

# Responses from legislation proponents — Report 14 of 2020<sup>1</sup>

---

1 This can be cited as: Parliamentary Joint Committee on Human Rights, Responses from legislation proponents, *Report 1 of 2020*; [2020] AUPJCHR 179.





**The Hon Christian Porter MP**

Attorney-General  
Minister for Industrial Relations  
Leader of the House

MC20-031883

Senator the Hon Sarah Henderson  
Chair  
Parliamentary Joint Committee on Human Rights  
Parliament House  
CANBERRA ACT 2600  
[human.rights@aph.gov.au](mailto:human.rights@aph.gov.au)

Dear Chair

Thank you for your Email of 16 October 2020 regarding the consideration by the Parliamentary Joint Committee on Human Rights (the Committee) of the Age Discrimination Regulations 2020 [F2020L01138].

The Committee has requested further information to inform its consideration of the proposed measures and their compatibility with Australia's human rights obligations. The enclosed documents respond to the Committee's request.

I thank the Committee for its consideration of the regulations and trust the additional information enclosed will assist the Committee.

Yours sincerely

**The Hon Christian Porter MP**  
Attorney-General  
Minister for Industrial Relations  
Leader of the House

Encl. Response to Report 12 of 20 of the Parliamentary Joint Committee on Human Rights concerning the Age Discrimination Regulations 2020

CC. Senator the Hon Linda Reynolds CSC, Minister for Defence; Deputy Prime Minister and Minister for Infrastructure, Transport and Regional Development, the Hon Michael McCormack MP

## Response to the Parliamentary Joint Committee on Human Rights – Report 12 of 2020

### Age Discrimination Regulations 2020

The *Age Discrimination Regulations 2020* are made under the *Age Discrimination Act 2004* (ADA) and relate to amendments of that Act by the *Statute Update (Regulations References) Act 2020* (Statute Update Act). The Statute Update Act made minor and technical changes to the Commonwealth statute book to enhance its usability, facilitate interpretation and administration, and promote consistency.

References to regulations in primary legislation have become out of date due to the repeal, replacement or renaming of those regulations, or are at risk of becoming out of date in future for these reasons. The Statute Update Act omitted references to specific regulations and specific provisions of regulations, replacing them with more general references to the Acts under which the relevant regulations are made or with more general means of identifying specific provisions so that the correct links between the contents of regulations and Acts will remain even if the regulations are remade, renamed or renumbered. The update retains existing exemptions, and alleviates the need to continuously update references in primary legislation in the future due to these changes.

Updates were made to the ADA by the Statute Update Act by replacing references to specific regulations with references to regulations, or prescribed regulations, made under named Acts and specific provisions of regulations with references to prescribed provisions. The description of the prescribed regulations and the prescribed provisions is contained in the *Age Discrimination Regulations*. The effect of these changes is that the identification of specific regulations and provisions is shifted from the ADA to the *Age Discrimination Regulations 2020*.

**(a) *What is the objective and effect of prescribing the entirety of the Airports (Control of On-Airport Activities) Regulations 1997 as exempt from the Age Discrimination Act?***

Subsection 39(1) of the ADA provides that any acts done in direct compliance with an Act or regulation mentioned or covered in Schedule 1 is exempt from the application of Part 4 of the ADA, resulting in that act not being unlawful age discrimination. This acknowledges that there are often sound policy reasons for the use of age-based criteria in a Commonwealth law or program.

The *Age Discrimination Regulations 2020* provide that, for the purposes of item 8 of the table in Schedule 1 to the Act, the *Airports (Control of On-Airport Activities) Regulations 1997* (*Airport Regulations*) are prescribed. The result is that any acts done in direct compliance with the *Airport Regulations* will not be unlawful age discrimination under Part 4 of the ADA.

The objective of prescribing the *Airport Regulations* 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.

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 on airport. 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.

It is intended that these responsibilities (and specifically the responsibility for liquor licencing) will be transferred to NSW in relation to NSW airports.

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 examine the consequences of transferring responsibility for airport activities to NSW, including the removal of the exemption in the Age Discrimination Regulations.

