

1997

THE PARLIAMENT OF THE COMMONWEALTH  
OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**HUMAN RIGHTS LEGISLATION AMENDMENT BILL 1996**

SUPPLEMENTARY EXPLANATORY MEMORANDUM

Amendments and New Clauses to be Moved on Behalf of  
the Government

(Circulated by authority of the Attorney-General,  
the Honourable Daryl Williams AM QC MP)



9 780644 500067

TABLE OF CONTENTS

	Page
OUTLINE OF AMENDMENTS	1
FINANCIAL IMPACT STATEMENT	1
NOTES ON AMENDMENTS AND NEW CLAUSES	2

# AMENDMENTS TO THE HUMAN RIGHTS LEGISLATION AMENDMENT BILL 1996

## OUTLINE OF AMENDMENTS

These amendments provide transitional arrangements for complaints which had been lodged with HREOC under the existing law but which will not have been completed at the commencement of the new law. There are also a number of minor consequential amendments and savings provisions which either supplement, or make corrections to, the original Bill.

The most significant points in the transitional regime are as follows:

- (i) complaints that have been lodged, or are in the process of inquiry or conciliation prior to the commencement of the new law will, on commencement of the new law, be treated as if they had been lodged, or were in the process of inquiry and conciliation under the new law;
- (ii) complaints which had been dismissed by a Commissioner or President, prior to the commencement of the new law will, on the commencement of the new law, be treated as if they had been terminated by the President under the new law. Upon termination an affected person may make an application to the Federal Court for a hearing of the matter (unless the decision to discontinue was made at the request of the complainant or complainants);
- (iii) where the relevant Commissioner has been unsuccessful in resolving a complaint and has referred the matter to HREOC for a hearing, but, at the start of the new law a hearing has not commenced, the complaint will be treated as if it had been terminated by the President. Upon termination an affected person may make an application to the Federal Court for a hearing of the matter;
- (iv) where, prior to the commencement of the new law, a complaint has been referred to HREOC for a hearing which has commenced, the complaint will continue to be dealt with under the existing law;
- (v) where a complaint has been determined in accordance with the existing law, enforcement will also take place in accordance with the existing law. The only change will be that the new provisions relating to assistance in preparing application forms, representation by a person other than a barrister or solicitor, and informality in court proceedings will also apply to enforcement proceedings in the Federal Court.

## FINANCIAL IMPACT STATEMENT

The transitional arrangements set out in the following amendments are not expected to impact on the financial position expressed in the Explanatory Memorandum to the parent Bill.

## NOTES ON AMENDMENTS AND NEW CLAUSES

1. In these notes, the following abbreviations are used:

DDA	<i>Disability Discrimination Act 1992</i>
HREOC	the Human Rights and Equal Opportunity Commission
HRA	<i>Human Rights and Equal Opportunity Commission Act 1986</i>
RDA	<i>Racial Discrimination Act 1975</i>
SDA	<i>Sex Discrimination Act 1984</i>

### **Amendment 1**

2. This amendment provides for the inclusion of the heading “Part 1 - Preliminary” for that part of the Bill which includes provisions dealing with the short title, commencement of legislation and schedules.

### **Amendment 2**

3. This amendment inserts a new Part 2 dealing with transitional and savings provisions. Part 2 consists of the following:

- Division 1 inserts an interpretation section;
- Division 2 deals with the treatment of complaints lodged before the commencement of the new legislation; and
- Division 3 inserts other transitional and application provisions

### **Division 1 - Interpretation**

#### *New section 3A - Interpretation*

4. This section defines many of the terms that are used in Part 2, the most significant of which are:

“holding of an inquiry”

This term refers to the substantive hearing of a complaint by HREOC, (which occurs after a referral by the relevant Commissioner). The definition is required so as to allow a distinction between those complaints and others which have been referred to HREOC but have yet to commence a substantive hearing.

“purported complaint”

This term refers to a complaint which has been lodged with HREOC but has yet to be accepted as a complaint within the terms of the relevant Acts.

