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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

EXPLANATORY MEMORANDUM

TO AMENDMENTS OF HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION  
(TRANSITIONAL PROVISIONS AND CONSEQUENTIAL AMENDMENTS) BILL  
1985.

(Circulated by the authority of the Minister Representing the  
Attorney-General).



These amendments affect a number of clauses in the Human Rights and Equal Opportunity Commission (Transitional Provisions and Consequential Amendments) Bill 1985. The most significant changes are designed to bring the procedural provisions in the Racial Discrimination Act 1975 into line, as far as practicable, with those in the Sex Discrimination Act 1984. The Explanatory Memorandum relating to the Bill should be read subject to the following amendments:

Page 5 - Paragraph 14 - Add, after the second point:

". "Federal Court" is defined as the Federal Court of Australia;"

- Add, at the end of the paragraph:

". "registered organisation" is defined as an organisation registered pursuant to the Conciliation and Arbitration Act 1904."

Pages 5 and 6 - Paragraphs 16 to 19 - Replace the paragraphs and associated headings with:

"Clause 14: Land, housing and other accommodation.

16. This clause amends section 12 of the Principal Act to except from that section acts relating to accommodation in a dwelling-house or flat, being accommodation shared or to be shared, in whole or in part, with the person who did the act or a person on whose behalf the act was done or a relative of either of those persons. The exception reflects an existing exception in paragraph 24(2)(a) of the Principal Act. The exception is to be moved to section 12 because the

procedural provisions in the Act (including section 24) are to be replaced with provisions based on the procedural provisions in the Sex Discrimination Act (see para. 19C below).

Clause 15: Employment

17. This clause amends section 15 of the Principal Act to except from that section acts relating to employment, or an application for employment, in a dwelling-house or flat occupied by the person who did the act or a person on whose behalf the act was done or a relative of either of those persons. The exception reflects an existing exception in paragraph 24(2)(b) of the Principal Act. The exception is to be moved to section 15 because the procedural provisions in the Act (including section 24) are to be replaced with provisions based on the procedural provisions in the Sex Discrimination Act (see para. 19C below).

Clause 16: Advertisements

18. This clause amends section 16 of the Principal Act so as to render unlawful advertisements or notices that indicate an intention to do an act which is excepted from section 12 or 15 by sub-section 12(3) or 15(5), respectively. The amendment to section 16 reflects a reference to section 16 in sub-section 24(2) of the Principal Act (see paras. 16 and 17 above).

Clause 17 - new Part III

19. Part III of the Principal Act is to be entirely replaced.

19A. The new section 19 establishes the office of Race Discrimination Commissioner, which is to replace the office of Commissioner for Community Relations.

19B. The new sub-section 20(1) confers functions on the new Commission. The first three functions reflect the present functions of the Human Rights Commission under the Principal Act. The other three functions (which are new) are to prepare and publish guidelines for the avoidance of unlawful acts under the legislation, (with the leave of the court) to intervene in proceedings that involve racial discrimination issues, and to inquire into, and make determinations on, matters referred to the Commission by the Minister or the Commissioner.

19C. Sections 20A to 25, inclusive, of the Principal Act are to be replaced with provisions modelled on sections 48(3) to 84, inclusive, of the Sex Discrimination Act 1984. The purpose of this amendment is to bring the procedural provisions in the Principal Act into line with those in the Sex Discrimination Act. Uniformity of procedures should enable the new Commission to conduct its operations more efficiently. The proposed new sections have the following effect.

Sub-section 20(2)

This sub-section provides that the Commissioner shall not participate in any inquiry of the Commission under Division 3 or be present during the Commission's deliberations or take part in a decision of the Commission in connection with such an inquiry.

Section 21 - Function of Commissioner

This section provides that one of the functions of the Commission shall be performed by the Commissioner on behalf of the Commission. This function is to inquire into alleged infringements and endeavour by conciliation to effect a settlement.

Section 22 - Complaints

This section provides that complaints of unlawful acts under Part II may be made in writing by certain persons on their own behalf or on behalf of other persons or a class of persons or by trade unions on behalf of members.

Section 23 - Commissioner deemed to be a complainant

This section provides that where the Commissioner refers to the Commission a matter that came before the Commissioner other than by way of a complaint made to the Commission, or where the Minister has referred a matter to the Commission, then the matter is to be dealt with as if it had been the subject of a complaint and the Commissioner is deemed to be a complainant.

