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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

HUMAN RIGHTS LEGISLATION AMENDMENT BILL 1995

EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General,
the Honourable Michael Lavarch MP)

THIS MEMORANDUM TAKES ACCOUNT OF AMENDMENTS MADE BY THE
SENATE TO THE BILL AS INTRODUCED

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HUMAN RIGHTS LEGISLATION AMENDMENT BILL 1995

Outline

1. This Bill amends the Human Rights and Equal Opportunity Act 1986 and other Human Rights legislation to implement recommendations of the initial report of the joint review of the Human Rights and Equal Opportunity Commission (HREOC). That report made recommendations relating to resource utilisation, corporate performance and the structure of HREOC.
2. The HREOC Act is to be amended to provide that the responsibility for the management of the Commission is vested in the Commission as a body corporate with Chief Executive Officer powers to be delegated by it to an Executive Director appointed by the Commission under the Public Service Act. This means that all the powers of a Secretary under the Public Service Act will be removed from the Human Rights Commissioner and settled upon the President and Commissioners collectively.
3. The amendment to the HREOC Act tabulates the President powers which remain the same as before but acknowledges the senior role of the President.
4. The HREOC Act is amended to require HREOC to prepare a corporate plan.
5. There is also an amendment to the HREOC Act relating to the delegation of the President's powers.
6. The amendment to the HREOC Act, the Race Discrimination Act, the Sex Discrimination Act, the Disability Discrimination Act and the Privacy Act provides general qualifications and requires appropriate knowledge or experience for appointment to each specialised position of Commissioner.
7. These amendments also respond to the consequences of the High Court's decision in *Brandy v Human Rights and Equal Opportunity Commission and Others* on 23 February which held that the mechanism for the enforcement of determinations by the Human Rights and Equal Opportunity Commission (the Commission) under the *Racial Discrimination Act 1975* other than determinations made affecting respondents who are Commonwealth agencies was constitutionally invalid.
8. The mechanism for the enforcement of determinations used under the *Sex Discrimination Act 1984*, the *Disability Discrimination Act 1992* and the *Privacy Act 1988* is similar to that used in the *Racial Discrimination Act* and hence is also invalid on the basis of the Court's decision. That mechanism was added to the *Racial Discrimination Act 1975* the *Sex Discrimination Act 1984* and the *Disability Discrimination Act 1992* in 1992 and to the *Privacy Act 1988* in 1993. Determinations made prior to the coming into force of the invalidated regime are unaffected. As a consequence of the High Court's decision the determinations of discrimination made by the Commission under these Acts since the mechanism came into force are unenforceable and there is currently no mechanism for the enforcement of the determinations of the Commission.
9. These amendments amend the *Racial Discrimination Act 1975*, the *Sex Discrimination Act 1984*, the *Disability Discrimination Act 1992* and the *Privacy Act 1988* to reinstate the procedure for the enforcement of the determinations made by the

Commission as it operated prior to 1992. This will operate as an interim measure pending the development of a new mechanism to enforce determinations of the Commission to replace that which was held to be invalid.

10. The amendments also provide transitional provisions relating to those determinations made by the Commission since the commencement of the invalid scheme.

Financial Impact Statement

The financial impact of the proposal is comparatively small with some increased costs if a full time President were appointed. In relation to the amendments resulting from the High Court's decision in *Brandy v Human Rights and Equal Opportunity Commission* there may be some costs associated with the transitional provisions. These costs relate to the possible need to provide additional legal aid to parties affected by the determinations made under the invalid scheme. These costs are not expected to be significant.

Notes on Clauses

Clause 1: Short title

1. Clause 1 provides for this legislation to be called the Human Rights Legislation Amendment Act 1994.

Clause 2: Commencement

2. Clause 2 provides for the commencement of the legislation. Proposed subsection 2(1) provides that this legislation other than item 16 of the Schedule comes into effect on the day it receives Royal Assent.

3. Proposed subsection 2(2) provides that a minor technical amendment made by Clause 16 of the Schedule, to the Human Rights and Equal Opportunity Legislation Amendment Act 1992 which commenced on 30 October 1992, is taken to have commenced at the same time. The amendment rectifies a misdescription of the words omitted so as to make sense.

Clause 3: Amendment of Acts

4. Clause 3 provides that the Acts specified in the Schedule are amended as set out in the Schedule.

Clause 4: Transitional provision - validity of current appointments not affected

5. Clause 4 provides that existing appointments are not affected by this legislation.

Clause 5: Transitional provision - powers of a Secretary in relation to staff of the Commission

6. Proposed subsection 5(1) defines Commission as the Human Rights and Equal Opportunity Commission and Commissioner as the Human Rights Commissioner.

7. Proposed subsection 5(2) provides that action taken by the Commissioner under section 43(2) before these amendments take effect, is to be treated as action taken by the Commission. This will enable the Commission to continue action taken under the powers of a Secretary that has been started by the Human Rights Commissioner following the removal of these powers from the Commissioner by this legislation.

Schedule

PART 1A - AMENDMENTS OF THE DISABILITY DISCRIMINATION ACT 1992, THE PRIVACY ACT 1988, THE RACIAL DISCRIMINATION ACT 1975 AND THE SEX DISCRIMINATION ACT 1984 RELATING TO ENFORCEMENT OF DETERMINATIONS

Disability Discrimination Act 1992

Item 1A - Sections 104A, 104B and 104C

8. This provides that these sections of the Disability Discrimination Act 1992 are repealed.

Item 1B - Section 106

9. This provides that in place of section 106 the following Division 3A is to be substituted.

Division 3A - Enforcement of determinations involving respondents other than Commonwealth agencies

10. A new Division of the Act is created concerning the enforcement of determinations involving respondents other than Commonwealth agencies. The provisions relating to Commonwealth agencies do not change.