“starting day”

This term refers to the day on which the transitional and savings provisions commence.

Division 2 - Treatment of complaints lodged before the starting day  
Subdivision A - Treatment of a complaint depends upon the stage it has reached

*New section 3B - Purported complaint lodged but no decision as to whether it is a complaint*

5. This section deals with complaints which have been lodged with HREOC under the old law but have neither been accepted nor rejected at the time when the new law starts. At that time these complaints will be treated as if they had been lodged under section 46P of the new law.

*New section 3C - Administrative appeal on Commission's decision as to whether a complaint*

6. This section deals with complaints which have been lodged with HREOC and accepted or rejected as a complaint under the old law. If a party to the complaint has sought, or could have sought judicial review of the decision (to accept or reject the complaint), prior to the start of the new law, and, after the start of the new law, the Court has made an order on review and remitted the matter back to HREOC for reconsideration, the complaint will be treated as if it had been lodged under section 46P of the new law and reconsideration will take place accordingly.

*New section 3D - Complaint lodged but Commissioner not notified of it*

7. This section deals with complaints which have been lodged with, and accepted by HREOC but have not been referred to the relevant Commissioner before the start of the new law. When the new law commences, these complaints will be treated as if they had been lodged and accepted under the new law.

*New section 3E - Commissioner notified of complaint but has not decided to dismiss or refer*

8. This section deals with complaints which have, before the start of the new law:  
- been lodged with HREOC; and  
- been referred to the relevant Commissioner; and  
- are either awaiting, or have started a process of inquiry or conciliation.

9. These complaints will be treated as if the referral to the Commissioner was a referral to the President under the new law. Anything already done in the inquiry and conciliation process will be treated as if it had been done by the President, (see new section 3M).

*New section 3F - Commissioner's decision to dismiss complaint*

10. This section deals with complaints which have:  
- been referred to the relevant Commissioner for inquiry and conciliation; and,  
- the Commissioner has subsequently decided not to inquire or not to continue to inquire into the complaint; and,

- before the start of the new law, a party could have sought review of the Commissioner's decision not to inquire by the President (under the DDA, RDA or SDA) or referral of the complaint to HREOC (under the SDA or RDA).

11. Complaints in this category will, on commencement of the new law, be treated as if the President had terminated the complaint under section 46PE. An affected person may then pursue the matter in the Federal Court.

*New section 3G - Presidential review of Commissioner's decision to dismiss complaint*

12. This section deals with complaints which have:

- been referred to the relevant Commissioner for inquiry and conciliation; and,
- the Commissioner has decided not to inquire or continue to inquire into the complaint; and,
- a party has sought presidential review of the Commissioner's decision and that review has not been completed prior to the start of the new law.

13. Complaints in this category, will be deemed to have been terminated under section 46PE. An affected person may then pursue the matter in the Federal Court.

*New section 3H - Administrative review of President's decision*

14. This section deals with complaints which have, before the start of the legislation:

- been the subject of a presidential review and decision; and,
- a party has sought, judicial review of the President's decision; and,
- judicial review has not been completed.

15. When an order is made on review and the decision is remitted to HREOC for re-consideration, the complaint will be treated as if it were terminated by the President under section 46PE. An affected person may then pursue the matter in the Federal Court.

*New section 3J - Complaint referred to Commission but inquiry not started*

16. This section deals with complaints which, prior to the start of the new law, have been referred to HREOC for inquiry and hearing but a substantive hearing has not yet started.

17. Complaints in this category will be treated as if they had been terminated by the President under section 46PE of the new law. An affected person may then pursue the matter in the Federal Court.

*New section 3K - Inquiry started*

18. This section deals with complaints which, prior to the start of the legislation, have:

- been referred to HREOC for inquiry and hearing; and,
- a substantive hearing has commenced.