***(b) what is the objective of prescribing sections 23 and 88 of the Defence Regulation 2016 as exempt from the Age Discrimination Act, and the objective behind the compulsory retirement age?***

In acknowledgement that there are often sound policy reasons for the use of age-based criteria in a Commonwealth law or program, subsection 39(1A) of the ADA provides that any acts done in direct compliance with a provision of an Act or regulation mentioned or covered in Schedule 2 is exempt from the application of Part 4 of the ADA, resulting in that act not being unlawful age discrimination. Provisions are included in Schedule 2 where an exemption is warranted, but where it is not necessary or appropriate to exempt the complete Act, regulation or instrument that contains the provision.

The Age Discrimination Regulations 2020 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 Regulation 2016 (Defence Regulation) are prescribed.

Section 23 of the Defence Regulation provides for a member's retirement age. Subsection 23(3) provides there is no retirement age for an Admiral of the Fleet, a Field Marshal or a Marshal of the Royal Australian Air Force. Subsection 23(4) provides a retirement age for the following members: (a) for a member of the Permanent Forces who holds the rank of Admiral, General or Air Chief Marshal—63 years of age; (b) for any other member of the Permanent Forces—60 years of age; (c) for a member of the Reserves—65 years of age.

Section 88 of the Defence Regulation 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.

Subsection 88 provides that: Australian Defence Force (ADF) members who had a different retirement age under the DPR 2002 may retain that retirement age upon commencement of Defence Regulation 2016; an ADF member who was able to make an election in relation to their retirement age under the DPR 2002 may make such an election as if those regulations had not been repealed; the Chief of the Defence Force may revoke an extension of a compulsory retirement age made under the DPR 2002, with the effect that the extension is determined to have been revoked before the repeal of those regulations.

Service in the Defence Force is arduous, and there are much higher demands on Defence Force members' medical and physical fitness than members of the general population. Retaining Defence Force 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 Defence Force 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. Older Defence Force members represent invaluable years of experience.

However, this is balanced against increased costs associated greater healthcare requirements and ensuring that older members have the requisite health and fitness standards.

One way this risk is managed in Defence is to increase the required frequency of periodic medical examinations as Defence Force members get older (this policy is currently included in the internal Defence document: *Defence Health Manual*, Volume 2). Retirement age is another mechanism used to manage the increased risk. A decision to permit a member to serve beyond their retirement age under paragraph 23(2)(b) of the Defence Regulation is an acceptance of the risk in relation to a particular member. This is likely to be influenced by the particular characteristics of the member, including their occupational workgroup, medical and physical fitness

Retirement ages for Defence Force members have increased over time. For example, amendments to the Defence (Personnel) Regulations 2002 in 2007 increased the retirement age for most members in the Permanent Forces from 55 years of age to 60 years of age. Section 88 of the Regulation provides a transitional provision for members who, under the Defence (Personnel) Regulations 2002, had a younger compulsory retirement age from an earlier iteration of the regulations.

***(c) whether providing such exemptions is a proportionate limit on the rights to equality and non-discrimination and work, and in particular, are there any less rights restrictive ways to achieve the stated objective, and are there any safeguards in place to protect these rights.***

#### Defence Force Regulations 2016

The concept of a compulsory retirement age in the Defence Force is a limitation on a person's right not to be discriminated against on the basis of age that is reasonable, necessary and proportionate in the circumstances.

The Defence Force's capability is dependent on the health and fitness of its members. Ensuring that Defence Force members are fit for duty and can be deployed at short notice without medical limitations is a legitimate purpose, and the retirement age in section 23 of the Defence Regulation is a necessary, reasonable and proportionate measure to achieve this.

The concept of a retirement age acts as an institutional milestone that restricts service beyond that age. It provides the ADF with fluent workforce planning and serves as an important capability management tool. That said, it does not guarantee that a member will be given an opportunity to serve to that age.

Subsection 12(5) of the Defence Regulation provides that appointment or enlistment may be for an indefinite period or for a specified period. Those appointed or enlisted for an indefinite, or open-ended, period will become subject to the retirement age provisions of section 23 of the Defence Regulation should their service not end on other grounds before that time. Members who are appointed or enlisted for a specified period will have their suitability for further service reviewed periodically in the context of Service need and ongoing operational capability requirements.