Subdivision A - Determinations made after commencement of Division

11. Subdivision A provides for the reinstatement of the method of enforcement of determinations which applied prior to the invalid mechanism coming into force. The Subdivision relates to determinations made by the Human Rights and Equal Opportunity Commission (the Commission) under the Act after the commencement of the Division.

Clause 105A - Proceedings in the Federal Court to enforce a determination

12. Proposed subsection 105A(1) provides that the Commission, the complainant or a person acting on behalf of the complainant may commence proceedings in the Federal Court for an order to enforce a determination made under either subsection 102(1), which concern interim determinations made by the Commission, or subsection 103(1) of the Act. As a result of the decision of the High Court such determinations made in favour of complainants are now unenforceable unless the person against whom the complaint was made is a Commonwealth agency. This provision provides that they may seek an order to enforce a determination which would otherwise be unenforceable except where the respondent is a Commonwealth agency or the Principal Executive of a Commonwealth agency.

13. Proposed subsection 105A(2) provides that if the court is satisfied that the respondent to the determination has engaged in conduct or committed an act that is unlawful under the Act then it may make such orders as it thinks fit including orders which give effect to a determination of the Commission.

14. Proposed subsection 105A(3) provides that the Court may grant an interim injunction pending the determination of proceedings under proposed subsection 105A(1). This will enable the position of the parties to be preserved pending the final resolution of proceedings under proposed subsection 105A(1).

15. Proposed subsection 105A(4) provides that the Court not make it a condition of granting an interim injunction referred to in proposed subsection 105A(3) that the person seeking the injunction give an undertaking as to damages. This is intended to make it easier for persons who may be seeking to enforce a determination of discrimination made by the Commission to obtain an interim injunction.

16. Proposed subsection 105A(5) makes clear that in any proceedings to enforce a determination under proposed subsection 105A(1) the question whether the respondent has engaged in conduct or committed an act that is unlawful under the Act (see proposed subsection 105A(2)) is to be dealt with by the Court by way of a complete rehearing of the matter. The proposed subsection also provides that in its rehearing the Court may receive as evidence any of the following:

- (a) a copy of the written reasons of the Commission for the determination which it is sought to have enforced under proposed subsection 105A(1);
- (b) a copy of any document that was before the Commission;
- (c) a copy of the record (including any tape recording) of the inquiry into the complaint by the Commission.

It is a matter for the discretion of the Court whether any or all of the above are received into evidence in any proceedings under proposed subsection 105A(1) and if received what weight is to be given to such evidence.

17. Proposed subsection 105A(6) provides that where the complaint is a representative complaint under section 69 of the Act, the complainant who may take an action under proposed subsection 105A(1) means any member of the class to which the determination in relation to the representative complaint relates.

Clause 105B - Assistance in proceedings before the Federal Court

18. Proposed subsection 105B(1) provides that a person who either commenced, or proposes to commence, proceedings under proposed clause 105A, or a person who has done, or is alleged to have done, an act in relation to which those proceedings have been commenced in the Federal Court under proposed clause 105A may apply to the Attorney-General for legal or financial assistance in relation to those proceedings.

19. Proposed subsection 105B(2) provides that if there is such an application to the Attorney-General for legal or financial assistance and the Attorney-General is satisfied that it will involve hardship to the person seeking such assistance to refuse the application and it is reasonable to grant the application in the circumstances the Attorney-General may authorise the provision of such assistance. The Attorney-General may impose conditions on such legal or financial assistance.

Subdivision B - Determinations made from 1 March 1993 to commencement of Division

20. Clauses 105C - 106 relate to the determinations made by the Commission under the Act in the period from the commencement of the enforcement mechanism which has been found to be invalid to the date of the commencement of this Division.

Clause 105C - Interpretation

21. In relation only to this Subdivision of the Act two definitions are provided.

'recovery proceedings' - refer to proceedings, commenced by respondents to determinations of discrimination under the Act made by the Commission during the period when the invalid scheme was in operation, in which the respondent is seeking to recover money which he or she may have paid to a complainant as a result of the determination. Respondents to determinations were not always, or were not always solely, required to pay money to complainants under determinations made by the Commission. They could also be required, for example, to apologise to the complainant. The definition includes proceedings to seek a remedy other than, or in addition to, the payment of money.

'Subdivision B determination' - in relation to the subdivision (clauses 105C - 106) this term refers to determinations made by the Commission under the Act during the period from 1 March 1993 (when the scheme which has been found to be invalid commenced under the Act) to the date on which this Division commences except where the respondent to the determination is a Commonwealth agency or the Principal Executive of a Commonwealth agency.

Clause 105D - Proceedings in the Federal Court in relation to a Subdivision B determination

22. Proposed subsection 105D(1) provides that the persons referred to in subsection (2) may commence proceedings in the Federal Court for an order in relation to a determination made by the Commission during the period from 1 March 1993 to the date on which this Division commences.

23. Proposed subsection 105D(2) lists the persons who may commence proceedings under proposed subsection 105D(1). They are the Commission, the complainant (note that proposed subsection 105D(8) provides that in relation to a representative complaint this means a member of the class to which the determination relates), a person acting on behalf of the complainant or the respondent to the determination.

24. Proposed subsection 105D(3) provides that the Court must consider whether the respondent to the determination has engaged in conduct, or committed an act, that is unlawful under this Act and may make any orders it thinks fit. The proposed subsection also provides that the orders the court may make are subject to the matters indicated in proposed subsection 105D(4).

25. Subparagraph 105D(4)(a) provides that in considering what orders to make under proposed subsection 105D(3) the Court must take into account any money already paid to the complainant by the respondent to the determination or any conduct in which the respondent has engaged or not engaged as a result of the determination.

26. Subparagraph 105D(4)(b) provides that, in considering what orders to make under proposed subsection 105D(3), the court must also take into account the outcome of any proceeding for recovery in relation to the determination.

27. It is possible that respondents who have paid moneys to complainants in relation to determinations which were registered under the mechanism which the High Court has found to be invalid may seek to recover those moneys. These amendments do not give a right to recovery, nor do they seek to take away any right which may exist under the general law. Respondents may seek to assert in the courts that a right to recovery does exist.

