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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

HUMAN RIGHTS AND EQUAL OPPORTUNITY

COMMISSION BILL 1984

EXPLANATORY MEMORANDUM

(Circulated by authority of Senator the Honourable
Gareth Evans, Q.C., Attorney-General)

OUTLINE

The Human Rights and Equal Opportunity Commission Bill 1984 establishes a new Human Rights and Equal Opportunity Commission. The new Commission (which will replace the existing Human Rights Commission) will be the basic machinery through which the Commonwealth's Racial Discrimination Act 1975 and Sex Discrimination Act 1984 will be administered and for implementing Australia's obligations under the International Covenant on Civil and Political Rights, the Declaration of the Rights of the Child, the Declaration on the Rights of Mentally Retarded Persons and the Declaration on the Rights of Disabled Persons.

2. It will also be the vehicle under which Australia's obligations under the Discrimination (Employment and Occupation) Convention, 1958 (ILO Convention 111) will be implemented. At present those obligations are implemented through National and State Employment Discrimination Committees established pursuant to a national policy announced by the then Minister for Labour in 1973. The investigation, conciliation and education functions performed by the Committees will be gradually subsumed within the functions of the new Commission.

3. Future legislation in the human rights area (such as the proposed Australian Bill of Rights) will also be administered through the new Commission.

NOTES ON CLAUSES

PART 1 - PRELIMINARY

Clauses 1 and 2

1. The first two clauses of the Bill provide for the short title and commencement of the legislation. The legislation will come into operation on a day to be fixed by Proclamation so as to provide time for preparatory arrangements to be made.

Clause 3: Interpretation

2. Definitions of significant words or phrases used in the legislation are detailed below.

"act or practice": this general definition, which is the same as the one that appears in the present Human Rights Commission Act, limits the meaning of the expression to acts or practices engaged in by or on behalf of the Commonwealth or an authority of the Commonwealth or of a Territory (other than the Northern Territory) or engaged in wholly or partly within a Territory (other than the Northern Territory). The meaning of the expression is extended in relation to those provisions covering the Commission's functions relating to equality of opportunity (see clause 30).

"Convention" is defined as the Discrimination (Employment and Occupation) Convention 1958 (ILO Convention 111). Australia is a member of the Convention and the Commission will be the major body through which effect is given to Australia's obligations under the Convention. The English text of the Convention is set out in Schedule 1 to the Bill.

"Covenant" is defined as the International Covenant on Civil and Political Rights, the English text of which is set out in Schedule 2 to the Bill.

"Declarations" is defined as the Declaration of the Rights of the Child, the Declaration on the Rights of Mentally Retarded Persons and the Declaration on the Rights of Disabled Persons. The English text of the Declarations is set out in Schedules 3, 4 and 5 of the Bill. The rights and freedoms recognised or declared in the Covenant and the Declarations form the basis of the definition of "human rights" for the purposes of the legislation.

"discrimination": this definition is derived from that appearing in the Convention, which specifies the grounds on which an act is to be treated as discrimination and also provides for the development of additional appropriate grounds. Additional grounds have already been developed in Australia by the Employment Discrimination Committees, including criminal record, age, marital status, medical

record, personal attributes, nationality, trade union activities, physical disability and sexual preference. The legislation will enable the Attorney-General to determine additional grounds of discrimination (see sub-clause 31(2)). The grounds developed by the Employment Discrimination Committees could be included in such a determination.

"Race Discrimination Commissioner" is defined as the Race Discrimination Commissioner appointed under the Racial Discrimination Act 1975. That Act presently provides for the appointment of a Commissioner for Community Relations but amendments which will come into operation on the same day as the Bill will change the office to Race Discrimination Commissioner.

"State" is defined to include the Northern Territory.

Clause 4 - Operation of State and Territory laws

3. This clause is designed to preserve any State or Territory law that furthers the objects of the Convention and that is capable of operating concurrently with the Bill.

Clauses 5 and 6 - External Territories and extent to which the
legislation binds the Crown

4. Clause 5 provides that the legislation shall apply to every external Territory. Under clause 6, the legislation will bind the Crown in right of the Commonwealth and Norfolk Island, but the Crown in right of the States and the Northern Territory is not bound except to the extent expressly provided by the legislation.

PART II - HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION

Division 1 - Establishment and Constitution of Commission

Clause 7 - Human Rights and Equal Opportunity Commission

5. This clause provides for the establishment, as a body corporate, of the Human Rights and Equal Opportunity Commission. The name of the new Commission reflects the importance of its equal opportunity and anti-discrimination functions.

