

1995

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

SEX DISCRIMINATION AMENDMENT BILL 1995

REPLACEMENT EXPLANATORY MEMORANDUM

(Circulated by the authority of the Attorney-General,  
the Honourable Michael Lavarch, M.P.)

THIS MEMORANDUM REPLACES THE EXPLANATORY MEMORANDUM  
PRESENTED TO THE HOUSE OF REPRESENTATIVES ON 30 MARCH 1995.



## TABLE OF CONTENTS

	Page
GENERAL OUTLINE	1
FINANCIAL IMPACT STATEMENT	2
NOTES ON CLAUSES	3

## SEX DISCRIMINATION AMENDMENT BILL 1995

### GENERAL OUTLINE

This Bill amends the *Sex Discrimination Act 1984* (the Act) to implement Stage 2 of the Government's response to the recommendations made by the House of Representatives Standing Committee on Legal and Constitutional Affairs in its Inquiry into Equal Opportunity and Equal Status for Women in Australia, known as the "Half Way to Equal" Report. The Committee made a number of substantial recommendations aimed at strengthening the Act and furthering its objects.

The Bill will amend the Act to:

- (a) insert a preamble incorporating both a general prohibition on discrimination on the grounds covered by the Act and an equality before the law provision;
- (b) amend subsections 5(2), 6(2) and 7(2) to simplify the test for indirect discrimination, clarify the meaning of indirect discrimination and provide a defence to the respondent if the respondent can satisfy all the elements of the defence including, that the condition, requirement or practice, the imposition of which it is alleged amounts to indirect discrimination, is reasonable in the circumstances;
- (c) repeal and replace section 7 of the Act to include potential pregnancy as an unlawful ground of discrimination and remove the reasonableness test for direct discrimination on the ground of pregnancy. "Potential pregnancy" will be defined in section 4 of the Act;
- (d) repeal section 33, the "special measures" provision, and replace it with a new provision which makes it clear that such measures do not amount to discrimination for the purposes of the Act and are designed to achieve equality of outcomes. For this reason the provision is also being moved from the exemptions division of the Act to the definitions division;
- (e) remove the reference to "combat-related duties" in the section 43 exemption for the Australian Defence Forces to take into account policy changes made by the Australian Defence Forces; and
- (f) make minor technical and consequential amendments.

## FINANCIAL IMPACT STATEMENT

While these amendments may result in cost implications for the Human Rights and Equal Opportunity Commission, these are not expected to be significant. Any additional resources for the Commission will be considered in the context of the current review of the Commission which is to be concluded by July 1995.

## NOTES ON CLAUSES

### Clause 1 - Short title etc

1. Subclause 1(1) provides for the Act to be cited as the *Sex Discrimination Amendment Act 1995*.
2. Subclause 1(2) states that the "Principal Act" is the *Sex Discrimination Act 1984*.

### Clause 2 - Commencement

3. Clause 2 provides for the commencement of the Act on the day on which it receives Royal Assent.

### Clause 3 - Schedule

4. Clause 3 provides that the Principal Act is amended as set out in the Schedule to the Bill.

## SCHEDULE

### Item 1 - Amendment of the Title

5. Item 1 makes a consequential amendment to the title of the Act to include a reference to "potential pregnancy".

### Item 2 - Insertion of a Preamble

6. Item 2 provides that a preamble be inserted into the Act after the title.
7. The first preambular paragraph recognises the need to prohibit, so far as is possible, discrimination against a person on the ground of sex, marital status, pregnancy or potential pregnancy as provided for in the Act.
8. The second preambular paragraph affirms that every individual is equal before and under the law and is entitled to equal protection and equal benefit of the law without discrimination on the ground of sex, marital status, pregnancy or potential pregnancy.

### Item 3 - Consequential amendment to the Objects of the Act

9. Item 3 makes a consequential amendment to paragraph 3(b) to include a reference to “potential pregnancy” as a ground of unlawful discrimination which the Act aims to eliminate.