28. Where there are proceedings under proposed section 105D the Federal Court may also hear any such recovery proceedings (*Federal Court of Australia Act 1976*, sections 19, 22 and 32). If such proceedings are commenced in a State or Territory court, they are generally able to be transferred to the Federal Court pursuant to the *Jurisdiction of Courts (Cross - Vesting) Act 1987* so that this issue can be heard together with the proceedings under proposed section 105D. Where such recovery proceedings are not transferred the Attorney-General will be able to seek to intervene in the proceedings in the State or Territory court.

29. Proposed subsection 105D(5) provides that the Court may grant an interim injunction pending the determination of proceedings under proposed subsection 105D(1). This will enable the position of the parties to be preserved pending the final resolution of proceedings under proposed subsection 105D(1).

30. Proposed subsection 105D(6) provides that the Court not make it a condition of granting an interim injunction referred to in proposed subsection 105D(5) that the person seeking the injunction give an undertaking as to damages. This is intended to make it easier for persons who may be seeking an order under this clause to obtain an interim injunction.

31. Proposed subsection 105D(7) makes clear that in any proceedings under proposed subsection 105D(1) the question whether the respondent has engaged in conduct or committed an act that is unlawful under the Act (see proposed subsection 105D(3)) is to be dealt with by the Court by way of a complete rehearing of the matter. The proposed subsection also provides that in its rehearing the Court may receive as evidence any of the following:

- (a) a copy of the written reasons of the Commission for the determination which is the subject of the proceedings;
- (b) a copy of any document that was before the Commission;
- (c) a copy of the record (including any tape recording) of the inquiry into the complaint by the Commission.

It is a matter for the discretion of the Court whether any or all of the above are received into evidence in any proceedings under proposed subsection 105D(1) and if received what weight is to be given to such evidence.

32. Proposed subsection 105D(8) provides that in relation to representative complaints, the term 'complainant' for the purposes of this clause means not only an

individual but also an individual who is a member of the class covered by the determination (see also proposed subsection 105D(2)).

Clause 105E - Federal Court may vary orders made under section 105D if a court determines recovery proceedings

33. Proposed section 105E deals with the situation in which the Federal Court has made an order under proposed subsection 105D(3) and, at some later time, a court makes an order determining the recovery proceedings relating to the determination which was the subject of the Federal Court's earlier order. Proposed subsection 105E(1) provides that in such a situation the person against whom the recovery proceedings were commenced may apply to the Federal Court to vary the order it made under proposed subsection 105D(3).

34. Proposed subsection 105E(2) provides that the court may vary the order made under proposed subsection 105D(3) if it thinks it is appropriate to do so having regard to its reasons for making that order and having regard to the order made by the court in determining the recovery proceedings.

Clause 105F - Assistance in proceedings before the Federal Court

35. Proposed subsection 105F(1) provides that a person who is a party to proceedings in the Federal Court under Subdivision B or who proposes to commence such proceedings may apply to the Attorney-General for the provision of assistance in respect of the proceedings.

36. Proposed subsection 105F(2) provides that if there is such an application to the Attorney-General for assistance and the Attorney-General is satisfied that it is reasonable to grant the application in the circumstances the Attorney-General may authorise the provision of assistance. The Attorney-General may impose conditions on such legal or financial assistance.

Clause 106 - Subdivision does not create right for respondent to determination to commence proceedings

37. Proposed section 106 provides that, with the exception of proposed section 105D, Subdivision B does not create a right of action in favour of the respondent to a Subdivision B determination nor is it to be taken to create any such right.

Privacy Act 1988

Item 1C. Division 3 of Part V

38. This provides that this Division of the Privacy Act 1988 is repealed. In place of the Division the following Division 3 is to be substituted.

Division 3 - Enforcement of determinations involving respondents other than Commonwealth agencies

39. A new Division of the Act is inserted concerning the enforcement of determinations involving respondents other than Commonwealth agencies.

Clause 54 - Application of Division

40. The new Division relates to determinations made by the Privacy Commissioner (the Commissioner) under the Act after the commencement of the Division. It does not apply to determinations involving respondents which are Commonwealth agencies, except where the agency is an eligible case manager.

Clause 55 – Proceedings in the Federal Court to enforce a determination

41. Proposed subsection 55(1) provides that the Commissioner or the complainant may commence proceedings in the Federal Court for an order to enforce a determination made under section 52 of the Act. As a result of the decision of the High Court such determinations made in favour of complainants are now unenforceable where they involve respondents other than Commonwealth agencies. This provision provides that the Commissioner or the complainant may seek an order to enforce a determination which would otherwise be unenforceable.

42. Proposed subsection 55(2) provides that if the court is satisfied that the respondent to the determination has engaged in conduct that constitutes an interference with the privacy of the complainant, then it may make such orders as it thinks fit, including to give effect to a determination of the Commissioner. Section 13 of the Act sets out what conduct constitutes an interference with the privacy of an individual.

43. Proposed subsection 55(3) provides that the Court may grant an interim injunction pending the determination of proceedings under proposed subsection 55(1). This will enable the position of the parties to be preserved pending the final resolution of proceedings under proposed subsection 55(1).

44. Proposed subsection 55(4) provides that the Court not make it a condition of granting an interim injunction referred to in proposed subsection 55(3) that the person seeking the injunction give an undertaking as to damages. This is intended to make it easier for persons who may be seeking to enforce a determination of an interference with privacy made by the Commissioner to obtain an interim injunction.

45. Proposed subsection 55(5) makes clear that in any proceedings to enforce a determination under proposed subsection 55(1) the question whether the respondent has engaged in conduct that constitutes an interference with the privacy of the complainant (see proposed subsection 55(2)) is to be dealt with by the Court by way of a complete rehearing of the matter. The proposed subsection also provides that in its rehearing the Court may receive as evidence any of the following:

- (a) a copy of the written reasons of the Commissioner for the determination which it is sought to have enforced under proposed subsection 55(1);
- (b) a copy of any document that was before the Commissioner;
- (c) a copy of a record (including a tape recording) of any appearance before the Commissioner (including any oral submissions made) under subsection 43(5) of the Act.

