a provision of an Act or regulation prescribed under Schedule 2 of the Age Discrimination Act is not unlawful age discrimination under the Age Discrimination Act.

The Regulations are necessary due to amendments made to the Age Discrimination Act by the Statute Update (Regulation References) Act which replace references to specific regulations with more generic references that will remain accurate over time.

Most of the amendments simply replace a reference to specific regulations with a general reference to those regulations by reference to the Act the regulations are made under. For example, a reference to the “*Australian Hearing Services Regulations 1992*” in item 11 of Schedule 1 to the Age Discrimination Act is replaced with a reference to “Regulations made under the *Australian Hearing Services Act 1991*”.

However, in two cases, references to specific regulations are instead replaced with provisions stating that the relevant regulations would be prescribed or that provisions of regulations made under a specified Act would be prescribed by regulations. Item 8 in Schedule 1 to the Age Discrimination Act mentions prescribed regulations made under the Airports Act. Item 3AA of Schedule 2 to the Age Discrimination Act mentions prescribed provisions of regulations made under the Defence Act.

The Regulations alter the text of the law. However, they are not intended to alter the interpretation of the law. This is because the prescribed regulations equate to those originally covered by the reference in the Age Discrimination Act prior to amendment by the Statute Update (Regulation References) Act.

CONSULTATION

Before the Regulations were made, the Attorney-General considered the general obligation to consult imposed by section 17 of the *Legislation Act 2003*.

The Attorney-General is responsible for administering the Age Discrimination Act, the enabling legislation under which the regulations are made. The Attorney-General is therefore the rule-maker for the Regulations for the purposes of section 6 of the *Legislation Act 2003*.

There was extensive consultation in relation to the Regulations within the Attorney-General's Department. The Department of Defence and the Department of Infrastructure, Transport, Regional Development and Communications were also consulted. As the Regulations only make small technical changes to the text of the law and do not affect the interpretation of the law, it was not considered necessary to consult further outside of those Departments.

The Regulations were drafted by the Office of Parliamentary Counsel.

REGULATION IMPACT STATEMENT

Regulations that are made for the purposes of Statute Update Bills are machinery of government instruments, and are therefore not subject to the regulatory impact assessment requirements set out by the Office of Best Practice Regulation (OBPR). The OBPR reference for this standing exemption is 25784.

OTHER DETAILS

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

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

The Regulations commence at the same time as the *Statute Update (Regulations References) Act 2020* commences.

The Regulations, the Age Discrimination Act and the *Statute Update (Regulations References) Act 2020* are available on the Federal Register of Legislation at www.legislation.gov.au.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

Age Discrimination Regulations 2020

The *Age Discrimination Regulations 2020* (the Regulations) are 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

The Regulations are made under the *Age Discrimination Act 2004* (Age Discrimination Act) and prescribe particular regulations and provisions of regulations under the *Airports Act 2006* (Airports Act) and the *Defence Act 1903* (Defence Act) for the purposes of establishing exemptions from the Age Discrimination Act. This is necessary due to amendments made to the Age Discrimination Act by the *Statute Update (Regulations References) Act 2020* (Statute Update (Regulation References) Act), which replace references to specific regulations with more generic references that will remain accurate over time.

Most of the amendments replace a reference to specific regulations with a general reference to those regulations by reference to the Act the regulations are made under. However, in two cases, references to specific regulations are instead replaced with provisions stating that the relevant regulations would be prescribed or that provisions of regulations made under a specified Act would be prescribed by regulations. Item 8 in Schedule 1 to the Age Discrimination Act mentions prescribed regulations made under the Airports Act. Item 3AA of Schedule 2 to the Age Discrimination Act mentions prescribed provisions of regulations made under the Defence Act.

The Regulations prescribe particular regulations and provisions of regulations under the Airports Act and the Defence Act for the purposes of establishing exemptions from the Age Discrimination Act. The opportunity to exempt acts, regulations or other instruments from the operation of the Age Discrimination Act through section 39 of that Act acknowledges that there are often sound policy reasons for the use of age-based criteria in a Commonwealth law or program.

The Regulations alter the text of the law. However, they are not intended to alter the interpretation of the law. This is because the prescribed regulations equate to those originally covered by the reference in the Age Discrimination Act prior to amendment by the Statute Update (Regulation References) Act.

Human rights implications

The Regulations engage the following rights:

- Right to equality and non-discrimination as contained in articles 2 and 26 of the *International Covenant on Civil and Political Rights*, and
- Right to work as contained in articles 6(1) and 7 of the *International Covenant on Economic, Social and Cultural Rights*.

Right to equality and non-discrimination

The right to equality and non-discrimination provides that everyone is entitled to enjoy their rights without discrimination of any kind and that all people are equal before the law and are entitled without discrimination to equal and non-discriminatory protection of the law.