### Item 4 - Insertion of definition

10. Item 4 inserts a definition in section 4. It provides that:
  - “potential pregnancy” has the meaning given in section 4B.

### Item 5- New definitions

11. Item 5 inserts a section after section 4A.
12. **Section 4B** defines potential pregnancy. For the purposes of the Act, “potential pregnancy” of a woman includes a reference to the fact that the woman is or may be capable of becoming pregnant, that the woman has expressed a desire to become pregnant or the fact that the woman is likely, or is perceived as being likely, to become pregnant.

### Item 6 - Indirect discrimination on the ground of sex

13. Item 6 omits subsection 5(2) and substitutes subsections 5(2) and (3).
14. Proposed subsection 5(2) replaces the existing test for indirect discrimination on the ground of sex. The new test is simpler and defines indirect discrimination more clearly. This gives greater guidance to what amounts to indirect discrimination on the ground of sex.
15. The existing test requires that a person (the “complainant”) making a complaint of indirect discrimination under subsection 5(2) satisfy the following elements:

the existence of a requirement or condition which is allegedly discriminatory;

that a substantially higher proportion of people of one sex than the other can comply with the requirement or condition (the “proportionality test”);

that the requirement or condition is unreasonable in the circumstances (the “reasonableness defence”);

that the complainant cannot comply with the requirement or condition.

16. The new test does not require a complainant alleging indirect discrimination to satisfy the proportionality test nor prove that a requirement or condition is unreasonable in the circumstances. The new test provides a “reasonableness” defence to the person who it is alleged discriminated (the “discriminator”) against another person. (See proposed section 7B under Item 10 below.)
17. The new test provides that the discriminator discriminates against another person if the discriminator imposes, or proposes to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging the other person because of his or her sex. This addresses situations in which the imposition of an apparently neutral condition, requirement or practice has, or is likely to have, the effect of disadvantaging persons of the same sex as the complainant.
18. This indirect discrimination test is the same for indirect discrimination on the grounds of marital status, and pregnancy and potential pregnancy. (See proposed subsections 6(2) and 7(2), inserted by Items 8 and 9 respectively.)
19. Proposed subsection 5(3) states that the section is subject to proposed sections 7B and 7D. These sections are inserted into the Act by Item 10 of the Bill and are explained below.

#### Item 7 - Paragraph 6(1)(a)

20. Item 7 makes a minor technical amendment to paragraph 6(1)(a) to insert “or” at the end of paragraph (a).

#### Item 8 - Discrimination on the ground of marital status

21. Item 8 omits subsection 6(2) and substitutes subsections 6(2) and (3).
22. Subsection 6(2) replaces the existing test for indirect discrimination on the ground of marital status. (See paragraph 15 above for a description of existing test.) The new test is simpler and defines indirect discrimination more clearly. This gives greater guidance to what amounts to indirect

discrimination on the ground of marital status. The new test does not require a complainant alleging indirect discrimination to satisfy the proportionality test nor prove that a condition, requirement or practice is unreasonable in the circumstances. Instead it addresses situations in which the imposition of an apparently neutral requirement, condition or practice has, or is likely to have, the effect of disadvantaging persons of the same marital status as the complainant. The new test provides a “reasonableness” defence to the person who it is alleged discriminated (the “discriminator”) against another person.  
(See proposed section 7B under Item 10 below.)

23. Subsection (3) provides that section 6 is subject to sections 7B and 7D. These sections are inserted into the Act by Item 10 of the Bill and are explained below.