It is a matter for the discretion of the Court whether any or all of the above are received into evidence in any proceedings under proposed subsection 55(1) and if received what weight is given to any such evidence.

46. Proposed subsection 55(6) provides that where the complaint is a representative complaint under section 36(2) of the Act, the complainant for the purposes of an action under proposed subsection 55(1) means any member of the class to whom the determination in relation to the representative complaint relates.

Item 1D. Subsection 63(2)

47. This item provides that subsection 63(2) of the Act is repealed and the following sub-clause is to be substituted. Proposed subsection 63(2) provides that a person who either has commenced, or proposes to commence, proceedings under clause 55, or a person who has engaged in, or is alleged to have engaged in, conduct in relation to which such proceedings have been commenced, may apply to the Attorney-General for assistance in relation to those proceedings.

Racial Discrimination Act 1975

Item 1E - sections 25ZAA, 25ZAB and 25ZAC

48. This provides that these sections of the Act are repealed.

Item 1F - section 25ZC

49. This provides that the section is to be repealed and the following Division 3A is to be substituted.

Division 3A - Enforcement of determinations involving respondents other than Commonwealth agencies

50. A new Division of the Act is created concerning the enforcement of determinations involving respondents other than Commonwealth agencies. The provisions relating to Commonwealth agencies do not change.

Subdivision A - Determinations made after commencement of Division

51. Subdivision A provides for the reinstatement of the method of enforcement of determinations which applied prior to the invalid mechanism coming into force. The Subdivision relates to determinations made by the Human Rights and Equal Opportunity Commission (the Commission) under the Act after the commencement of the Division.

Clause 25ZC - Proceedings in the Federal Court to enforce a determination

52. Proposed subsection 25ZC(1) provides that the Commission, the complainant or a trade union acting on behalf of the complainant, may commence proceedings in the Federal Court for an order to enforce a determination made under either subsection 25Y(1), which refers to interim determinations made by the Commission, or subsection 25Z(1) of the Act. As a result of the decision of the High Court such

determinations made in favour of complainants are now unenforceable unless the person against whom the complaint was made is a Commonwealth agency. This provision provides that they may seek an order to enforce a determination which would otherwise be unenforceable except where the respondent is a Commonwealth agency or the Principal Executive of a Commonwealth agency.

53. Proposed subsection 25ZC(2) provides that if the court is satisfied that the respondent to the determination has engaged in conduct, or committed an act, that is unlawful under the Act then it may make such orders as it thinks fit including an order to give effect to a determination of the Commission.

54. Proposed subsection 25ZC(3) provides that the Court may grant an interim injunction pending the determination of proceedings under proposed subsection 25ZC(1). This will enable the position of the parties to be preserved pending the final resolution of proceedings under proposed subsection 25ZC(1).

55. Proposed subsection 25ZC(4) provides that the Court not make it a condition of granting an interim injunction referred to in proposed subsection 25ZC(3) that the person seeking the injunction give an undertaking as to damages. This is intended to make it easier for persons who may be seeking to enforce a determination of discrimination made by the Commission to obtain an interim injunction.

56. Proposed subsection 25ZC(5) makes clear that in any proceedings to enforce a determination under proposed subsection 25ZC(1) the question whether the respondent has engaged in conduct, or committed an act, that is unlawful under the Act (see proposed subsection 25ZC(2)) is to be dealt with by the Court by way of a complete rehearing of the matter. The proposed subsection also provides that in its rehearing the Court may receive as evidence any of the following:

- (a) a copy of the written reasons of the Commission for the determination which it is sought to have enforced under proposed subsection 25ZC(1);
- (b) a copy of any document that was before the Commission;
- (c) a copy of the record (including any tape recording) of the inquiry into the complaint by the Commission.

It is a matter for the discretion of the Court whether any or all of the above are received into evidence in any proceedings under proposed subsection 25ZC(1) and if received what weight is given to any such evidence.

57. Subparagraph 25ZC(6)(a) provides that where the complaint is a representative complaint under section 22 of the Act, the complainant who may take an action under proposed subsection 25ZC(1) means any member of the class to which the determination in relation to the representative complaint relates. Subparagraph 25ZC(6)(b) provides that where the complaint was made by a trade union on behalf of a person and the complaint was not a representative complaint, the complainant who may take action under proposed subsection 25ZC(1) means the person on whose behalf the trade union made the complaint. The term 'trade union' is defined in section 22 of the Act and has the same meaning for the purposes of this clause.

Clause 25ZCA - Assistance in proceedings before the Federal Court

58. Proposed subsection 25ZCA(1) provides that a person who either has commenced, or proposes to commence, proceedings under proposed section 25ZC, or a person who has done, or is alleged to have done, an act in relation to which those proceedings have been commenced in the Federal court under proposed section 25ZC may apply to the Attorney-General for assistance in relation to those proceedings.

59. Proposed subsection 25ZCA(2) provides that if there is such an application to the Attorney-General for legal or financial assistance and the Attorney-General is satisfied that it will involve hardship to the person seeking such assistance to refuse the application and it is reasonable to grant the application in the circumstances the Attorney-General may authorise the provision of such assistance. The Attorney-General may impose conditions on such legal or financial assistance.

Subdivision B - Determinations made from 13 January 1993 to the commencement of this Division.

60. Clauses 25ZCB - 25ZCF relate to the determinations made by the Commission under the Act in the period from the commencement of the enforcement mechanism which has been found to be invalid to the date of the commencement of this Division.