Defence's current preference is to continue to manage service beyond the regulated retirement ages by exception. 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.

Retirement age is a necessary and reasonable mechanism used to manage increased risks as member's age. The retirement ages in the Defence Regulation represent a balance between 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. The Defence Force retirement ages have increased over time, reflecting improvements in the average health and fitness of older people.

Airports (Control of On-Airport Activities) Regulations 1997

Discrimination on the basis of age in relation to the matters regulated by the Airport Regulations 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.

Consideration will be given to removing the exemption for these regulations in the sunseting review process currently underway.

## Excerpt from Parliamentary Joint Committee on Human Rights Report 12 of 2020

**Exemptions from the *Age Discrimination Act 2004***

1.3 The *Age Discrimination Act 2004* (the Age Discrimination Act) makes it unlawful to discriminate against someone on the ground of age in respect of a number of areas (including employment and the provision of goods and services). The Age Discrimination Act sets out that an act will not be unlawful if it is done in compliance with certain listed legislation. This includes 'prescribed regulations made under the *Airports Act 1996*' and 'prescribed provisions' of 'Regulations made under the *Defence Act 1903*'. This instrument prescribes these exemptions. In particular, it prescribes the entirety of the *Airports (Control of On-Airport Activities) Regulations 1997*, which deals with control of liquor, commercial trading, vehicles, gambling, smoking and infringement notices at airports. It also prescribes section 23 of the *Defence Regulation 2016*, which specifies a compulsory retirement age for certain members, and section 88, which provided that those covered under the previous regulations are also subject to the compulsory retirement age. This instrument ensures that anything done by a person in direct compliance with these prescribed regulations will not constitute unlawful age discrimination.

**Preliminary international human rights legal advice*****Right to equality and non-discrimination and right to work***

1.4 Insofar as the instrument prescribes exemptions from the Age Discrimination Act, it engages and appears to limit the right to equality and non-discrimination, on the basis of age, as well as the right to work. 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 (listed as 60 years of age for most members of the Permanent Forces). 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 entitled without discrimination to equal and non-discriminatory protection of the law. The right to equality encompasses both 'direct' discrimination (where measures have a discriminatory *intent*) and 'indirect' discrimination (where measures have a discriminatory *effect* on the enjoyment of rights). The right to work must be made available in a non-discriminatory way and includes a right not to be unfairly deprived of work. 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.

1.5 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. Mandatory retirement ages do not necessarily constitute age discrimination if justified on reasonable and objective grounds, in pursuit of a legitimate objective.

1.6 The statement of compatibility neither acknowledges that the instrument engages the right to equality and non-discrimination and the right to work, nor explains the purpose and necessity of the prescribed exemptions. It notes that the regulations alter the text of the law but 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 2004* prior to amendment by the *Statute Update (Regulation References) Act 2020*. It is therefore unclear whether the exemptions from the discrimination provisions in the Age Discrimination Act pursue a legitimate objective and are proportionate to that objective.

1.7 In order to assess the compatibility of this instrument with the right to equality and non-discrimination and the right to work, further information is required as to:

- (a) what is the objective and effect of prescribing the entirety of the *Airports (Control of On-Airport Activities) Regulations 1997* as exempt from the Age Discrimination Act;
- (b) what is the objective of prescribing sections 23 and 88 of the *Defence Regulation 2016* as exempt from the Age Discrimination Act, and the objective behind the compulsory retirement age; and
- (c) whether providing such exemptions is a proportionate limit on the rights to equality and non-discrimination and work, and in particular, are there any less rights restrictive ways to achieve the stated objective, and are there any safeguards in place to protect these rights.

#### **Committee view**

1.8 The committee notes that this instrument prescribes particular regulations under the *Airport Act 2006* and the *Defence Act 2003* as exempt from the requirements in the *Age Discrimination Act 2004*.

1.9 The committee notes that this instrument engages and may limit the right to equality and non-discrimination, specifically on the ground of age, and the right to work. Differential treatment on the basis of age may not be unlawful discrimination if it is shown to be justified on reasonable and objective grounds, in pursuit of a legitimate objective.

1.10 It is unclear whether the exemptions from the discrimination provisions in the Age Discrimination Act pursue a legitimate objective and are proportionate to that objective.

