

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

SEX DISCRIMINATION BILL 1981

EXPLANATORY MEMORANDUM

(Circulated by Senator S. Ryan)

OUTLINE

The main purpose of the Bill is to implement Australia's treaty obligations under the International Convention on the Elimination of All Forms of Discrimination Against Women.

Unlawful Discrimination

The Bill makes it unlawful to discriminate on the ground of sex or marital status in the areas of employment, education, the provision of goods and services, accommodation, land and clubs. It also makes victimisation, advertisements, aiding and abetting of unlawful acts unlawful and it becomes unlawful for principals and employers as well as agents and employees. There are exceptions from the Act for acts done under statutory authority, charities, religious bodies and voluntary bodies.

There are limited exceptions for superannuation for a period of 2 years, for insurance schemes and for special provision for pregnancy or childbirth.

A person who is the victim of an unlawful act of discrimination on the grounds of sex or marital status will have the right to lodge a complaint with the Director of Conciliation, whose role is to investigate and conciliate such complaints. The Director may issue a notice in writing to require either the complainant or the respondent to appear at a meeting to assist in the conciliation process. A failure to attend at such a meeting will be an offence and there will be a penalty of \$1,000.

In the minority of cases where conciliation is unsuccessful, for a variety of reasons, the Director (or in a limited number of cases the complainant may request) may refer the complaint for an inquiry by the Human Rights Commission.

The Commission is that established by the Human Rights Commission Act 1981, although it will be constituted in a different form for inquiries under this Bill. The Commission will consist of the Chairman (or in some cases the Deputy Chairman) and 2 other members to be chosen from the panel of members that are currently appointed to the Commission.

The Commission is provided with powers to call witnesses and demand the production of documents. The Commission is empowered to issue interim declarations in situations where it is important to preserve a complainant's rights at that instant.

The Commission is empowered to conduct an inquiry and make a determination, which may consist of a declaration covering a number of important rights for the complainant.

If the respondent does not fulfil the terms of the declaration the Commission or the complainant will have the right to initiate an action in the Federal Court for an order to enforce the terms of the declaration. The Commission is empowered to specify any facts on which it has based a determination. The Federal Court is then empowered to accept any such stated facts as prima facie evidence of the matters contained in the facts.

Affirmative Action

The Bill establishes that various organisations must establish affirmative action plans for women employees. These organisations are :

- . the Commonwealth and all authorities of the Commonwealth;
- . any financial, foreign or trading corporation which employs over 100 people;
- . any person, firm or body which enters into a contract, sub-contract or agreement with the Commonwealth or an authority of the Commonwealth for supplies or services exceeding \$50,000.

A Director of Affirmative Action is established to advise on the planning and implementing of these affirmative action plans. If the Director is dissatisfied with any organisation's management plan, then the plan may be referred to the Human Rights Commission. The Commission has powers to conduct an investigation, and call witnesses, demand production of documents and has power to enter premises for inspection purposes.

The Commission at the end of an investigation may -

- . make recommendations to the Director or the organisation;

- . make written declarations on amendments to the plan;
- . report to the Minister, which must be tabled in Parliament.

If an organisation fails to comply with a written direction, the Commission may apply to the Federal Court for an order requiring compliance.

Further, where a corporation fails to comply with a written direction from the Commission, then the Commission may recommend to the Minister that the Governor-General in Council take certain specified action, including declaring the corporation ineligible for further government contracts.

There are a number of administrative provisions to establish the Directors of Conciliation and Affirmative Action and to provide them and the Commission with the necessary powers and duties to conduct their roles.

NOTES ON CLAUSES

PART I - PRELIMINARY

Clause 1 - Short Title

The short title of the Act will be the Sex Discrimination Act 1981.

Clause 2 - Commencement

The legislation will come into operation on the day on which it receives Royal Assent.

Clause 3 - Objects of this Act

The objects of this Act are to implement Australia's treaty obligations under the International Convention on the Elimination of All Forms of Discrimination Against Women, to make sex and marital status discrimination unlawful in a number of specified areas, to promote affirmative action for women in employment and create the necessary enforcement mechanism.

Clause 4 - Operation of this Act

The International Convention provides the main constitutional basis for the Act; others are set out in sub-clause (2).