Clause 25ZCB - Interpretation

61. In relation only to this Subdivision of the Act two definitions are provided.

'recovery proceedings' - refer to proceedings, commenced by respondents to determinations of discrimination under the Act made by the Commission during the period when the invalid scheme was in operation, in which the respondent is seeking to recover money which he or she may have paid to a complainant as a result of the determination. Respondents to determinations were not always, or were not always solely, required to pay money to complainants under determinations made by the Commission. They could also be required, for example, to apologise to the complainant. The definition includes proceedings to seek a remedy other than, or in addition to, the payment of money.

'Subdivision B determination' - in relation to the subdivision (clauses 25ZCB - 25ZCF) this term refers to determinations made by the Commission under the Act during the period from 13 January 1993 (when the scheme which has been found to be invalid commenced under the Act) to the date on which this Division commences except where the respondent to the determination is a Commonwealth agency or the Principal Executive of a Commonwealth agency.

Clause 25ZCC - Proceedings in the Federal Court in relation to a Subdivision B determination

62. Proposed subsection 25ZCC(1) provides that the persons referred to in proposed subsection (2) may commence proceedings in the Federal Court for an order in relation to a determination made by the Commission during the period from 13 January 1993 to the date on which this Division commences.

63. Proposed subsection 25ZCC(2) lists the persons who may commence proceedings under proposed subsection 25ZCC(1). They are the Commission, the complainant, a trade union acting on behalf of the complainant or the respondent to the determination.

64. Proposed subsection 25ZCC(3) provides that the Court must consider whether the respondent to the determination has engaged in conduct, or committed an act, that is unlawful under this Act and may make any orders it thinks fit. The proposed subsection also provides that the orders the court may make are subject to the matters indicated in proposed subsection 25ZCC(4).

65. Subparagraph 25ZCC(4)(a) provides that in considering what orders to make under proposed subsection 25ZCC(3) the Court must take into account any money already paid to the complainant by the respondent to the determination, or any conduct in which the respondent has engaged or not engaged, as a result of the determination.

66. Subparagraph 25ZCC(4)(b) provides that, in considering what orders to make under proposed subsection 25ZCC(3), the court must also take into account any outcome of any proceeding for recovery in relation to the determination.

67. It is possible that respondents who have paid moneys to complainants in relation to determinations which were registered under the mechanism which the High Court has found to be invalid may seek to recover those moneys. These amendments do not give a right to recovery, nor do they seek to take away any right which may exist under the general law. Respondents may seek to assert in the courts that a right to recovery does exist.

68. Where there are proceedings under proposed section 25ZCC the Federal Court may also hear any such recovery proceedings (*Federal Court of Australia Act 1976*, sections 19, 22 and 32). If such proceedings are commenced in a State or Territory court, they are generally able to be transferred to the Federal Court pursuant to the *Jurisdiction of Courts (Cross - Vesting) Act 1987* so that this issue can be heard together with the proceedings under proposed section 25ZCC. Where such recovery proceedings are not transferred the Attorney-General will be able to seek to intervene in the proceedings in the State or Territory court.

69. Proposed subsection 25ZCC(5) provides that the Court may grant an interim injunction pending the determination of proceedings under proposed subsection 25ZCC(1). This will enable the position of the parties to be preserved pending the final resolution of proceedings under proposed subsection 25ZCC(1).

70. Proposed subsection 25ZCC(6) provides that the Court not make it a condition of granting an interim injunction referred to in proposed subsection 25ZCC(5) that the person seeking the injunction give an undertaking as to damages. This is intended to make it easier for persons who may be seeking an order under this clause to obtain an interim injunction.

71. Proposed subsection 25ZCC(7) makes clear that in any proceedings under proposed subsection 25ZCC(1) the question whether the respondent has engaged in conduct, or committed an act, that is unlawful under the Act (see proposed subsection 25ZCC(3)) is to be dealt with by the Court by way of a complete rehearing of the matter. The proposed subsection also provides that in its rehearing the Court may receive as evidence any of the following:

- (a) a copy of the written reasons of the Commission relating to the determination which is the subject of the proceedings;
- (b) a copy of any document that was before the Commission;
- (c) a copy of the record (including any tape recording) of the inquiry into the complaint by the Commission.

It is a matter for the discretion of the Court whether any or all of the above are received into evidence in any proceedings under proposed subsection 25ZCC(1) and if received what weight is given to any such evidence.

2. Subparagraph 25ZCC(8)(a) provides that where the complaint is a representative complaint under section 22 of the Act, a complainant who may take an action under proposed subsection 25ZCC(2) means not only an individual but also an individual who is a member of the class to which the determination in relation to the representative complaint relates. Subparagraph 25ZCC(8)(b) provides that where the complaint was made by a trade union on behalf of a person and the complaint was not a representative complaint, the complainant who may take action under proposed subsection 25ZCC(2) means the person on whose behalf the trade union made the complaint. The term 'trade union' is defined in section 22 of the Act and has the same meaning for the purposes of this clause.

Clause 25ZCD - Federal Court may vary orders made under section 25ZCC if a court determines recovery proceedings

73. Proposed section 25ZCD deals with the situation in which the Federal Court has made an order under proposed subsection 25ZCC(3) and, at some later time, a court makes an order determining the recovery proceedings relating to the determination which was the subject of the Federal Court's earlier order. Proposed subsection 25ZCD(1) provides that in such a situation the person against whom the recovery proceedings were commenced may apply to the Federal Court to vary the order it made under proposed subsection 25ZCC(3).

74. Proposed subsection 25ZCD(2) provides that the court may vary the order made under proposed subsection 25ZCC(3) if it thinks it is appropriate to do so having regard to its reasons for making that order and having regard to the order made by the court in determining the recovery proceedings.

Clause 25ZCE - Assistance in proceedings before the Federal Court

75. Proposed subsection 25ZCE(1) provides that a person who is a party to proceedings in the Federal Court under Subdivision B or who proposes to commence such proceedings may apply to the Attorney-General for the provision of assistance in respect of the proceedings.