1.11 In order to form a concluded view of the human rights implications of this instrument, the committee seeks the minister's advice as to the matters set out at paragraph [1.7].





**The Hon Greg Hunt MP**  
**Minister for Health**  
**Minister Assisting the Prime Minister for the**  
**Public Service and Cabinet**

Ref No: MC20-040854

05 NOV 2020

Senator the Hon Sarah Henderson  
Chair  
Parliamentary Joint Committee on Human Rights  
[human\\_rights@aph.gov.au](mailto:human_rights@aph.gov.au)

Dear Chair

Thank you for the opportunity to comment upon Report 12 of 2020 (Report) of the Parliamentary Joint Committee on Human Rights'.

The Report acknowledges specifically that the Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Cruise Ships) Amendment (No. 1) Determination 2020 and the Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Variation (Extension No. 2) Instrument 2020 are non-disallowable instruments, and therefore, the requirement to prepare compatibility statements does not apply.

That statements of compatibility are not required to be prepared for instruments I make under the *Biosecurity Act 2015* (Act) in no way indicates that such rights are not a key consideration in the Australian Government's response. Although a statement of compatibility with human rights is not required, I note that the instruments I have made under the Act are underpinned by engagement with rights such as the rights to life and health.

Instruments made during a human biosecurity emergency under Chapter 8 of the Act are made by me on the advice of the Commonwealth Chief Medical Officer and/or the Australian Health Principal Protection Committee. The text of an instrument is drafted by the Office of Parliamentary Counsel on instructions from my Department and with advice from the Australian Government Solicitor. Once made, the instrument is then published on the Federal Register of Legislation.

Before determining a requirement, I must be satisfied of the following (subsection 477(4)):

- (a) that the requirement is likely to be effective in, or to contribute to, achieving the purpose for which it is to be determined
- (b) that the requirement is appropriate and adapted to achieve the purpose for which it is to be determined
- (c) that the requirement is no more restrictive or intrusive than is required in the circumstances
- (d) that the manner in which the requirement is to be applied is no more restrictive or intrusive than is required in the circumstances
- (e) that the period during which the requirement is to apply is only as long as is necessary.

While each of these requires a strict assessment, I draw your particular attention to subsections (c) and (d) which, in effect, provide that I must be satisfied that a requirement is no more restrictive or intrusive than is required in the circumstances, in both its construction and proposed application.

Additionally, individual determinations made under the Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Declaration 2020 (Declaration) are required to be revoked if circumstances change to reduce the period the requirement is needed. Individual measures under the Declaration are regularly reviewed, based on expert advice, for appropriateness and proportionality.


The Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Cruise Ships) Determination 2020 is designed to protect Australians from the high human biosecurity risk in relation to the spread of COVID-19 on cruise ships. As at 23 October 2020, there have been 1,554 cases of COVID-19 acquired at sea (including on cruise ships, merchant ships and commercial vessels). Statistics on the number of exemptions on cruise ship restrictions are more appropriately sought from the Australian Border Force. Decisions made in relation to exemptions of the restrictions on cruise ships can be the subject of judicial review.

The Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020 is designed to protect Australia against COVID-19 infections brought in by overseas travellers and to limit the global spread of COVID-19. Statistics on the number of individuals that have been exempted from overseas travel restrictions are more appropriately sought from the Australian Border Force. Applicants are eligible to reapply.

I am satisfied that the measures taken by the Government are necessary and appropriate to prevent or control the entry, emergence, establishment or spread of COVID-19 in Australia and are compatible with human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. Once again, I would like to assure the Committee that compatibility with human rights will continue to be a central consideration in the review of current measures and development of additional measures taken by the Government to address the COVID-19 pandemic.

Thank you for writing on this important matter.

Yours sincerely

  
Greg Hunt



**THE HON PETER DUTTON MP  
MINISTER FOR HOME AFFAIRS**

Ref No: MS20-002694

Senator the Hon Sarah Henderson  
Chair  
Parliamentary Joint Committee on Human Rights  
Parliament House  
CANBERRA ACT 2600

*Sarah,*  
Dear Ms Henderson

Thank you for your correspondence of 15 October 2020, requesting further information on the *Coronavirus Economic Response Package (Deferral of Sunsetting – ASIO Special Powers Relating to Terrorism Offences) Determination 2020*.