19. For complaints which have progressed to this stage or further, the old law will continue to apply.

#### Subdivision B - Other rules about complaints lodged before starting day

##### *New section 3L - Notice of termination*

20. Under the new law, when a complaint is terminated by HREOC the President must issue a termination notice. Such a notice is a requirement for making an application to the Federal Court. A number of transitional provisions also provide for the termination of complaints previously lodged under the old law and generally this occurs if a complaint has been dismissed or declined in the initial stages, either by HREOC or the relevant Commissioner.

21. This section provides that where a complaint has been terminated under the transitional provisions, a termination notice must also be issued in the circumstances specified so as to allow an affected person to pursue the matter in the Federal Court.

##### *New section 3M - Work done by Commissioner is taken to have been done by President*

22. A number of transitional provisions provide that complaints which have either been lodged or are in the process of inquiry or conciliation under the old law are to be treated as if they had been lodged or were in the process of inquiry or conciliation under the new scheme. As the processes under the old and new law are similar, this section provides that anything done by the relevant Commissioner under the old law will be treated as if it had been done by the President under the new law. This will mean, for example, that complaints which are in the process of inquiry or conciliation will be able to continue at that stage despite having been transferred to the new scheme.

##### *New section 3N - Special rules apply to proceedings to enforce a determination*

23. This section provides that certain provisions in the new law will apply to court proceedings for the enforcement of a determination made under the old law. The additional provisions relate to assistance in the preparation of initial application forms, the limited right to representation by someone other than a barrister or solicitor, and, informality of court proceedings. The new section will ensure that the provisions designed to make the Federal Court more accessible in human rights cases will also be available to a party who, under the transitional arrangements, will be forced to seek enforcement of a determination under the old law.

#### Division 3 - Other transitional and savings provisions

##### *New section 3P - Protection from civil actions*

24. This section is a savings provision made necessary by the transfer of complaint handling functions to the HRA. The section ensures that HREOC, Commissioners and

their delegates remain protected from civil actions for acts done in the performance of their duties under the old law.

*New section 3Q - Referrals under the old SDA*

25. This section provides specific transitional arrangements for complaints involving discriminatory awards, agreements or particular determinations lodged under the old law. In this regard, the Sex Discrimination Commissioner has the power to refer:

- an alleged discriminatory award or agreement to the Australian Industrial Relations Commission; and,
- an alleged discriminatory determination to the Remuneration Tribunal or the Defence Force Remuneration Tribunal.

26. Complaints relating to a discriminatory award, agreement or determination which have been lodged with HREOC before the start of the new law will remain to be dealt with by the Sex Discrimination Commissioner. After the start of the new law the President will be responsible for the initial handling of such complaints, including decisions to refer. The Sex Discrimination Commissioner's existing functions in any review proceedings, (e.g. before the Australian Industrial Relations Commission), will be retained.

*New section 3R - Inquiries started by Human Rights Commissioner*

27. This section provides specific transitional arrangements for complaints that have been lodged and are being dealt with by the Human Rights Commissioner before the start of the new law. These complaints will continue to be dealt with by the Human Rights Commissioner.

28. The transitional arrangements for complaints under the HRA are different to those which apply to complaints under either the DDA, RDA or SDA because complaints under the HRA do not progress to the Commission for a hearing. Instead, they may result in a report to the Attorney-General.

*New section 3S - When a person cannot lodge a complaint under the new HREOCA*

29. The general transitional arrangements provide that a complaint which is in the process of a substantive hearing before HREOC before the start of the new law, will remain to be heard under the old law.

30. This section deals specifically with representative complaints in the process of a hearing and provides that a person who remains a member of a representative complaint under the old law cannot lodge a separate complaint under the new law (while the matter is still being heard in HREOC). This avoids the potential for an individual to start an action under the new law while they are a party to a matter being determined under the old law.



## Amendments to the Disability Discrimination Act 1992

### **Amendments 3 and 4**

#### Items 9 and 10 - Subsection 13(4)

31. This consequential amendment is required due to the transfer of the legislative structure for complaint handling to the HRA.