76. Proposed subsection 25ZCE(2) provides that if there is such an application to the Attorney-General for assistance and the Attorney-General is satisfied that it is reasonable to grant the application in the circumstances the Attorney-General may authorise the provision of assistance. The Attorney-General may impose conditions on such legal or financial assistance.

Clause 25ZCF - Subdivision does not create right for respondent to determination to commence proceedings

77. Proposed section 25ZCF provides that, with the exception of proposed section 25ZCC, Subdivision B does not create a right of action in favour of the respondent to a Subdivision B determination nor is it to be taken to create any such right.

Sex Discrimination Act 1984

Item 1G - sections 82A, 82B and 82C

78. This provides that these sections of the Act are repealed.

Item 1H - section 84

79. This provides that the section is to be repealed and the following Division 3A is substituted.

Division 3A - Enforcement of determinations involving respondents other than Commonwealth agencies

80. A new Division of the Act is created concerning the enforcement of determinations involving respondents other than Commonwealth agencies. The provisions relating to Commonwealth agencies do not change.

Subdivision A - Determinations made after commencement of Division

81. Subdivision A provides for the reinstatement of the method of enforcement of determinations which applied prior to the invalid mechanism coming into force. The Subdivision relates to determinations made by the Human Rights and Equal Opportunity Commission (the Commission) under the Act after the commencement of the Division.

Clause 83A - Proceedings in the Federal Court to enforce a determination

82. Proposed subsection 83A(1) provides that the Commission, the complainant or a trade union acting on behalf of the complainant may commence proceedings in the Federal Court for an order to enforce a determination made under either subsection 80(1), which refers to interim determinations, or subsection 81(1) of the Act. As a result of the decision of the High Court such determinations made in favour of complainants are now unenforceable unless the person against whom the complaint was made is a Commonwealth agency. This provision provides that they may seek an order to enforce a determination which would otherwise be unenforceable except where the respondent is a Commonwealth agency or the Principal Executive of a Commonwealth agency.

83. Proposed subsection 83A(2) provides that if the court is satisfied that the respondent to the determination has engaged in conduct or committed an act that is unlawful under the Act then it may make such orders as it thinks fit including an order to give effect to a determination of the Commission.

84. Proposed subsection 83A(3) provides that the Court may grant an interim injunction pending the determination of proceedings under proposed subsection

83A(1). This will enable the position of the parties to be preserved pending the final resolution of proceedings under proposed subsection 83A(1).

85. Proposed subsection 83A(4) provides that the Court not make it a condition of granting an interim injunction referred to in proposed subsection 83A(3) that the person seeking the injunction give an undertaking as to damages. This is intended to make it easier for persons who may be seeking to enforce a determination of discrimination made by the Commission to obtain an interim injunction.

86. Proposed subsection 83A(5) makes clear that in any proceedings to enforce a determination under proposed subsection 83A(1) the question whether the respondent has engaged in conduct, or committed an act, that is unlawful under the Act (see proposed subsection 83A(2)) is to be dealt with by the Court by way of a complete rehearing of the matter. The proposed subsection also provides that in its rehearing the Court may receive as evidence any of the following:

- (a) a copy of the written reasons of the Commission for the determination which it is sought to have enforced under proposed subsection 83A(1);
- (b) a copy of any document that was before the Commission;
- (c) a copy of the record (including any tape recording) of the inquiry into the complaint by the Commission.

It is a matter for the discretion of the Court whether any or all of the above are received into evidence in any proceedings under proposed subsection 83A(1) and if received what weight is given to any such evidence.

87. Subparagraph 83A(6)(a) provides that where the complaint is a representative complaint under section 50 of the Act, the complainant who may take an action under proposed subsection 83A(1) means any member of the class to which the determination in relation to the representative complaint relates. Subparagraph 83A(6)(b) provides that where the complaint was made by a trade union on behalf of a person and the complaint was not a representative complaint, the complainant who may take action under proposed subsection 83A(1) means the person on whose behalf the trade union made the complaint. The term 'trade union' is defined in section 50 of the Act and has the same meaning for the purposes of this clause.

Clause 83B - Assistance in proceedings before the Federal Court

88. Proposed subsection 83B(1) provides that a person who either has commenced, or proposes to commence, proceedings under proposed section 83A, or a person who has done, or is alleged to have done, an act in relation to which those proceedings have been commenced in the Federal Court under proposed section 83A may apply to the Attorney-General for assistance in relation to those proceedings.

89. Proposed subsection 83B(2) provides that if there is such an application to the Attorney-General for legal or financial assistance and the Attorney-General is satisfied that it will involve hardship to the person seeking such assistance to refuse the application and it is reasonable to grant the application in the circumstances, the Attorney-General may authorise the provision of such assistance. The Attorney-General may impose conditions on such legal or financial assistance.

Subdivision B - Determinations made from 13 January 1993 to the commencement of this Division.

90. Clauses 83C - 84 relate to the determinations made by the Commission under the Act in the period from the commencement of the enforcement mechanism which has been found to be invalid to the date of the commencement of this Division.

Clause 83C - Interpretation

91. In relation only to this Subdivision of the Act two definitions are provided.

'recovery proceedings' - refer to proceedings, commenced by respondents to determinations of discrimination under the Act made by the Commission during the period when the invalid scheme was in operation, in which the respondent is seeking to recover money which he or she may have paid to a complainant as a result of the determination. Respondents to determinations were not always, or were not always solely, required to pay money to complainants under determinations made by the Commission. They could also be required, for example, to apologise to the complainant. The definition includes proceedings to seek a remedy other than, or in addition to, the payment of money.

'Subdivision B determination' - in relation to the subdivision (clauses 83C - 84) this term refers to determinations made by the Commission under the Act during the period from 13 January 1993 (when the scheme which has been found to be invalid commenced under the Act) to the date on which this Division commences except where the respondent to the determination is a Commonwealth agency or the Principal Executive of a Commonwealth agency.