Division 2 - Inquiries by Commissioner

Section 24 - Inquiries by Commissioner

Sub-section (1) of this section provides that where a complaint is made to the Commission or it appears a person has done an act made unlawful by a provision of Part II, the Commission is to notify

the Commissioner who shall inquire into the complaint and endeavour, by conciliation, to effect a settlement.

Sub-section (2) describes the circumstances in which the Commissioner can decide not to inquire, or continue an inquiry, into an act.

Sub-sections (3), (4) and (5) provide that where the Commissioner decides not to inquire or continue to inquire into a matter, notice is to be given to the complainant of that decision, of the reasons for the decision and the rights of the complainant. The complainant can within a specified time require the Commissioner to refer the complaint to the Commission. The Commissioner is then to so refer the complaint together with a report of inquiries made.

Sub-section (6) provides that the Commissioner may obtain information from such persons and make such inquiries as the Commissioner thinks fit.

Section 24A - Application for interim determination under section 25Y

This section provides for an application to be made by the Commissioner to the Commission for an interim determination in regard to a complaint or for the variation or revocation of such a determination.

Section 24B - Power to obtain information and documents

Sub-section (1) of this section empowers the Commissioner to serve notice on a person requiring

the furnishing of information, or the production of documents, relevant to an inquiry under this Division.

Sub-section (2) describes the powers of the Commissioner in regard to documents so produced.

Section 24C - Directions to persons to attend compulsory conference

This section provides that the Commissioner may direct persons to attend a conference for the purposes of inquiry into an act or to endeavour to settle a matter to which the legislation relates.

Section 24D - Compulsory conference

This section deals with matters concerning the conduct of a compulsory conference including the requirement for the conference to be conducted in private.

Section 24E - Reference of matters to the Commission

Sub-section (1) of this section provides that the Commissioner shall refer a matter to the Commission, together with a report about the Commissioner's inquiries, where the matter cannot be settled by conciliation or the nature of the matter is such that it should be referred to the Commission.

Sub-section (2) provides that the Commissioner's report shall not include details of anything said or done in conciliation proceedings under the Division.



Sub-section (3) provides that evidence of matters arising in the course of conciliation proceedings is not admissible in subsequent proceedings under this Part.

Division 3 - Inquiries by Human Rights and Equal Opportunity Commission

Section 24F - Minister may appoint persons to participate in inquiries

Under this section, the Minister may appoint such persons as he or she considers necessary to participate in the inquiry function of the Commission. Persons so appointed will be available, when called upon by the President of the Commission, to assist the Commission in the performance of its inquiry function under the Principal Act. This provision enables the appointment of, for example, officers of State anti-discrimination or equal opportunity agencies to assist in the conduct of an inquiry in their State.

An appointment under this provision is for a maximum period of 5 years and the Minister has power to determine the terms and conditions of appointment. The Minister also has power to enter into an arrangement with an appropriate State or Northern Territory Minister to secure the services of the holder of a judicial office of that State or Territory. Such an arrangement may provide for reimbursement to the State or Territory. The appointment of a person who is the holder of a Commonwealth judicial office will not affect the various entitlements or privileges to which the person is entitled as the holder of that judicial office.

Section 25 - Reference of matter to the Commission  
by the Minister

This clause provides that the Minister may refer any matter to the Commission for inquiry as a complaint.

Section 25A - Inquiries into complaints

This section provides that the Commission shall hold inquiries into complaints referred to it unless the complainant, or the Minister, in regard to a section 25 matter, notifies the Commission that he or she does not wish the inquiry to be held or to continue.

Section 25B - Exercise of inquiry powers by  
Commission

Sub-section (1) provides that inquiries may be conducted by a single legally qualified member of the Commission or by two or more members, at least one of whom is legally qualified.

Sub-section (2) provides that if only one legally qualified member is present at an inquiry, that member is to preside. The sub-section makes further provision for the case where more than one legally qualified member is present.

Sub-section (3) provides that a legally qualified person is a Judge or legal practitioner.

Section 25C - Single inquiry in relation to several complaints

This section empowers the Commission to hold a single inquiry where two or more complaints arise out of the same circumstances.

Section 25D - Joinder of parties by the Commission

This section empowers the Commission to join a person as a party to an inquiry.

Section 25E - Notice of inquiry and rights of parties at inquiry

This section provides for giving of notice of an inquiry, opportunity to give evidence, etc. An inquiry may be held in the absence of a party who fails to attend after notice has been given.