#### Item 9 - Discrimination on the ground of pregnancy or potential pregnancy

24. Item 9 repeals section 7 and substitutes a new section 7. This section makes unlawful direct and indirect discrimination on the grounds of pregnancy and potential pregnancy. Explicit inclusion of potential pregnancy as a proscribed ground of discrimination is necessary to prevent discrimination against women on the basis of their potential or perceived potential to become pregnant.
25. Proposed subsection 7(1) states that direct discrimination on the ground of pregnancy or potential pregnancy is unlawful. The amendment removes the reasonableness defence for a complaint of direct discrimination on the ground of pregnancy.
26. Proposed subsection 7(2) inserts a new test for indirect discrimination on the ground of pregnancy and potential pregnancy. The new test is simpler and defines indirect discrimination more clearly. This gives greater guidance to what amounts to indirect discrimination on the ground of pregnancy and on the new ground of potential pregnancy. The new test does not require a complainant alleging indirect discrimination to satisfy the proportionality test nor prove that a condition, requirement or practice is unreasonable in the circumstances. Instead, it addresses situations in which the imposition of an apparently neutral requirement, condition or practice has, or is likely to have, the effect of disadvantaging persons, including the complainant, who are



pregnant or potentially pregnant. The new test provides a “reasonableness” defence to the person who it is alleged discriminated (the “discriminator”) against another person.

(See proposed section 7B under Item 10 below.)

27. Subsection (3) provides that section 7 is subject to sections 7B and 7D. These sections are inserted into the Act by Item 10 of the Bill and are explained below.

#### Item 10 - Insertion of new sections

28. Item 10 inserts three sections after section 7A, sections 7B, 7C and 7D.

#### **Section 7B - Indirect discrimination: -Reasonableness Test:**

29. Subsection 7B(1) provides that it is not unlawful for a person to indirectly discriminate against another person on the ground of sex, marital status, pregnancy or potential pregnancy by imposing or proposing to impose a condition, requirement or practice if the imposition is reasonable in the circumstances.
30. Subsection 7B(2) sets out a non-exhaustive list of matters to be taken into account in determining if a condition, requirement or practice is reasonable in the circumstances.
31. Paragraph 7B(2)(a) refers to the nature and extent of the disadvantage resulting from the imposition, or proposed imposition, of the condition, requirement or practice. This paragraph incorporates considerations of the type or degree of disadvantage or detriment to members of the group to which the complainant belongs. For example, under paragraph (a) a relevant factor may be whether the condition, requirement or practice complained of subjects persons of, for example, a particular sex, to ongoing disadvantage by entrenching the results of past discriminatory practices.
32. Paragraph 7B(2)(b) refers to the feasibility of overcoming or mitigating the disadvantage. In assessing the feasibility of overcoming or mitigating the disadvantage to members of the affected group, paragraph (b) involves an examination of the purpose for which the condition, requirement or practice was imposed or proposed to be imposed, and an assessment of whether alternative means of a less discriminatory, or non

discriminatory, nature are available to achieve the result sought. Factors such as cost, workplace planning, business needs and business efficiency would be relevant considerations in determining the feasibility of overcoming or mitigating the disadvantage.

33. Paragraph 7B(2)(c) refers to whether the disadvantage is proportionate to the result sought by the person who imposes, or proposes to impose, the condition, requirement or practice. Paragraph (c) contemplates a balancing approach. Consideration is to be given to the purpose or reason underlying the imposition, or proposal to impose, the condition, practice or requirement, balanced against the disadvantage which will flow, or is likely to flow, to members of the group to which the complainant belongs, if the discriminatory condition, practice or requirement is imposed.
34. **Section 7C - Burden of proof:** Section 7C provides that the person alleged to have indirectly discriminated (the "discriminator") against another person bears the onus of proving the elements of the "reasonableness" defence for his or her discriminatory actions. That is, that his or her discriminatory actions were reasonable in the circumstances and therefore not unlawful under subsection 5(2), 6(2) or 7(2), as the case may be.
35. Under the existing test for indirect discrimination, the complainant had to prove, amongst other things, that a requirement or condition was unreasonable in the circumstances. (See Item 6 above for an explanation of the existing test for indirect discrimination.) It is recognised that requiring a complainant to prove that conduct is unreasonable is a significant barrier to successfully proving a complaint of indirect discrimination. It is a particularly onerous burden on the complainant who does not usually have access to the information needed to prove that actions allegedly amounting to indirect discrimination are unreasonable in the circumstances. By contrast, the respondent is likely to have access to the information needed to prove that such action is reasonable in the circumstances. Thus the respondent is better able to bear this burden of proof. For this reason "reasonableness" is provided as a defence to the respondent who must prove the elements of the defence in order to rely on it rather than as an element of the test for indirect discrimination to be proved by the complainant.