Clause 8 - Constitution of Commission

6. The Commission will consist of a President, the Race Discrimination Commissioner and the Sex Discrimination Commissioner appointed under the Racial Discrimination Act and Sex Discrimination Act, respectively, and at least one, but not more than 3, other members. Members, other than the two specialist Commissioners, are to be appointed by the Governor-General (sub-clause 8(2)). It is expected that appointments will be on a full-time basis but the Bill provides for part-time appointments where the Governor-General is satisfied that such appointments are desirable (sub-clauses 8(3) and (4)). At least one member must be legally qualified (sub-clause 8(5)).

7. The affairs of the Commission will be administered by the President in accordance with the decisions, and subject to the directions of the Commission as a whole.

Clauses 9 and 10 - Appointment of Judges

8. Clause 9 empowers the Governor-General to enter into arrangements with the Governor of a State or the Administrator of the Northern Territory to secure the services of a judge of that State or Territory as a member of the Commission. Clause 10 preserves the status and rights of a person who is the holder of a Commonwealth judicial office and who is appointed as a member of the Commission.

Division 2 - Functions of Commission

Clause 11 - Functions of Commission

9. Clause 11 sets out the functions of the Commission. The Commission will perform functions conferred under the Racial Discrimination Act, the Sex Discrimination Act or any other Commonwealth enactment. Additional functions may be conferred pursuant to Commonwealth/State arrangements and under certain State enactments. The Commission will have inquiry, conciliation and reporting functions in relation to acts or practices that may be inconsistent with or contrary to any human right; it will have research, education and promotion

functions; it will examine relevant international instruments, Commonwealth enactments and (where requested to do so by the Minister) proposed enactments to ensure that they contain nothing inconsistent with or contrary to any human right; it will report to the Minister on any action that needs to be taken by Australia to comply with its international obligations or on any laws that should be made by the Parliament in the human rights area; it will prepare and publish guidelines for the avoidance of acts or practices inconsistent with or contrary to human rights; and it will be able (with the consent of the court) to intervene in proceedings involving human rights issues. Additional functions in relation to ILO Convention 111 are conferred under clause 31 of the Bill.

Clause 12 - Commission to have regard to certain matters

10. This clause requires the Commission to perform its functions on the basis of the principle that every person is free and equal in dignity and rights.

Clause 13 - Powers and duties of Commission

11. Clause 13 gives the Commission the power to do all things necessary or convenient for or in connection with the

performance of its functions. Under sub-clause 13(2), it may report to the Minister at any time on any matter arising in the course of the performance of its functions and is required to so do if requested by the Minister.

Clause 14 - Form of examination or inquiries

12. Clause 14 empowers the Commission to conduct examinations and inquiries as it sees fit and without being bound by rules of evidence. This provision will enable the Commission to act informally in carrying out its examination, inquiry and conciliation functions. In any case where the Commission considers it necessary to protect the interests of a complainant or any person who has given, (or proposes to give) oral or written information or evidence to the Commission, it may give directions prohibiting the disclosure of the identify of the person (sub-clause 14(2)). Sub-clause 14(3) makes it an offence to contravene or fail to comply with such a direction.

Clause 15 - Commission may engage in consultations

13. This clause will enable the Commission to work and consult with a range of individuals and organizations, both governmental and non-governmental, in the performance of its functions.

Clause 16 - Inter-governmental arrangements

14. This clause empowers the Minister to make arrangements with a Minister of a State for the performance on a joint basis of functions relating to human rights or discrimination in employment and occupation in that State; for the performance by that State or a State instrumentality of functions (including functions of the Commission) relating to human rights or discrimination in employment and occupation on behalf of the Commonwealth; or for the performance by the Commission of functions on behalf of that State relating to human rights or discrimination in employment or occupation. Any arrangement so made must be published in the Gazette. A system of co-operative arrangements will be developed under this clause. Such a system will prevent duplication of Commonwealth and State efforts and will provide a basis for the establishment of an effective system of "one-stop shopping" for complainants.

Clause 17 - Advisory committees

15. Clause 17 provides for the establishment of a system of advisory committees appointed by the Minister or (with the approval of the Minister) by the Commission. It is at this stage proposed to establish:

- . a National Advisory Committee on Discrimination in Employment, including representatives of Commonwealth and State governments, the ACTU and CAI and women, migrants and Aborigines: this Committee will advise the Commission on the performance of its functions and will have the additional special function of advising the Minister on the implementation of ILO Convention 111;
- . an Advisory Committee comprising the heads of State equal opportunity bodies to advise on matters such as co-ordination of procedures under Commonwealth/State co-operative arrangements developed under clause 16; and
- . regional Advisory Committees, which will keep the Commission in touch with community opinion and assist the Commission in its public information and promotion work: present members of the State Employment Discrimination Committees and part-time members of the present Human Rights Commission could become members of these regional committees.