The Regulations may limit the right to equality and non-discrimination on the basis of age. By prescribing exemptions, the instrument has the effect of permitting discrimination on the grounds of age in certain circumstances, such as depriving certain members of the defence force the right to work when they reach their retirement age.

While age is not specifically listed as a prohibited ground of discrimination under article 26 of the *International Covenant on Civil and Political Rights*, the United Nations Human Rights Committee has stated that 'distinction related to age which is not based on reasonable and objective criteria may amount to discrimination on the ground of "other status" under [article 26]...or to a denial of the equal protection of the law within the meaning of the first sentence of article 26.

Differential treatment (including the differential effect of a measure that is neutral on its face) will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

Prescribing the Airport (Control of On-Airport Activities) Regulations 1997 (Airport Regulations)

The objective of prescribing the Airport Regulations under Schedule 1 of the Age Discrimination Act is to ensure that age based restrictions that apply in the wider community to the range of matters covered by the Airport Regulations can be matched in the airports to which the Airport Regulations apply (such as sale and supply of alcohol to minors, gambling, smoking and vehicle use).

The Airport Regulations provide the Department of Infrastructure, Transport, Regional Development and Communications with regulatory responsibility for certain matters at federally-leased airports in New South Wales (NSW) - namely (Sydney (Kingsford-Smith), Bankstown and Camden Airports). Matters covered by the Airport Regulations include the sale and supply of liquor, and the regulation of gambling, smoking and vehicle use. Discrimination on the basis of age in relation to these is a practical approach that mirrors Commonwealth and State age based laws restricting persons under the age of 18 from certain activities in relation to these matters.

The Airport Regulations were considered necessary at the time of privatisation of airports in Australia, as constitutional issues associated with the NSW liquor licencing regime at the time prevented the Australian Government from handing over certain responsibilities to the NSW Government. These constitutional issues have been resolved and the Airport Regulations are due to sunset in 2024. Work commenced earlier this year on the review and options for sunseting but was put on a temporary hold due to the COVID-19 pandemic. The sunseting work will continue in 2021. The sunseting review will look at whether these responsibilities (and specifically the responsibility for liquor licencing) should be transferred to the NSW Government in relation to NSW airports and whether the exemption in the Regulations can be removed. In the meantime, exempting the Airport Regulations from the

Age Discrimination Act seeks to achieve the legitimate and necessary objective of ensuring that a number of age based restrictions which are contained in the Regulations are applied in certain airports.

Prescribing the Defence Regulation 2016 (Defence Regulations)

The Regulations provide, as per section 5, that for the purposes of item 3AA of the table in Schedule 2 to the Act, sections 23 and 88 of the Defence Regulations are prescribed.

Section 23 of the Defence Regulations provides for Australian Defence Force (ADF) members retirement age which is determined according to their rank or service category. For some members, there is no retirement age, whereas for certain persons the retirement age ranges between 60-65 years of age. It is open to any member approaching retirement age to apply to the Chief of the Defence Force (or their delegate) to serve beyond retirement age. The Chief of the Defence Force (or their delegate) may allow a member to serve beyond retirement age in order to fill a specific capability gap, subject to the member continuing to meet the inherent requirements of service, including those relating to medical and physical fitness.

Section 88 of the Defence Regulations forms part of the broader transitional provisions to deal with processes begun under the Defence (Personnel Regulations) 2002 (DPR 2002) before their repeal, and deals specifically with transitional retirement age provisions. For example, ADF members who had a different retirement age under the DPR 2002 may retain that retirement age upon commencement of the Defence Regulations.

The concept of a compulsory retirement age in the Defence Force is a limitation on a person's right to equality and non-discrimination as well as the right to work on the basis of age. Service in the Defence Force is arduous, and there are much higher demands on ADF members' medical and physical fitness than members of the general population. Retaining ADF members at less than optimal fitness results in increased risks both to the individual member and to others, including in both training and operational environments.

An inherent requirement of service in the Defence Force is that a member is fit for duty and can be deployed at short notice without limitations. The realities of aging mean that, as members of the Defence Force become older, they also become less likely to be able to meet the required medical and fitness standards that must apply to ADF members. This is not to say that every individual who reaches retirement age is unable to meet the necessary medical and physical fitness requirements, but fewer and fewer members can do so as they approach and pass retirement age.

This is balanced against increased costs associated with greater healthcare requirements and ensuring that older members have the requisite health and fitness standards. The Defence Force currently conducts frequent medical examinations as ADF members get older. While the frequency of medical examinations could be further increased as member's age, there is a risk that this becomes arduous on the member and costly for the Defence Force. Therefore, it is the Defence Force's current preference to continue to manage service beyond the regulated retirement ages by exception by allowing members apply to the Chief of the Defence Force (or their delegate) to serve beyond retirement age. This offers important flexibility to treat individual cases differently.