I have attached my response to the Parliamentary Joint Committee on Human Rights' Scrutiny Report 12 of 2020 as requested. I appreciate the extension of time until 5 November 2020 within which to provide the response.

Yours sincerely

PETER DUTTON

*02/11/20*

## Response to Parliamentary Joint Committee on Human Rights Human rights scrutiny report 12 of 2020

### Coronavirus Economic Response Package (Deferral of Sunsetting—ASIO Special Powers Relating to Terrorism Offences) Determination 2020

#### Introduction

This paper responds to clarification sought by the Parliamentary Joint Committee on Human Rights in relation to the Coronavirus Economic Response Package (Deferral of Sunsetting—ASIO Special Powers Relating to Terrorism Offences) Determination 2020 (the **Determination**) in its *Human rights scrutiny report 12 of 2020*.

The Determination extended the sunset date for the existing questioning, and questioning and detention, powers of the Australian Security Intelligence Organisation (**ASIO**) in Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979 (ASIO Act)*, from 7 September 2020 to 7 March 2021, or until the provisions in the Australian Security Intelligence Organisation Amendment Bill 2020 (the **Bill**) are operative (if earlier).

#### Extending the operation of the Australian Security Intelligence Organisation's (ASIO) compulsory questioning and detention powers

##### Committee comment

**1.35 In order to form a concluded view regarding the extended operation of ASIO's compulsory questioning and detention warrants powers, further information is required as to:**

- (a) what evidence demonstrates a pressing and substantial concern sought to be addressed by maintaining ASIO's questioning and detention warrant power, noting that the government has introduced primary legislation seeking to repeal the detention powers, and that the power itself has never been used;**
- (b) how maintaining ASIO's questioning and detention warrant powers is rationally connected with (that is, effective to achieve) any such pressing and substantial concern; and**
- (c) whether the extension of ASIO's detention warrant powers is a proportionate means by which to address a pressing and substantial concern; and whether there are any less rights restrictive measures (such as the use of questioning warrants without detention) to achieve the stated objective.**

##### Response

The Australian Security Intelligence Organisation Amendment Bill (the **Bill**) was introduced into Parliament on 13 May 2020 and referred to the Parliamentary Joint Committee on Intelligence and Security (**PJCIS**) for review. The Bill repeals the Australian Security Intelligence Organisation's (**ASIO**) existing questioning, and questioning and detention, warrant framework in Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979 (ASIO Act)* and introduces a reformed

compulsory questioning and apprehension framework. The proposed framework in the Bill remains subject to consideration by the PJCIS.

The Bill implements the Government's response to recommendations of the PJCIS in its Inquiry Report on ASIO's questioning and detention powers of 10 May 2018. In its report, the PJCIS recommended that ASIO retain a compulsory questioning power. Consistent with this recommendation, the Determination will ensure that ASIO's compulsory questioning power is retained while the PJCIS and the Parliament consider the reforms to ASIO's compulsory questioning powers brought forward in the Bill. The Government intends to pass the Bill as soon as possible after carefully considering any recommendations of the PJCIS's current review of the Bill.

In addition, allowing ASIO's detention power to sunset before the new questioning framework contained in the Bill is implemented would risk a capability gap for ASIO. The ability to detain a person under a questioning and detention warrant is potentially necessary to ensure that ASIO's questioning and investigation is not prejudiced where there are reasonable grounds on which to believe that the person may not comply with a request to appear, may alert people involved in a terrorism offence to the investigation, or may destroy records or other things that the person may be requested to produce. This power is necessary to ensure the timely gathering of information relevant to investigating a terrorism offence. If a person is allowed to disrupt questioning this could jeopardise the effectiveness of the information gathering process, thereby undermining an investigation into a terrorism offence. This issue has been addressed by the addition of an apprehension power contained in the Bill, but could not be addressed if only ASIO's questioning, but not its questioning and detention, powers were extended pending passage of the Bill.

The Government's aim remains to pass the Bill as soon as possible, at which time the extension of the existing powers will cease to have effect, and the new framework contained in the Bill will come into force.