Clause 83D - Proceedings in the Federal Court in relation to a Subdivision B determination

92. Proposed subsection 83D(1) provides that the persons referred to in subsection (2) may commence proceedings in the Federal Court for an order in relation to a determination made by the Commission during the period from 13 January 1993 to the date on which this Division commences.

93. Proposed subsection 83D(2) lists the persons who may commence proceedings under proposed subsection 83D(1). They are the Commission, the complainant, a trade union acting on behalf of the complainant or the respondent to the determination.

94. Proposed subsection 83D(3) provides that the Court must consider whether the respondent to the determination has engaged in conduct, or committed an act, that is unlawful under this Act and may make any orders it thinks fit. The proposed subsection also provides that the orders the court may make are subject to the matters indicated in proposed subsection 83D(4).

95. Subparagraph 83D(4)(a) provides that in considering what orders to make under proposed subsection 83D(3) the Court must take into account any money already paid to the complainant by the respondent to the determination or any conduct in which the respondent has engaged or not engaged as a result of the determination.

96. Subparagraph 83D(4)(b) provides that, in considering what orders to make under proposed subsection 83D(3), the court also must take into account the outcome of any proceeding for recovery in relation to the determination.

97. It is possible that respondents who have paid moneys to complainants in relation to determinations which were registered under the mechanism which the High Court has found to be invalid may seek to recover those moneys. These amendments do not give a right to recovery, nor do they seek to take away any right which may exist under the general law. Respondents may seek to assert in the courts that a right to recovery does exist.

98. Where there are proceedings under proposed section 83D the Federal Court may also hear any such recovery proceedings (*Federal Court of Australia Act 1976*, sections 19, 22 and 32). If such proceedings are commenced in a State or Territory court, they are generally able to be transferred to the Federal Court pursuant to the *Jurisdiction of Courts (Cross - Vesting) Act 1987* so that this issue can be heard together with the proceedings under proposed section 83D. Where such recovery proceedings are not transferred the Attorney-General will be able to seek to intervene in the proceedings in the State or Territory court.

99. Proposed subsection 83D(5) provides that the Court may grant an interim injunction pending the determination of proceedings under proposed subsection 83D(1). This will enable the position of the parties to be preserved pending the final resolution of proceedings under proposed subsection 83D(1).

100. Proposed subsection 83D(6) provides that the Court not make it a condition of granting an interim injunction referred to in proposed subsection 83D(5) that the person seeking the injunction give an undertaking as to damages. This is intended to make it easier for persons who may be seeking to obtain an order under this clause to obtain an interim injunction.

101. Proposed subsection 83D(7) makes clear that in any proceedings to obtain an order under proposed subsection 83D(1) the question whether the respondent has engaged in conduct, or committed an act, that is unlawful under the Act (see proposed subsection 83D(3)) is to be dealt with by the Court by way of a complete rehearing of the matter. The proposed subsection also provides that in its rehearing the Court may receive as evidence any of the following:

- (a) a copy of the written reasons of the Commission for the determination which is the subject of the proceedings;
- (b) a copy of any document that was before the Commission;
- (c) a copy of the record (including any tape recording) of the inquiry into the complaint by the Commission.

It is a matter for the discretion of the Court whether any or all of the above are received into evidence in any proceedings under proposed subsection 83D(1) and if received what weight is given to any such evidence.

102. Subparagraph 83D(8)(a) provides that where the complaint is a representative complaint under section 50 of the Act, the complainant who may take an action under proposed subsection 83D(2) means not only an individual but also an individual who

is a member of the class to which the determination in relation to a representative complaint relates. Subparagraph 83D(8)(b) provides that where the complaint was made by a trade union on behalf of a person and the complaint was not a representative complaint, the complainant who may take action under proposed subsection 83D(2) means not only an individual but also the person on whose behalf the trade union made the complaint. The term 'trade union' is defined in section 50 of the Act and has the same meaning for the purposes of this clause.

Clause 83E - Federal Court may vary orders made under Proposed subsection 83D if a court determines recovery proceedings

103. Proposed section 83E deals with the situation in which the Federal Court has made an order under proposed subsection 83D(3) and, at some later time, a court makes an order determining the recovery proceedings relating to the determination which was the subject of the Federal Court's earlier order. Proposed subsection 83E(1) provides that in such a situation the person against whom the recovery proceedings were commenced may apply to the Federal Court to vary the order it made under proposed subsection 83D(3).

104. Proposed subsection 83E(2) provides that the court may vary the order made under proposed subsection 83D(3) if it thinks it is appropriate to do so having regard to its reasons for making that order and having regard to the order made by the court in determining the recovery proceedings.

Clause 83F - Assistance in proceedings before the Federal Court

105. Proposed subsection 83F(1) provides that a person who is a party to proceedings in the Federal Court under Subdivision B or who proposes to commence such proceedings may apply to the Attorney-General for the provision of assistance in respect of the proceedings.

106. Proposed subsection 83F(2) provides that if there is such an application to the Attorney-General for assistance and the Attorney-General is satisfied that it is reasonable to grant the application in the circumstances the Attorney-General may authorise the provision of assistance. The Attorney-General may impose conditions on such legal or financial assistance.

Clause 84 - Subdivision does not create right for respondent to determination to commence proceedings

107. Proposed section 84 provides that, with the exception of clause 83D, Subdivision B does not create a right of action in favour of the respondent to a Subdivision B determination nor is it to be taken to create any such right.

Part 1

108. This Part of the Schedule deals with the amendments to the Human Rights and Equal Opportunity Commission Act 1986.

Item 1 - Paragraph 8(1)(d)

109. Item 1 is a minor technical amendment adding "and" at the end of paragraph 8(1)(d).

Item 2 - Subsections 8(2), (3), (4) and (5)

110. Item 2 omits subsections 8(2), (3), (4) and (5) of the principal Act. It also inserts a new subsection (2) which requires members to act consistently with a collegiate Commission.