Clause 18 - Declaration by Minister

16. This clause enables the Minister to declare, by notice in the Gazette, that a function expressed to be conferred on the Commission by a State enactment can conveniently be performed by the Commission. The Commission can then perform that function.

Clause 19 -Delegation

17. This clause empowers the Commission to delegate all or any of its powers (other than the power of delegation) to a member of the Commission, a member of the staff of the Commission or to any person or body. A power exercised by a delegate shall be deemed to have been exercised by the Commission.

Division 3 - Functions relating to Human RightsClause 20 - Performance of functions relating to human rights

18. Sub-clause 20(1) requires the Commission to perform its inquiry and conciliation functions whenever it receives a complaint or is requested to do so by the Minister, or whenever it appears desirable to the Commission to do so. Sub-clause 20(2) sets out the circumstances in which the Commission is to have a discretion to refuse to hold an inquiry or to discontinue an inquiry. If the Commission is satisfied that the matter complained of is not inconsistent with or contrary to any human right or that the person aggrieved does not wish the inquiry to be made or continued, the Commission may refuse to make an inquiry or may discontinue an inquiry. It may also refuse to make an inquiry or may discontinue an enquiry where the act or practice

concerned occurred more than 12 months before the complaint was made, where the Commission is of the opinion that the complaint is frivolous, vexatious, misconceived or lacking in substance, or where it is of the opinion that some other more appropriate remedy is available or that the complaint could be dealt with more effectively or conveniently by another statutory authority.

19. In order to ensure that, if the Commission decides not to make an inquiry, it does so expeditiously, sub-clauses 20(3) and (4) require the Commission to decide whether or not to inquire into a complaint within two months of receiving it, and if it decides not to inquire, to inform the complainant in writing of the reasons for its decision.

20. Sub-clause 20(5) requires the Commission to provide assistance to complainants in formulating complaints or reducing them to writing.

Clause 21, 22 and 23: Power to obtain information and examine witnesses

21. These clauses, taken together, will assist the Commission in the performance of its functions by providing it with comprehensive coercive powers to obtain information or documents. To allow it to investigate thoroughly complaints

made to it, clause 21 empowers the Commission, by notice served on a person, to require the person to give any information or produce any documents relevant to its inquiries. A person may be required to provide information in writing or by answering questions.

22. Clause 22 empowers the Commission to administer an oath or affirmation to a person required to answer questions under clause 21.

23. Clause 23 provides penalties for persons who fail to provide information or produce a document in pursuance of a notice under clause 21, or who refuse an oath or affirmation under clause 22.

Clause 24 - Disclosure of information

24. The Commission's powers under clause 21 are subject to restrictions on the production of certain sensitive material. Under clause 24, the Attorney-General may certify that the disclosure of specified information to the Commission would be contrary to the public interest on the ground that it would prejudice the security, defence or international relations of the Commonwealth; it would disclose communications between a Commonwealth Minister and a State Minister thereby prejudicing relations between the Commonwealth and State Governments; or

it would involve the disclosure of the deliberations of the Cabinet, or a Committee of the Cabinet, or of the Executive Council. The Commission is not empowered to require any information specified in such a certificate to be furnished to it.

25. Sub-clause 24(2) provides that a person cannot refuse to provide information on the grounds that to do so would contravene the provisions of another Act, or would be contrary to the public interest; would disclose legal advice to a Minister, a Commonwealth authority or a person or body acting on behalf of the Commonwealth; might make the person liable to a penalty; or would tend to incriminate the person (except where the information relates to a pending change - sub-clause 24(4)). Any information provided by the person is not, however, admissible in evidence against the person except in proceedings under clause 25.

26. Sub-clause 24(3) protects a person who, when required to do so, furnishes information, produces a document or answers a question from liability to any penalty under any other law.

Clause 25 - False or misleading information

27. This clause makes it an offence for a person to furnish information or make a statement to the Commission or any person exercising powers or performing functions under the legislation, where the information or statement is, to the knowledge of the person, false or misleading in a material particular.