Mandatory retirement ages, with the ability for members to work beyond the prescribed age by exception, seeks to achieve the legitimate objective of ensuring all members of the Defence Force are fit for duty and can be deployed at short notice without medical limitations. It is a necessary, reasonable and proportionate mechanism which balances the

need to manage the risk of an aging Defence Force, with the need to not unfairly discriminate against people on the basis of age.

Right to work

The right to work includes the right of everyone to the opportunity to gain his or her living by work which he or she freely chooses or accepts. The United Nations Committee on Economic, Social and Cultural Rights has stated that the right to work also encompasses the right not to be unjustly deprived of work. This right may be subject only to such limitations ‘as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society’.

The mandatory retirement age for ADF members may be seen as limiting the right to work in circumstances where a person may feel they are fit and well enough to continue working. A person could consider they are being unjustly deprived of the opportunity to work on the basis of their age. However the Regulations seek to achieve the legitimate and reasonable objective of ensuring that all members of the Defence Force are fit for duty and can be deployed at short notice without medical limitations. Defence Force members approaching retirement age are also able to apply to the Chief of the Defence Force (or their delegate) to serve beyond retirement age, offering important flexibility to treat individual cases differently.

Conclusion

The Regulations are compatible with human rights because to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.

Details of the *Age Discrimination Regulations 2020*

Part 1—Preliminary

Section 1—Name

This section provides for the name of the Regulations to be the *Age Discrimination Regulations 2020* (the Regulations).

Section 2—Commencement

This section provides for the whole of the Regulations to commence at the same time as the *Statute Update (Regulation References) Act 2020*.

Section 3—Authority

This section provides that the Regulations are made under the *Age Discrimination Act 2004*.

Section 4—Definitions

This section provides that in the Regulations, *Act* means the *Age Discrimination Act 2004*. That definition is relied on in subsections 5(1) and (2) of the Regulations.

Part 2—Exemptions

Section 39 of the *Age Discrimination Act 2004* provides an exemption for acts that would otherwise be unlawful age discrimination under that Act. Subsection 39(1) provides an exemption for anything done by a person in direct compliance with another Act, regulation, or any other instrument mentioned in Schedule 1 to the *Age Discrimination Act 2004*. Subsection 39(1A) provides an exemption for anything done by a person in direct compliance with a provision of an Act, regulation, or other instrument if the provision is mentioned in Schedule 2 to the *Age Discrimination Act 2004*.

Section 5—Exemptions

Subsection 5(1)

Item 5 of Schedule 1 to the *Statute Update (Regulation References) Act 2020* amends item 8 of the table in Schedule 1 to the *Age Discrimination Act 2004* to repeal that item (which refers to the *Airports (Control of On-Airport Activities) Regulations 1997* and replaces it with an item referring to prescribed regulations made under the *Airports Act 1996*.

Subsection 5(1) of the Regulations provides that, for the purposes of item 8 of the table in Schedule 1 to the *Age Discrimination Act 2004*, the *Airports (Control of On-Airport Activities) Regulations 1997* are prescribed.

This is necessary to ensure that anything done by a person in direct compliance with the *Airports (Control of On-Airport Activities) Regulations 1997* will continue to not be unlawful age discrimination.

The prescribed regulations under the *Airports Act 1996* refer to the same regulations as the current specified regulations in item 8 of the table in Schedule 1 to the *Age Discrimination Act 2004*.

Subsection 5(2)

Item 7 of the *Statute Update (Regulation References) Act 2020* repeals item 24 of the table in Schedule 1 to the *Age Discrimination Act 2004* to omit a specific reference to the *Defence (Personnel) Regulations 2002*, which have been repealed. A technical correction to the law is required to deal with the repeal.

The *Defence (Personnel) Regulations 2002* covered many matters. The provisions that were relevant to the exemption from the *Age Discrimination Act 2004* are now covered by sections 23 and 88 of the *Defence Regulation 2016*.

So, item 9 of the *Statute Update (Regulation References) Act 2020* includes a general reference to prescribed provisions of regulations made under the *Defence Act 1903* in a new table item 3AA of the table in Schedule 2 to the *Age Discrimination Act 2004* to ensure that sections 23 and 88 of the *Defence Regulation 2016* may be prescribed.

Subsection 5(2) of the Regulations provides that, for the purposes of item 3AA of the table in Schedule 2 to the *Age Discrimination Act 2004*, sections 23 and 88 of the *Defence Regulation 2016* are prescribed.

This is necessary to ensure that anything done by a person in direct compliance with these provisions of the *Defence Regulation 2016* will continue to not be unlawful age discrimination.

The prescribed provisions are intended to more precisely equate to those that, in practice, were originally covered by the references in the *Age Discrimination Act 2004* prior to amendment by the *Statute Update (Regulation References) Act 2020*.