Item 3 - Subsection 8(8)

111. Item 3 omits subsection 8(8) which defined 'legally qualified person'. This is related to the omission of the subsection 8(4) requirement that the Human Rights Commissioner be a legally qualified person.

Item 4 - After Section 8

112. Item 4 inserts two new sections in the Human Rights and Equal Opportunity Commission Act. Section 8A deals with the appointment of the President as a full or part-time member of the Commission. It also refers to the President's senior role in the Commission. It highlights for ease of reference in one table the existing significant powers and functions of the President under various Acts.

114. Section 8B provides for the appointment of the Human Rights Commissioner by the Governor-General as a full time member. The requirement that the Human Rights Commissioner be legally qualified has been replaced by the requirement that the person so appointed hold appropriate qualifications, knowledge or experience.

Item 5 - Heading to Division 2 Part II

115. Item 5 omits the heading to Division 2 of Part II and substitutes a new heading. The Division will now deal with the duties and powers of the Commission as well as its functions.

Item 6 - Before Section 11

116. Item 6 inserts new section, section 10A before section 11. Section 10A states that the duty of the Commission is to ensure that its functions are carried out effectively having regard for all human rights. This duty is a statement of principle and is not legally enforceable.

Item 7 - Section 12

117. Item 7 repeals section 12 which has been incorporated into new section 10A.

Clause 7A - After subsection 19(2)

118. Item 7A allows the President of the Commission to delegate powers under the *Racial Discrimination Act 1975*, the *Sex Discrimination Act 1984* or the *Disability Discrimination Act 1992*. Provision is made for the powers to be delegable to a member of the Commission (ie the other Commissioners) or to persons appointed as 'part-time hearing Commissioners' by the Attorney-General under the three Acts. These powers cannot be delegated using the existing provision in section 19(2) of the Act which relates only to powers conferred by this Act. The powers covered by this amendment are conferred under the individual anti-discrimination Acts. The clause excludes from delegation the President's power to make interim determinations which should be exercised only by the President given their scope.

Item - Subsection 36(1)

119. Item 8 omits subsection 36(1).

Item 9 - Subsection 36(2)

120. Item 9 omits all the words after paragraph 36(2)(b). The effect of items 8 and 9 is to remove the automatic right of the Human Rights Commissioner to act as President during a vacancy in the office of the President. The Minister will now have the power to appoint a person to act as President during a vacancy.

Item 10 - Subsection 38(3)

121. Item 10 makes a minor technical amendment to subsection 38(3).

Item 11 - Subsection 43(2)

122. By omitting subsection 43(2) and substituting a new subsection, this item transfers to the Commission all the powers of a Secretary under the Public Service Act previously exercised by the Human Rights Commissioner.

Item 12 - After Section 43

123. Item 12 inserts a new section, section 43A after section 43. New section 43A states that the Commission is able to expend its resources on the functions of the Privacy Commissioner under the Privacy Act or any other Act.

Item 13 - Subsection 44(5)

124. Item 13 omits subsection 44(5) and substitutes a new subsection which states that members attending a Commission meeting from which the President is absent are able to elect one of their number to preside at that meeting.

Item 14 - After Section 43

125. Item 14 inserts a new division, Division 6 in Part II dealing with a corporate plan.

- (1) New section 46AA requires that the Human Rights and Equal Opportunity Commission prepare a Corporate Plan within 12 months after the commencement of the section. The plan is to cover a three year period and may be reviewed and revised at any time. The Commission is to take account of the current corporate plan when exercising its powers and performing functions.
- (2) New section 46AB deals with the matters to be included in the corporate plan.
- (3) New section 46AC states that as soon as practicable, after the Commission prepares or revises a corporate plan, the Minister is to be given a copy.

PART 2 - OTHER AMENDMENTS

126. This Part of the Schedule deals with amendments of other Acts.

Item 15 - Section 113

127. Item 15 amends section 113 of the Disability Discrimination Act 1992 by adding a new subsection 2 stating that, to be appointed as the Disability Discrimination Commissioner, the person must have appropriate qualifications, knowledge or experience.

Item 16 - Paragraph 9(c)

128. Item 16 deals with a minor technical amendment to paragraph 9 (c) of the Human Rights and Equal Opportunity Legislation Amendment Act 1992. It amends section 19(2) of the Human Rights and Equal Opportunity Commission Act.

Item 17 - Section 19

129. Item 17 amends section 19 of the Privacy Act 1988 by adding a new subsection 2 stating that to be appointed as the Privacy Commissioner, the person must have appropriate qualifications, knowledge or experience.

Item 18 - Subsection 21(3)

130. Item 18 makes a minor technical amendment to subsection 21(3) of the Privacy Act 1988.

Item 19 - Section 29

131. Item 19 amends section 29 of the Racial Discrimination Act 1975 by adding a new subsection 2 stating that, to be appointed as the Race Discrimination Commissioner, the person must have appropriate qualifications, knowledge or experience.

Item 20 - Subsection 31(3)

132. Item 20 makes a minor technical amendment to subsection 31(3) of the Race Discrimination Act 1975.

Item 21 - Subsection 42 (3)

133. Item 21 makes a minor technical amendment to subsection 42(3) of the Race Discrimination Act 1975.

Item 22 - Subsection 44(3)

134. Item 22 amends subsection 44(3) of the Sex Discrimination Act 1984 by inserting after the reference to paragraph 41 (1) (e) a reference to paragraph 41 B (1) (b) to give the Commission a discretion when granting exemptions under that paragraph.

Item 23 - Section 96

135. Item 23 amends section 96 of the Sex Discrimination Act 1984 by adding a new subsection 2 stating that, to be appointed as the Sex Discrimination Commissioner, the person must have appropriate qualifications, knowledge or experience.

Item 24 - Subsections 98(3)

136. Item 24 makes a minor technical amendment to subsection 98(3) of the Sex Discrimination Act 1984.

Note about Section Heading

Note 1

137. This amends the heading of section 13 at the time item 6 of the Schedule commences.