Clause 5 - Interpretation

Sub-clause (1) contains definitions of terms frequently used throughout the Act. These include -

"marital status", as the basis for unlawful discrimination in Part II, is defined as the status or condition or being single, married, separated, divorced, widowed or living in a de facto relationship;

"services" is used in Part II in relation to unlawful discrimination in the provision of goods and services and is defined as including banking, insurances and loans, entertainment, transport, professional or trade services, police or prison authorities.

PART II - PROHIBITION OF DISCRIMINATION

Division 1 - General

Clause 8 - Sex Discrimination

Sub-clause (1) - this sub-clause defines direct discrimination by a discriminator against an aggrieved person on the ground of sex, by reason of the aggrieved person's sex, or stereotyped assumptions or imputations about persons of that sex.

Sub-clause (2) - this sub-clause defines indirect discrimination on the ground of sex by the discriminator against an aggrieved person, and covers the application of a requirement or condition which person of the opposite sex to the aggrieved person can comply with, and the requirement or condition is unreasonable and the aggrieved person can not comply with it.

Clause 9 - Discrimination on the ground of marital status

This clause contains similar definitions on the ground of marital status for direct and indirect discrimination set out in clause 8.

Division 2 - Discrimination in Work

Clause 10 - Discrimination against applicants and employees

Sub-clause (1) - this sub-clause makes it unlawful to discriminate on the ground of sex or marital status against any application for employment or in the terms a person is offered employment.

Sub-clause (2) - this sub-clause makes it unlawful to discriminate on the ground of sex or marital status against any employee in such areas as terms or conditions of employment, access to promotion, training or transfer, dismissal or any other detriment (e.g. demotion, denial of overtime etc).

Clauses 11-16

These clauses cover similar provisions of unlawful discrimination in the areas of commission agents, contract workers, partnerships, trade unions, qualifying bodies and employment agencies.

Clause 17 - Inherent requirements of the job

This clause provides an exception from this Part for jobs where sex or marital status may be an inherent requirement for the job. This uses the language of the International Labour Organisation's Convention No. 111, Convention Concerning Discrimination in Respect of Discrimination in Employment and Occupation, Article 1, clause 2 which recognises that there may be circumstances where a person of a particular sex or marital status may be required for a particular job.

Division 3 - Discrimination in Other Areas

Clause 18 - Education

This clause makes it unlawful to discriminate on the ground of sex or marital status against a person applying to become a student, or against a student. There is an exception for single sex institutions.

Clause 19 - Provision of goods and services

This clause makes it unlawful to discriminate on the ground of sex or marital status by refusing to provide goods or services, or by the terms in which they are provided.

Clause 20 - Accommodation

This clause makes it unlawful to discriminate on the ground of sex or marital status against an applicant for accommodation, or against a tenant by limiting access or by eviction. There is an exception for a person who wants to have someone living in the 'family home' and where there are no more than 3 people resident.

Clause 21 - Land

This clause makes it unlawful to discriminate on the ground of sex or marital status when selling land by the choice of buyer or the terms or conditions placed on a buyer.

Clause 22 - Clubs

This clause makes it unlawful for a club to discriminate on the ground of sex or marital status in accepting applications for membership, or in the access to any benefits for a member. A "club" is defined in Clause 5 and the major requirements are that it is a bona fide association of 30 or more members, and that it sells or supplies liquor for consumption on the club-s premises. There are exceptions for single-sex clubs (sub-clause (3)) or where it is not practicable for the benefits to be used simultaneously or to the same extent, then a club may make adjustments as are fair and reasonable (sub-clause (4)).

Division 4 - Other Unlawful Acts

Clause 23 - Victimisation

In order to protect a complainant, or any person assisting the complainant, it is unlawful for a discriminator to victimise any such person.

Clause 24 - Advertisements

This clause makes it unlawful to advertise an intention to breach the Act, e.g. by advertising for "men only", "salesman wanted".

Division 5 - Exceptions to Part II

Clause 28 - Superannuation

There is a 2 year exemption for all existing superannuation and provident funds and schemes to allow them to bring their provisions in line with the Act, while all new schemes and funds will be covered.

Clause 29 - Insurance

This clause exempts all insurance policies which discriminate on the ground of sex as long as the discriminatory provisions are based on reasonable actuarial or statistical data.