32. Under the old law, subsection 13(4) restricted a complainant from making similar complaints of disability discrimination in respect of the same act or omission under both the State and Commonwealth law. With the consolidation of the complaint handling process in the one Act, this amendment preserves that limited restriction. It does not restrict a person from making a subsequent complaint alleging, for example, sex or racial discrimination arising out of the same act or omission. A similar amendment has been made to related provisions in the RDA and SDA.

### **Amendment 5**

#### Item 11 - At the end of paragraph 42(2)(a)

33. This is a consequential amendment made necessary by the transfer of the legislative structure for complaint handling to the HRA.

34. Under the old law, paragraph 42(2)(a) provided that an act of victimisation includes, amongst other things, subjecting a person to any detriment because that person has made, or proposes to make, a complaint under the DDA. Since complaint based action will now be taken under the HRA, the provision will be amended to refer to action taken under either the DDA or the HRA.

### **Amendment 6**

#### Item 14 - Paragraph 42(2)(d)

35. This is a consequential amendment made necessary by the transfer of the legislative structure for complaint handling to the HRA.

36. Under the old law, paragraph 42(2)(d) provided that an act of victimisation includes, amongst other things, subjecting a person to any detriment because that person has attended, or proposes to attend a conference under the DDA. Since complaint based action will now be taken under the HRA, the provision will be amended to refer to a conference held under either the DDA or the HRA.

#### Item 15 - Paragraph 42(2)(e)

37. This is a consequential amendment made necessary by the transfer of the legislative structure for complaint handling to the HRA.

38. Under the old law, paragraph 42(2)(e) provided that an act of victimisation includes, amongst other things, subjecting a person to any detriment because that person has appeared, or proposes to appear, as a witness before HREOC in proceedings under the DDA. Since complaint based action will now be taken under the HRA, the provision will be amended to refer to action taken under either the DDA or the HRA.

### **Amendment 7**

#### **Item 20A - At the end of subsection 67(1)**

39. This is a consequential amendment which inserts a note into the Disability Discrimination Act to inform the reader that the provisions dealing with the inquiry and conciliation of complaints of disability discrimination have been placed in Part IIB of the new HRA.

### **Amendments to the Federal Court of Australia Act 1976**

#### **Amendment 8 - 10**

##### **Items 31 to 33 - Judicial Registrars**

40. These are consequential amendments to provisions in the original Bill which allow the Court to delegate certain powers to Judicial Registrars to deal with human rights matters. As the Native Title Amendment Bill also proposes to give the Federal Court similar powers to deal with matters arising under that legislation, a number of amendments, (generally relating to numbering), were necessary in order to ensure that the provisions in each of the Bills were complementary.

### **Amendments to the Human Rights Legislation Amendment Bill 1996**

#### **Amendment 11**

##### **Item 51 - After paragraph 11(1)(a)**

41. This is a consequential amendment which corrects an error in the original Bill by removing the word "section".

### **Amendments to the Racial Discrimination Act 1975**

#### **Amendments 12 - 13**

##### **Items 62 and 63 - Subsection 6A(2)**

42. This is a consequential amendment made necessary by the transfer of the legislative structure for complaint handling to the HRA.

43. Under the old law, subsection 6A(2) restricted a complainant from making similar complaints of racial discrimination in respect of the same act or omission under both the State and Commonwealth law. With the consolidation of the complaint handling process in the one Act, this amendment preserves that limited restriction. It does not restrict a person from making a subsequent complaint alleging, for example, sex or disability discrimination arising out of the same act or omission. A similar amendment has been made to related provisions in the SDA and DDA.

#### **Amendment 14**

##### **Item 67A - At the end of subsection 20(1)**

44. This is a consequential amendment and inserts a note into the RDA to inform the reader that the provisions dealing with the inquiry and conciliation of complaints of racial discrimination have been placed in Part IIB of the new HRA.