Clause 26: Offences

28. Sub-clause 26(1) makes it an offence to insult, hinder, obstruct, molest or interfere with a member of the Commission participating in an examination or inquiry or a person holding an inquiry or carrying out an investigation on behalf of the Commission. Sub-clause 26(2) makes it an offence to victimize complainants (or intended complainants); persons who have made (or propose to make), in good faith, allegations that an act or practice is inconsistent with or contrary to a human right or constitutes discrimination; and persons who furnish or give (or who propose to furnish or give) information or evidence to the Commission or to an authorized person.

Clause 27 - Commission to give opportunity for making submissions

29. When the Commission considers that an act or practice is inconsistent with any human right, clause 27 requires it to give the person who did the act or engaged in the practice a reasonable opportunity to make oral or written submissions (or both) to the Commission before it reports to the Minister.

Clause 28 - Nature of settlements

30. This clause requires that the recognition and protection of human rights is reflected in any settlement that the Commission attempts.

Clause 29 - Reports to contain recommendations

31. Sub-clause 29(1) is designed to ensure that, when it reports the result of its examination of enactments or proposed enactments that the Commission finds inconsistent with or contrary to any human right, the Commission will make specific recommendations to the Minister on the action the Commission considers should be taken to remove the inconsistency or ensure that the enactment is not contrary to any human right. Sub-clause 29(2) requires the Commission,

when reporting the results of an inquiry into an act or practice that the Commission finds to be inconsistent with or contrary to any human right, to advise those involved of its findings and authorises it to make recommendations for the prevention of the repetition of the act or a continuation of the practice.

32. Where the Commission finds that an act or practice has not been established or is not inconsistent with or contrary to any human right, sub-clause 29(3) requires it to advise the complainant and the respondent of its findings.

Division 4 - Functions relating to Equal Opportunity in Employment

Clause 30 - Interpretation

33. For the purposes of Division 4 of Part II of the legislation, sub-clause 30(1) defines the expression "act or practice" so as to include an act or practice done or engaged in by or on behalf of a State or a State authority, under a State law, or wholly or partly within a State. Sub-clause 30(2) provides that Division 4 binds the Crown in right of a State. The ensuing provisions of the Division (clauses 31 to 35, inclusive) deal with the Commission's functions in relation to equal opportunity in employment and occupation and

are designed to enable the Commission to function as the machinery for giving effect to Australia's obligations under ILO Convention 111 in both the Commonwealth and State spheres.

Clause 31 - Functions of Commission relating to equal opportunity

34. Clause 31 confers on the Commission special functions in relation to equal opportunity in employment or occupation. In this area it has research, education and promotion functions; it will inquire into and attempt to conciliate discriminatory acts or practices; it will examine enactments and (when requested by the Minister) proposed enactments to ascertain whether they nullify or impair equality of opportunity or treatment in employment and occupation; it will examine relevant international instruments to ascertain whether they contain anything inconsistent with the Convention; and it will report to the Minister on any action that should be taken by Australia to comply with the requirements of the Convention and on any law that should be made by the Parliament on matters relating to equality of opportunity and treatment in employment and occupation. The Commission will prepare and publish guidelines for the avoidance of discriminatory acts or practices. It will also be able (with the consent of the Court) to intervene in proceedings involving discrimination issues.

Clause 32 - Performance of functions relating to equal opportunity

35. This clause requires the Commission to conduct an inquiry in response to a complaint, or a request by the Minister or where it appears desirable to the Commission to do so. The Commission has discretionary powers to refuse to conduct an inquiry, or to continue an inquiry, similar to the discretionary powers under clause 19.

36. It is not intended that the functions of the Commission in this area should replace the existing Commonwealth or State anti-discrimination legislation. Sub-clause 32(2) therefore provides that the Commission is not to inquire, or continue to inquire, into an act or practice that is dealt with by a prescribed Commonwealth enactment or State law. The effect of this provision is that a complaint of discrimination in employment or occupation that is covered by the Racial Discrimination Act or the Sex Discrimination Act will continue to be dealt with under that Act. A complaint covered by State anti-discrimination legislation will be referred to the relevant State authorities to be dealt with under the State legislation.

Clause 33 - Application of certain provisions of Division 3

37. The Commission's powers and duties set out in sub-clauses 20(3) to (5), inclusive, and clauses 21 to 27, inclusive, are, by virtue of clause 33, applicable in relation to its functions under this Division. There is, however, an important exception. It is not intended that the legislation should confer on the Commission wider functions in relation to employment and occupation than the functions hitherto carried out by the State Employment Discrimination Committees. The effect of paragraph 33(c), therefore, is to ensure that the Commission does not have coercive information gathering powers in this area. Any extension of the Commission's functions in this area will be a matter for Commonwealth/State arrangements.