PART III - INVESTIGATIONS AND INQUIRIES

Division 1 - Investigation and Conciliation of Complaints
by the Director of Conciliation

Clause 31 - Director of Conciliation

This clause creates the position of a Director of Conciliation and later clauses require the Director to investigate and conciliate complaints of unlawful discrimination on the ground of sex or marital status which are lodged (clauses 32, 33, 37).

Clause 34 - Application for interim determination under s. 63

The Director may apply to the Commission for an interim determination, as there may be many situations where it is necessary to preserve the status quo or the rights before investigation or conciliation are possible.

Clause 37 - Resolution of complaint by conciliation

The Director must endeavour to resolve the complaint by conciliation. To assist in this process, the Director may give written notice to either or both parties that they are to appear before her/him and there is a penalty of \$1,000 for failing to comply with such a notice.

Clause 39 - Reference of complaints to Commission

Where the Director is satisfied that either of 3 criteria are met then she/he may refer a complaint to the Human Rights Commission.

Clauses 40-42 - Director's other functions

These clauses provide the Director with a self-initiation power to investigate complaints where it appears an unlawful act is being done and to exercise all the usual powers, functions and duties under the Act.

Division 2 - Inquiries by Human Rights Commission

Clauses 43-67

This Division sets out the procedures that the Commission must adopt when conducting an inquiry and its powers to join parties, have a counsel assisting the Commission, give leave for a party to be represented by a solicitor, barrister or agent, to hear and determine complaints as representative complaints (i.e. class actions), require evidence on oath or affirmation and summons a witness or demand the production of documents (penalty for non-compliance with such a summons is \$5,000).

The Commission is not bound by the rules of evidence and may inform itself as it thinks fit, and it is intended that an inquiry would be conducted in an informal, non-legal environment. The Chairman, however, is vested with the power to determine questions of admissibility of evidence and any other questions of law and procedure (clause 64).

The Commission may make an interim determination to preserve the status quo or rights of the parties, or on the Director's application, until the complaint inquiry is completed (clause 63).

Clause 64 - Determination or other decision of the Commission

The Commission, after hearing all the evidence in an inquiry, may -

- . dismiss the complaint;
- . find that the complaint of unlawful discrimination on the grounds of sex or marital status in the appropriate area is substantiated and make a determination which may include a declaration that the respondent has engaged in unlawful conduct; that the respondent employ, re-employ or promote the complainant; or that the respondent should pay damages to the complainant for any loss or damage suffered by the respondent's behaviour.

Sub-clause (2) empowers the Commission to specify any facts upon which such a determination is based.

Clause 65 - Proceedings in the Federal Court

Sub-clause (1) - this sub-clause empowers a complainant or the Commission to apply to the Federal Court for an order to enforce a determination made by the Commission.

Sub-clause (2) - this sub-clause allows the Federal Court to receive as prima facie evidence any statement by the Commission of the facts on which it based its determination.

Sub-clause (3) - this sub-clause empowers the Federal Court to make any order it thinks fit, where it is satisfied that the respondent has engaged in conduct or committed an act which is unlawful under this Act.

Clause 66 - Costs

The basic rule is that all parties shall bear their own costs. However, if a complainant or the Commission go to the Federal Court to have the determination of the Commission enforced, and the Federal Court makes a decision favourable to either the complainant or the Commission, then the respondent must pay the other party's costs.

PART IV - AFFIRMATIVE ACTION IN PUBLIC AND PRIVATE
EMPLOYMENT

Division 1 - General

Clause 69 - Application to public employment

This clause sets out that the Commonwealth and the authorities of the Commonwealth will be covered by the provisions of this Part.

Clause 71 - Application to private employment

Sub-clause (1) - this provision establishes that all financial, foreign and trading corporations or any related holding company which employs more than 100 people, are required to establish affirmative action management plans.

Sub-clause (2) - this provision establishes that any person, firm or body which enters into a contract or agreement with the Commonwealth or an authority of the Commonwealth to provide supplies or services over the value of \$50,000 will be required to establish an affirmative action management plan.

Division 2 - Functions and Powers of the Director
of Affirmative Action

Clause 73 - Director of Affirmative Action

This clause establishes the position of the Director of Affirmative Action. Following clauses set out the Director's functions (clause 74); requirements of authorities or corporations to provide information, documents and answer questions (clause 75); and require the authorities and corporations to file an annual report (clause 78).