## **Amendment 15**

### **Item 71 - Paragraph 27(2)(e)**

45. This is a consequential amendment made necessary by the transfer of the legislative structure for complaint handling to the HRA.

46. Currently, paragraph 27(2)(e) makes it an offence to subject a person to specified detrimental acts by reason that the person has made, or proposes to make, a complaint under the RDA. Since action will now be taken under the HRA, the reference to the RDA will be amended to refer to a complaint under either the RDA or HRA.

## **Amendment 16**

### **Item 73 - Paragraph 27(2)(g)**

47. This is a consequential amendment made necessary by the transfer of the legislative structure for complaint handling to the HRA.

48. Currently, paragraph 27(2)(g) makes it an offence to subject a person to specified detrimental acts by reason that the person has attended, or proposes to attend, a conference under section 24C of the RDA. Since action will now be taken under the HRA, the provision will be amended to refer to a conference under either the RDA or HRA.

## **Amendments to the Sex Discrimination Act 1984**

### **Amendments 17 and 18**

#### **Items 84 and 85 - Subsection 10(4)**

49. This is a consequential amendment made necessary by the transfer of the legislative structure for complaint handling to the HRA.

50. Under the old law, subsection 10(4) restricted a complainant from making similar complaints on grounds covered by the SDA, in respect of the same act or omission, under both the State and Commonwealth law. With the consolidation of the complaint handling process in the one Act, this amendment preserves that limited restriction. It does not restrict a person from making a subsequent complaint alleging, for example, disability or racial discrimination arising out of the same act or omission. A similar amendment has been made to related provisions in the DDA and RDA.

### **Amendments 19**

#### **Items 86 and 87 - Subsection 11(4)**

51. This is a consequential amendment made necessary by the transfer of the legislative structure for complaint handling to the HRA.

52. Under the old law, subsection 11(4) performed a similar function to ss. 10(4) of the SDA by restricting similar complaints under both State and Commonwealth law. However ss. 11(4) refers to complaints made under a law of a State or Territory that furthers the object of the Convention on the Elimination of All Forms of Discrimination Against Women, (see s.11(2) SDA). With the consolidation of the

complaint handling process in the one Act, this amendment preserves that limited restriction. It does not restrict a person from making a subsequent complaint alleging, for example, disability or racial discrimination arising out of the same act or omission.

#### **Amendment 20**

##### Item 90A - At the end of subsection 48(1)

53. This is a consequential amendment which inserts a note into the SDA to inform the reader that the provisions dealing with the inquiry and conciliation of complaints of alleged unlawful discrimination on grounds covered by the SDA have been placed in Part IIB of the new HRA.

#### **Amendment 21**

##### Item 102 - Paragraph 94(2)(a)

54. This is a consequential amendment made necessary by the transfer of the legislative structure for complaint handling to the HRA.

55. Under the old law, paragraph 94(2)(a) made it an offence to subject a person to specified detrimental acts by reason that the person has made, or proposes to make, a complaint under the SDA. Since action will now be taken under the HRA, the provision will be amended to refer to action taken under either the SDA or the HRA.

