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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

SEX DISCRIMINATION AMENDMENT BILL 1995

SUPPLEMENTARY EXPLANATORY MEMORANDUM

Amendments to be Moved on Behalf of the Government

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



GOVERNMENT AMENDMENTS TO THE SEX DISCRIMINATION
AMENDMENT BILL 1995

GENERAL OUTLINE

These amendments amend the *Sex Discrimination Amendment Bill 1995* (the Bill) to clarify certain provisions of the Bill so that they more clearly reflect Government policy. The amendments implement recommendations one and two of the Senate Legal and Constitutional Legislation Committee's Report of 21 September 1995 on the Bill. The amendments also implement the principle expressed in recommendation 3 of the Committee's Report.

The amendments will amend the Bill to:

- (a) clarify the test for indirect discrimination in items 6 (proposed subsection 5(2)), 8 (proposed subsection 6(2)) and 9 (proposed subsection 7(2)) of the Schedule; and
- (b) make a consequential amendment to item 10 of the Schedule, proposed subsection 7B(1); and
- (c) clarify what is meant by "equality" in item 10 of the Schedule, proposed subsection 7D(1).

FINANCIAL IMPACT STATEMENT

No financial implications arise from the amendments to the Bill.

NOTES ON CLAUSES

Item 1 - Indirect discrimination on the ground of sex

1. Item 1 amends the test for indirect discrimination on the ground of sex. It omits “the aggrieved person because of his or her sex” from proposed subsection 5(2) in item 6 of the Schedule, and substitutes “persons of the same sex as the aggrieved person”.
2. The amended proposed subsection 5(2) will make it clear that the test for indirect discrimination on the ground of sex is satisfied if a discriminator imposes, or proposes to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging persons of the same sex as the aggrieved person.
3. This revised test makes it clear that indirect discrimination involves the imposition of (or proposal to impose) a condition, requirement or practice which is, on its face, “non discriminatory” but which, in fact, has, or is likely to have, an adverse impact upon members of the group to which the complainant belongs, that is, persons of the same sex as the complainant.
4. The new test is still subject to proposed subsection 7B which provides a defence of reasonableness to a respondent to a complaint of indirect sex discrimination. It is also subject to proposed section 7D, the “special measures” provision.

Item 2 - Indirect discrimination on the ground of marital status

5. Item 2 amends the test for indirect discrimination on the ground of marital status. It omits “the aggrieved person because of his or her marital status” from proposed subsection 6(2) in item 8 of the Schedule, and substitutes “persons of the same marital status as the aggrieved person”.
6. The amended proposed subsection 6(2) will make it clear that the test for indirect discrimination on the ground of marital status is satisfied if a discriminator imposes, or proposes to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging persons of the same marital status as the aggrieved person.
7. This revised test makes it clear that indirect discrimination involves the imposition of (or proposal to impose) a condition, requirement or practice which is, on its face, “non discriminatory” but which, in fact, has, or is likely to have, an adverse impact upon members of the group to which the complainant belongs, that is, persons of the same marital status as the aggrieved person.
9. The new test is still subject to proposed subsection 7B which provides a defence of reasonableness to a respondent to a complaint of indirect marital status discrimination. It is also subject to proposed section 7D, the “special measures” provision.

Item 3 - Indirect discrimination on the ground of pregnancy or potential pregnancy

10. Item 3 amends the test for indirect discrimination on the ground of pregnancy or potential pregnancy. It omits "the aggrieved woman because of her pregnancy or potential pregnancy" from proposed subsection 7(2) in item 9 of the Schedule, and substitutes "women who are also pregnant or potentially pregnant".
11. The amended proposed subsection 7(2) will make it clear that the test for indirect discrimination on the ground of pregnancy or potential pregnancy is satisfied if a discriminator imposes, or proposes to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging women who are pregnant or potentially pregnant.
12. This revised test makes it clear that indirect discrimination involves the imposition of (or proposal to impose) a condition, requirement or practice which is, on its face, "non discriminatory" but which, in fact, has, or is likely to have, an adverse impact upon members of the group to which the complainant belongs, that is, women who are pregnant or potentially pregnant.
13. The new test is still subject to proposed subsection 7B which provides a defence of reasonableness to a respondent to a complaint of indirect pregnancy or potential pregnancy discrimination. It is also subject to proposed section 7D, the "special measures" provision.

Item 4 - Consequential Amendment

14. Item 4 makes a consequential amendment to proposed subsection 7B(1) in item 10 of the Schedule to omit "the effect of disadvantaging the other person as" and substitute "the disadvantaging effect".
15. This amendment is consequential upon the amendments made to proposed subsections 5(2), 6(2) and 7(2).

Item 5 - Special measures intended to achieve equality

16. Item 5 amends proposed subsection 7D(1) in item 10 of the Schedule to insert "substantive" after "achieving".
17. This amendment clarifies that special measures, taken to achieve substantive equality, sometimes referred to as de facto equality or equality in fact, are not discrimination for the purposes of the Act.
18. This clause recognises that such special measures may include, but are not limited to, measures taken to achieve equality of opportunity, equality of treatment and equality of outcomes.