Clause 76 - Preparation and implementation of
management plans

This clause establishes the requirements for all authorities and corporations to prepare and implement an affirmative action management plan for women and sets out the basic, minimum requirements that such a plan must have. The dates for the commencement of the management plan are set out (sub-clauses (5), (6)).

Clauses 79-83 - Human Rights Commission

If the Director is dissatisfied with any stage or section of the preparation or implementation of a management plan then she/he may refer it to the

Human Rights Commission (clause 79) for an investigation (clause 80). The Director, an authority and a corporation may appear personally or be represented, with the Commission's leave, by a solicitor, barrister or an agent.

The Commission may require a person to answer questions, give a statement of information, or produce any documents; and such a requirement shall be in writing and the compliance time specified (clause 82). The Commission is given a power to enter premises to inspect documents (clause 83).

Clause 84 - Conclusion of investigation

After the Commission has completed an investigation into a management plan, it may make recommendation to the Director, authority or corporation; issue a written direction for an authority or corporation to amend the plan; or report to the Minister, and that report must be tabled within 6 sitting days of receipt.

Clause 86 - Commission may apply to Federal Court

This provision makes it an unlawful act to refuse to comply with a direction of the Commission, and empowers the Commission to apply to the Federal Court for an order that the direction be complied with.

Clause 87 - Cancellation etc. of contracts

Where a person, firm or body refuses or fails to comply with a direction from the Commission, then the Commission may recommend to the Minister that the Governor-General in Council take one of several actions, including cancelling or terminating an existing contract, or declaring that that organisation is no longer eligible for further government contracts. If this is done the organisation may later apply for removal from the Contract Ineligibility List (clause 88).

PART V - ADMINISTRATIVE PROVISIONS

Division 1 - The Director of Conciliation and Affirmative Action

Clauses 90-103 - Terms and Conditions for Directors

Clauses 90-103 contain relatively standard provisions to apply to statutory appointments. Appointments are made by the Governor-General in Council (clause 91); for 7 years (clause 92); the Remuneration Tribunal will

determine remuneration (clause 96(1)); allowances will be prescribed (clause 96(2)); an acting Director may be appointed (clause 98); and there is provision for staff to be employed (clause 100); and the Director is required to make an annual report to the Minister which must be tabled within 15 sitting days (clause 103).

Division 2 - Human Rights Commission

Clauses 104-107 - Human Rights Commission

Clauses 104-107 set out the machinery for establishing a Human Rights Commission for the purposes of this Act. The Commission must be constituted by the Chairman (or in some circumstances the Deputy Chairman) and 2 members who are chosen from the members which are appointed to the Commission under the Human Rights Commission Act 1981 (clauses 104, 105); the procedures for sitting of the Commission are set out (clause 106) and the provision for the position of Registrar for the Commission (clause 107).

PART VI - MISCELLANEOUS

Division 1 - Research and Community Education

Clauses 108, 109 - Human Rights Commission

Clauses 108 and 109 give the Human Rights Commission the power to conduct the necessary research and community education programmes, and for the Minister to refer certain matters (e.g. a law or proposed law) to the Commission for an examination.

Division 2 - General Exceptions to this Act

Clause 110 - Acts done under statutory authority

This clause provides an exemption for all Commonwealth, State and Territory Acts and regulations which discriminate on the ground of sex or marital status and gives those 2 sub-clauses ((1), (2)) a 2 year expiry date. After that date all will have to be in conformity to the provisions of the Act. The exclusion for orders of the Human Rights Commission, or court or tribunal orders will continue as they perform different functions.

Clause 114 - Granting of exemptions

Clause 114 empowers the Commission to grant an exemption from the provisions of the Act for a period of up to 5 years, and renewable for a further

period of 5 years. When determining an exemption application the Commission may take any course of action it deems appropriate, and this includes the holding of a public inquiry into the matter.

Clause 115 - Saving of other laws

Clause 115 is included so that Acts which are consistent with the objects of this Act are able to continue operating, without any constitutional objections being raised. At this stage the only States which have any effective legislation are New South Wales, Victoria and South Australia. Sub-clause (2) ensures that an aggrieved person's rights are not limited, restricted or otherwise affected as if this Act had not been enacted. This is a further protection to any person who has been the victim of unlawful discrimination to select where they wish to exercise their rights and remedies - either at a Federal or State level.

Clause 119 - Regulations

Clause 119 provides the general standard authority for the making of regulations, and allows regulations to be made which will act as a permanent exemption from the Act.