## **Section 7D - Special measures intended to achieve equality:**

36. Section 7D provides that a person does not discriminate against another person for the purposes of the Act by taking special measures, a purpose of which is to achieve equality between men and women, people of different marital status, pregnant women and women who have the potential to become pregnant and people who do not. These measures may be discriminatory if they continue once a purpose for which they were protected under this section is achieved.
37. This provision replaces section 33 of the Act which currently provides that an act which would otherwise be discriminatory for the purposes of the Act is not unlawful if a purpose of the act is to ensure equal opportunity. Section 33 therefore operates to provide an exemption from the anti discrimination provisions of the Act.
38. The new clause recognises that certain special measures may have to be taken to overcome discrimination and achieve equality. Subsection (2) clearly states that such measures are not discrimination for the purposes of the Act.
39. Subsection 7D(3) states that measures are special measures for the purpose of subsection (1) if they are being taken solely for the purpose of achieving equality or if they are being taken for that purpose as well as for other purposes. In the latter case it is not necessary for the purpose of achieving equality to be the main purpose for taking the measure.
40. This provision seeks to achieve equality of outcomes and is based on Australia's international obligations to achieve equality, as required by international instruments such as the Convention on the Elimination of All Forms of Discrimination Against Women.

### **Item 11 - Technical amendment to subsection 9(4)**

41. Item 11 amends subsection 9(4) by omitting "the provisions of Division 3" and substituting "the prescribed provisions of Division 3". This amendment is necessary to correct a technical error.

### **Items 12 - 28 - Consequential amendments**

42. Items 12 - 28 make consequential amendments to subsections 10(2) and 11(2), sections 14 to 21 inclusive, subsection 22(1), section 23, subsection

24(1), section 25, and subsections 26(1) and 27(1) to include a reference in these provisions to “potential pregnancy”.

#### Item 29

43. Item 29 repeals section 33 which will be replaced by proposed section 7D.

#### Item 30 - Consequential amendment to subsection 40(6)

44. Item 30 makes a consequential amendment to subsection 40(6) to remove the reference to section 33 and replace it with a reference to the new special measures provision, subsection 7D(1).

#### Item 31 - Combat-related duties

45. Item 31 omits references to “combat-related duties” from paragraphs 43(1)(a) and (b). These paragraphs provide an exemption for the Australian Defence Forces (the ADF) from the operation of the anti discrimination provisions of the Act in relation to “combat-related duties”. The ADF has amended its policy in relation to assigning women to combat-related duties thus rendering this exemption unnecessary.

#### Item 32 - Definition of combat-related duties

46. Item 32 omits the definition of “combat-related duties” from subsection 43(2). This definition is no longer needed as reference to “combat related duties” is to be removed from the section.

#### Item 33 - Consequential amendment to section 48

47. Item 33 makes a consequential amendment to paragraphs 48(1)(g), (ga) and (gb) to include a reference to “potential pregnancy”.

#### Item 34 - Consequential amendment to section 48

48. Item 34 makes a consequential amendment to subsection 48(2) to remove the reference to section 33 and replace it with a reference to the new special measures provision, subsection 7D(1).

#### Note about section heading

49. The Note amends the heading of section 19 to take account of the repeal of the Conciliation and Arbitration Act and its replacement by the *Industrial Relations Act 1988*.