#### **Amendment 22**

##### Item 105 - Paragraph 94(2)(d)

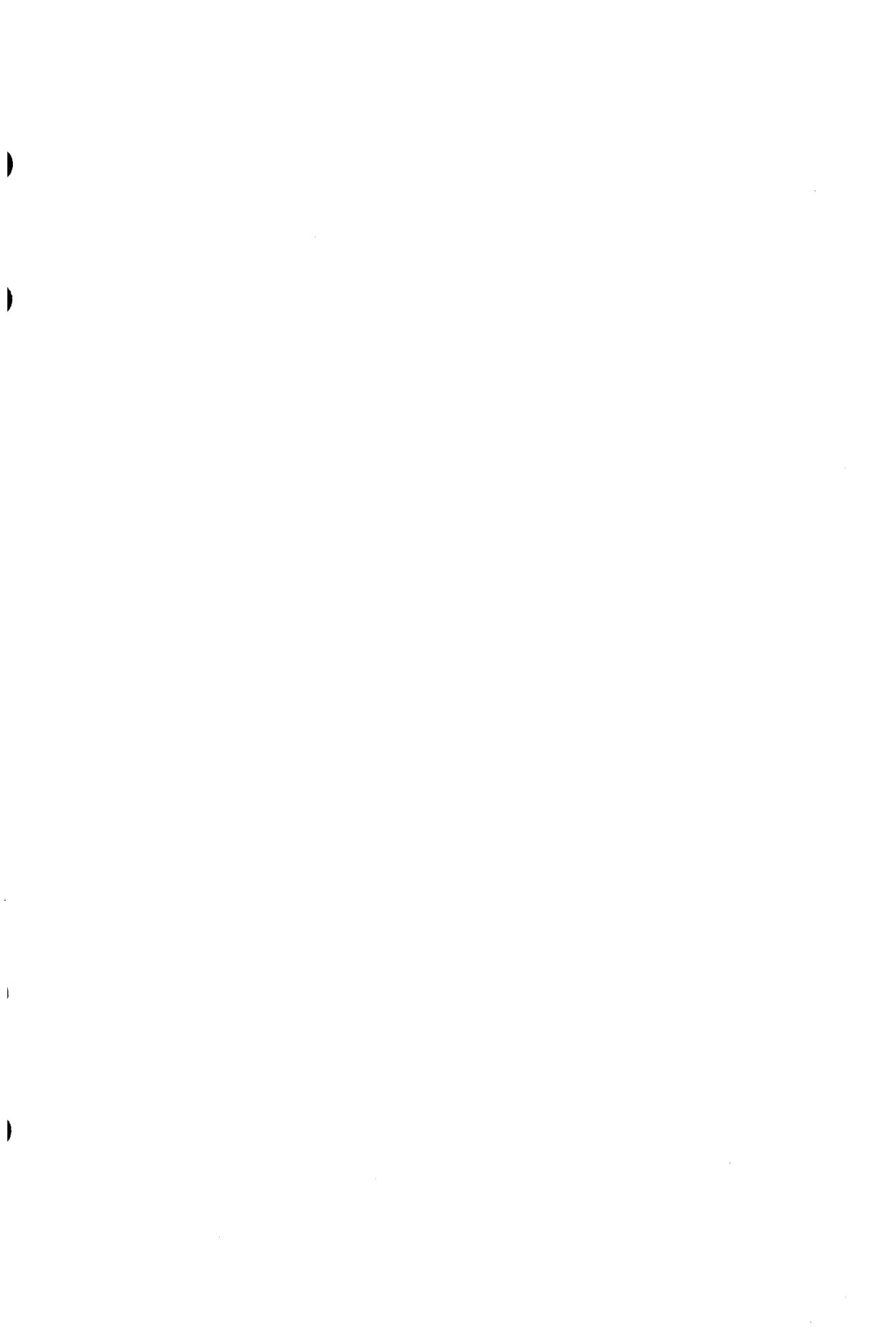
56. This is a consequential amendment made necessary by the transfer of the legislative structure for complaint handling to the HRA.

57. Under the old law, paragraph 94(2)(d) provided that an act of victimisation includes, amongst other things, subjecting a person to any detriment because that person has attended, or proposes to attend, a conference under the SDA. Since complaint based action will now be taken under the HRA, the provision will be amended to refer to a conference under either the SDA or the HRA.