Section 25F - Parties to an inquiry

This section describes who are to be parties to an inquiry.

Section 25G - Right of appearance and to representation

This section provides that parties to an inquiry are entitled to appear personally or, where the party is a body of persons, by an officer, employee or agent of the body. Where the Commission has made arrangements for counsel to assist it, parties may be represented by a solicitor, counsel or

agent. In other cases, legal representation is with the leave of the Commission. Only solicitors or counsel are entitled to remuneration for representing a party to an inquiry.

Section 25H - Inquiries may be held in private

This section provides that inquiries shall be held in public unless the Commission decides on its own motion or on the application of a party to the inquiry that the inquiry, or part of the inquiry, should be held in private.

Section 25J - Commission may prohibit publication of evidence, & c.

Sub-section (1) of this section provides that the Commission may direct that evidence or the contents of a document or details that might identify a party or witness are not to be published or are to be published subject to restrictions.

Sub-section (2) provides that this does not derogate from the power of the Commission to hold an inquiry in private.

Section 25K - Counsel assisting the Commission

This section provides that the Commission may make arrangements for counsel to appear to assist the Commission at an inquiry.

Section 25L - Determination of representative complaints

This section provides for the Commission to determine as a preliminary matter to an inquiry whether a complaint should be dealt with as a representative complaint.

Section 25M - Matters to be considered in determination of representative complaint

This section sets out the matters to be considered by the Commission in deciding whether a complaint should be dealt with as a representative complaint.

Section 25N - Amendment of representative complaints

This section empowers the Commission to amend a complaint so that it can be dealt with as a representative complaint and vice versa.

Section 25P - Ordinary complaints not excluded by representative complaints

This section provides that a complaint may be lodged notwithstanding that the same conduct is the subject of a representative complaint.

Section 25Q - Resolution of complaint by conciliation

This section empowers the Commission to endeavour to resolve complaints by conciliation and requires it to effect an amicable settlement where possible.

Section 25R - Evidence and findings in other proceedings

This section provides that the Commission may, in its discretion, receive certain matters in evidence and adopt relevant findings of a court or tribunal.

Section 25S - Powers of Commission to take evidence

Sub-sections (1) and (2) of this section provide that the Commission may administer an oath or affirmation and summon persons to give evidence and produce documents.

Sub-section (3) provides that parties to proceedings may call witnesses. Sub-section (4) provides that a person appearing as a witness may be examined, cross-examined and re-examined.

Section 25T - Fees for witnesses

This section allows for fees and allowances for witnesses who are summoned to appear before the Commission. The fees and allowances are generally to be paid by the Commonwealth, unless a person other than the Commonwealth requested that the witness be summoned. In that case, the person making the request is to pay the fees and allowances, unless the Commission orders that they be paid by the Commonwealth.

Section 25U - Retention and copying of documents

This section provides that the Commission may retain for a reasonable period documents produced to it and may make copies of the documents.

Section 25V - Application of rules of evidence, & c.

This section provides that for the purposes of an inquiry, the Commission, inter alia, is not bound by rules of evidence, shall conduct the inquiry with as little formality and with as much expedition as the requirements of the Act and the subject of the complaint allows and can give directions as to procedure.

Section 25W - Consideration of exceptions and exemptions

This section provides that in determining whether an act is unlawful under the legislation, the Commission is not required to have regard to any exemption or exception unless evidence of the applicability of the exemption or exception is before the Commission.

Section 25X - Commission may dismiss frivolous, & c., complaints

This section enables the Commission to dismiss a complaint if it is satisfied it is frivolous, vexatious, misconceived, lacking in substance or relates to an act not unlawful by reason of a provision of Part II.

Section 25Y - Making of interim determination

This section empowers the Commission or the President to make an interim determination, after the lodgment of a complaint, of such nature as would, if it were binding or conclusive, preserve the status quo or rights of parties to the complaint, but the determination is not to be binding or conclusive between the parties.

Section 25Z - Determination or other decision of the Commission

This section provides that the Commission after holding an inquiry may dismiss a complaint or if it finds the complaint substantiated may make a determination. The section lists matters which can be included in the determination which is not binding or conclusive between the parties.

The determination that can be made by the Commission can include, inter alia:

- . a declaration that the respondent should perform any reasonable act to redress loss or damage;
- . a declaration that the respondent should employ or re-employ the complainant; and
- . a declaration that the respondent should pay damages by way of compensation - this course is not available if the complaint has been dealt with as a representative complaint.