Clause 34 - Nature of settlements

38. This clause is similar to clause 28. It requires the Commission to have regard to the need to ensure that any settlement reflects a recognition of the right of equality of opportunity and treatment in respect of employment and occupation.

Clause 35 - Reports to contain certain recommendations

39. The requirements of this clause, which deals with reports following an examination or inquiry by the Commission under Division 4, are substantially similar to the requirements of clause 29.

Division 5 - Administrative Provisions

Clause 36 - Acting President

40. This clause enables the Minister to appoint a person to act as President during a vacancy in the office of President or during any period (or all periods) when the President is absent from duty or from Australia or is, for any other reason, unable to perform the functions of his office.

Clause 37 - Terms and conditions of appointment

41. Clause 37 provides that an appointed member of the Commission is to hold office for such term, not exceeding 5 years, as is specified in the instrument of appointment and is to be eligible for re-appointment. A person who has attained the age of 65 years (or 70 years in the case of certain

judges) cannot be appointed or re-appointed. A person cannot be appointed for a term that extends beyond his 65th birthday (or 70th birthday in the case certain judges).

Clause 38 - Remuneration and allowances

42. Under this clause the remuneration of an appointed member of the Commission will be determined by the Remuneration Tribunal. Where no determination is in operation appointed members are to be paid such remuneration as is prescribed. Allowances are to be payable to appointed members as prescribed. Sub-clause 38(4) provides that a member who is in receipt of a salary or annual allowance as a Judge is not entitled to remuneration under the legislation.

Clause 39 - Leave of absence

43. Under this clause the Minister may grant leave of absence to members of the Commission.

Clause 40 - Resignation

44. This clause provides that an appointed member of the Commission may resign by writing signed and delivered to the Governor-General.

Clauses 41 and 42 - Termination of appointment and disclosure of interests

45. These are standard clauses. Clause 41 sets out the circumstances in which the Governor-General may (or is required to) terminate the appointment of appointed members, other than Judges. Clause 42 obliges members to disclose any direct or indirect pecuniary interest they may have in matters considered, or about to be considered, by the Commission.

Clause 43 - Staff

46. This clause provides that the staff of the Commission are to be employed under the Public Service Act 1922. The President will have the powers of a Secretary under that Act.

Clause 44 - Meetings of the Commission

47. This clause sets out how meetings of the Commission are to be convened and their conduct regulated. In particular, it provides that a quorum is to be constituted by not less than one-half of the number of members for the time being holding office.

Clauses 45 and 46 - Reports

48. Under clause 45, the Commission is required to make an annual report, and its first annual report is to cover the operations of the Human Rights Commission for the period from that Commission's last annual report to the time when the new Commission commences operation.

49. Clause 46 requires that the Commission's annual reports and every report furnished by it under Part II of the legislation, are to be tabled in Parliament within 15 sitting days after receipt by the Minister.

PART III - MISCELLANEOUSClause 47: Declaration of international instruments

50. Sub-clause 47(1) empowers the Minister, after consultation with the States, to declare an international instrument ratified, acceded to or adopted by Australia to be an international instrument relating to human rights and freedoms for the purposes of the legislation. The effect of this provision is that an instrument so declared becomes a "relevant international instrument" as defined in clause 3 and the rights and freedoms recognized or declared in the instrument become "human rights" within the definition of that expression.

51. Sub-clause 47(2) requires publication in the Gazette of copies of a declaration under sub-clause 47(1) and of the instrument to which it relates, together with a copy of Australia's instrument of ratification or accession or of the terms of any explanation given by Australia of its vote in respect of the instrument. Under sub-clause 47(3) a declaration is to be tabled in both Houses of the Parliament and may be subject to disallowance.

Clause 48 - Protection from civil action

52. Sub-clause 48(1) protects the Commission, a member or a person acting on behalf of the Commission against actions and

other proceedings for damages, in relation to anything done or omitted to be done in good faith in the performance (or purported performance) of the functions of the Commission or in the exercise (or purported exercise) of any power or authority of the Commission. Sub-clause 48(2) protects persons from civil actions for loss, damage or injury by reason only that a complaint or submission has been made to the Commission or information has been furnished to the Commission.

Clause 49 - Non-disclosure of private information

53. This clause is designed to protect private information that comes into the hands of a member of the Commission, an authorized person or a member of the staff of the Commission. Such persons are not permitted, except in the performance of their duties or the exercise of their powers under the legislation, to record, divulge, communicate or use any such information.

Clause 50: Regulations

54. This clause enables the Governor-General to make regulations for the purposes of the legislation.