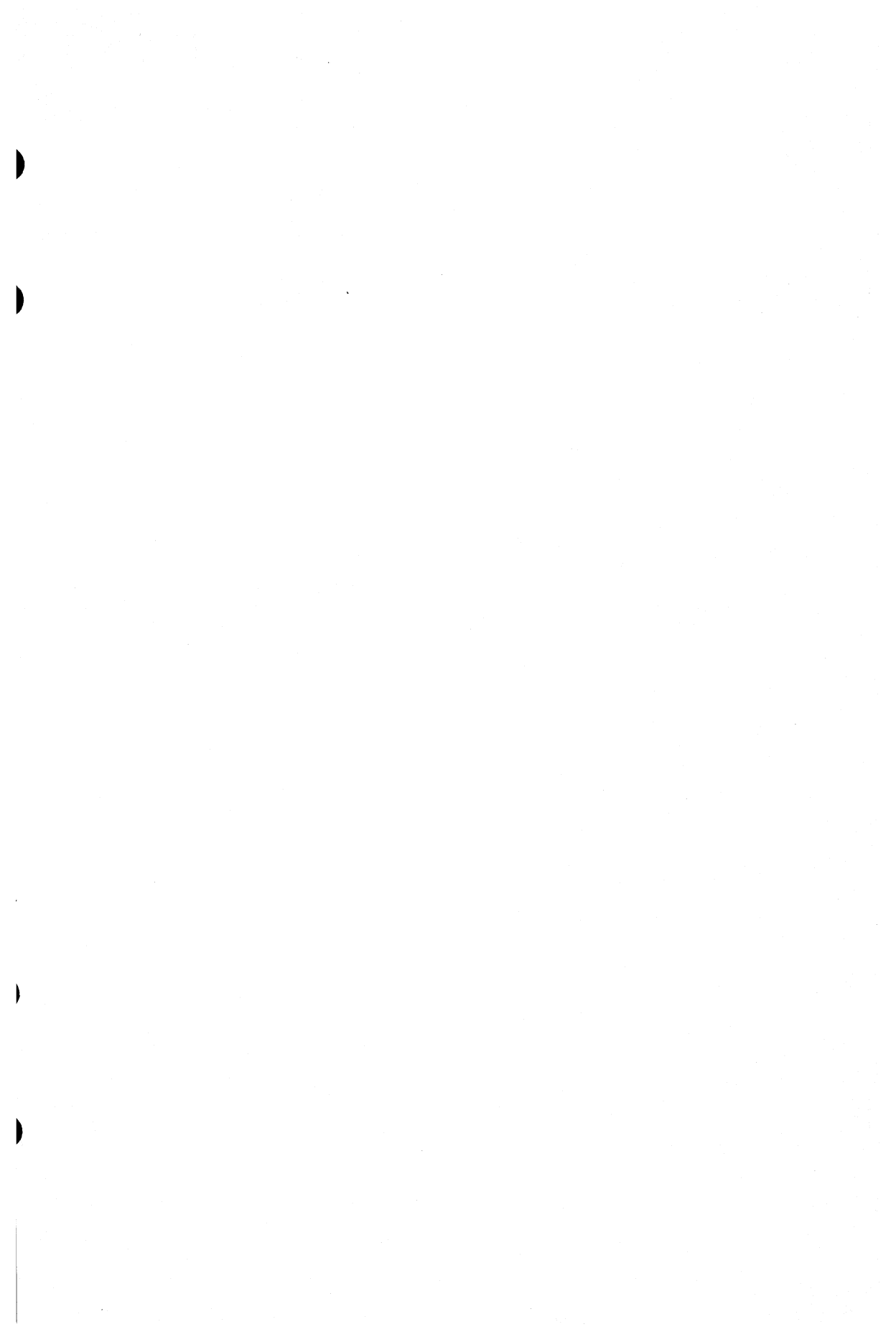
##### Item 106 - Paragraph 94(2)(e)

58. This is a consequential amendment made necessary by the transfer of the legislative structure for complaint handling to the HRA.

59. Under the old law, paragraph 94(2)(e) provided that an act of victimisation includes, amongst other things, subjecting a person to any detriment because that person has appeared, or proposes to appear, as a witness before HREOC in proceedings under the SDA. Since complaint based action will now be taken under the HRA, the provision will be amended to refer to action taken under either the SDA or the HRA.







1998