Section 25ZA - Proceedings in Federal Court

Sub-section (1) of this section provides that the Commission or complainant may institute proceedings in the Federal Court to enforce a Commission determination.

Sub-sections (2) and (3) provide for the making of orders by the Federal Court where it is satisfied that a respondent has engaged in conduct that is unlawful under the legislation.



Section 25ZB - Assistance in proceedings before the Commission

Sub-section (1) of this section provides that the Commission may recommend to the Attorney-General that assistance be given to a person in respect of expenses incurred in proceedings before the Commission.

Sub-section (2) provides for the authorization by the Attorney-General of the grant of assistance either unconditionally or subject to such conditions as the Attorney-General determines.

Section 25ZC - Assistance in proceedings before Federal Court

Sub-section (1) of this section provides that a person may apply to the Attorney-General for assistance in regard to proceedings instituted in the Federal Court under section 25ZA.

Sub-section (2) provides for the authorization by the Attorney-General of the grant of assistance either unconditionally or subject to such conditions as the Attorney-General determines."

Page 6 - After paragraph 20 - Insert the following:

"Clause 21A

20A. This clause inserts 6 new sections into the Principal Act. The new sections are based on existing sections in the Sex Discrimination Act. They are necessary complements to the new procedural provisions proposed for the Principal Act. Notes on the new sections follow.

Section 27A - Failure to attend conference

This section makes it an offence to fail to attend a conference when directed.

Section 27B - Failure to furnish information, & c.

This section makes it an offence to fail to furnish information or produce a document without reasonable excuse when required to do so by the Commissioner.

Section 27C - Offences in relation to Commission

Sub-sections (1) and (2) of this section make it an offence to fail to attend before the Commission when required, and to refuse to be sworn, answer questions, etc. without reasonable excuse.

Sub-section (3) creates offences relating to disruption of proceedings of the Commission.

Section 27D - Self-incrimination

Sub-section (1) of this section provides that for the purposes of the offence created by section 27B, it is not a reasonable excuse for a person to refuse or fail to furnish information or produce a document to the Commissioner that to do so might incriminate the person. Evidence of the information or the production of the document is not admissible in evidence against the person in any civil or criminal proceedings in a court, other than a proceeding for an offence of knowingly furnishing false or misleading information under section 27E.

Sub-section (2) provides that it is a reasonable excuse for the purposes of the offence created by section 27C for a person to refuse or fail to answer a question put at an inquiry before the Commission or to refuse to produce a document to the Commission that to do so might incriminate the person.

Section 27E - False or misleading information

This section makes it an offence to knowingly furnish false or misleading information.

Section 27F - Non-disclosure of private information

Sub-section (1) of this section provides that persons connected with the work of the Commission are not to directly or indirectly, except in the performance or exercise of any duty, function or power under or in connection with the legislation, disclose private information about other persons acquired by reason of that work.

Sub-section (2) provides that the persons mentioned in sub-section (1) cannot be required to divulge such private information to any court except where to do so is necessary for the purposes of this legislation.

Sub-sections (3) and (4) provide a number of exceptions to the prohibition on disclosure.

Sub-section (5) sets out certain definitions for the purposes of the section."

Page 7 - Paragraph 23 - replace "five years" with "seven years".

Page 8 - After paragraph 28 - insert the following heading and paragraph:

"Clause 29A: Repeal of section 45

28A. This clause repeals section 45 of the Principal Act, which deals with the provision of legal and financial assistance. That matter is now to be dealt with by proposed new sections 25ZB and 25ZC in the Principal Act."

Page 12 - Heading preceding paragraph 43 and paragraph 43 - replace with:

"Clause 42: Exercise of inquiry powers by Commission

43. This clause replaces sub-sections 60(1) and (2) in the Principal Act.

43A. Sub-section (1) provides that inquiries may be conducted by a single legally qualified member of the Commission or by two or more members, at least one of whom is legally qualified.

43B. Sub-section (2) provides that if only one legally qualified member is present at an inquiry, that member is to preside. The sub-section makes further provision for the case where more than one legally qualified member is present."

Page 12 - After paragraph 45 - insert the following heading and paragraph:

"Clause 44A: Terms and conditions of appointment

45A. This clause increases to 7 years the maximum term of any future appointment to the office of Sex Discrimination Commissioner".





