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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION

(TRANSITIONAL PROVISIONS AND CONSEQUENTIAL AMENDMENTS) BILL 1984

EXPLANATORY MEMORANDUM

(Circulated by authority of Senator the Honourable

Gareth Evans, Q.C., Attorney-General)

HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION

(TRANSITIONAL PROVISIONS AND CONSEQUENTIAL AMENDMENTS) BILL 1984

OUTLINE

This Bill repeals the Human Rights Commission Act 1981 and contains transitional provisions necessitated by that repeal. It also contains consequential and other amendments of the Racial Discrimination Act 1975 and the Sex Discrimination Act 1984.

NOTES ON CLAUSES

PART I - PRELIMINARY

Clauses 1 and 2

The first two clauses of the Bill provide for the short title and commencement of the legislation. The Bill will come into

operation on the same day as the Human Rights and Equal Opportunity Commission Act 1984.

Clause 3: Interpretation

2. This clause contains relevant definitions used in the legislation. In particular, "Commission" is defined as the Human Rights and Equal Opportunity Commission; "Commission Act" is defined as the Human Rights and Equal Opportunity Commission Act; and "former Commission" is defined as the Human Rights Commission established under the repealed legislation.

PART II - REPEAL OF THE HUMAN RIGHTS COMMISSION ACT 1981

Clause 4: Repeal

3. This clause repeals the Human Rights Commission Act 1981.

Clause 5: Operation of Commission Act, & c.

4. The effect of sub-clause 5(1) is to save any complaints made to the former Commission and not finally dealt with before the commencement of the legislation. Such complaints will be dealt with by the new Commission under the Commission Act.

5. The effect of sub-clause 5(2) is to save any act or thing done by or to, or any instrument made by or given to, the former Commission, a member of the former Commission or the Minister. The Commission Act is to be read as if it included references to such acts, things or documents and the Act will apply to them accordingly. Sub-clause 5(3) has the effect of excluding certain declarations made by the Minister from the savings provisions of sub-clause 5(2). Declarations relating to the conferral of functions on the Commission by State enactments and declarations relating to relevant international instruments under the repealed legislation will not be saved. No declarations are in fact affected by this provision.

6. Sub-clause 5(4) will enable the new Commission to continue and complete the performance of functions that the former Commission had begun to perform but had not completed on the commencement of the legislation.

7. Sub-clause 5(5) will enable persons who had begun but not completed an inquiry or investigation on behalf of the former Commission before the commencement of the legislation to continue and complete the inquiry or investigation as if they had been given a delegation to do so under the new legislation.

Clause 6: Inter-governmental arrangements

8. Arrangements between the Minister and a Minister of a State or the Northern Territory made under section 11 of the Human Rights Commission Act are to continue in force after the repeal of that Act as if references in the arrangements to the Human Rights Commission were references to the Human Rights and Equal Opportunity Commission and references in the arrangements to the Human Rights Commission Act were references to the Human Rights and Equal Opportunity Commission Act.

Clause 7: References in agreements, & c. to former Commission

9. Agreements or instruments to which the Human Rights Commission is a party will continue to operate after the repeal of the Human Rights Commission Act, as if the Human Rights and Equal Opportunity Commission were substituted in the agreement or instrument for the Human Rights Commission.

Clause 8: Obligation of secrecy

10. The provisions of the Human Rights Commission Act relating to the disclosure of private information obtained by persons performing functions under that Act will continue to apply in relation to those persons, notwithstanding the repeal of that Act.

Clause 9: Transfer of funds

11. Money appropriated for the purposes of, or in connection with the activities of, the former Commission will be available for the purposes of, or in connection with the activities of, the Human Rights and Equal Opportunity Commission.

PART III - AMENDMENTS OF THE RACIAL DISCRIMINATION ACT 1975

Clause 10: Principal Act

12. This clause defines "Principal Act" for the purposes of Part III as the Racial Discrimination Act 1975.

Clause 11: Commencement

13. Clause 11 omits sub-section 2(3) of the Principal Act, which relates to the commencement of the provisions enabling the Governor-General to appoint the Commissioner for Community Relations and to make regulations, and the power of the Minister to appoint members of the Community Relations Council. There is no further need for this provision.

Clause 12: Interpretation

14. The following amendments of section 3 of the Principal Act are to be made:

- . "Commission" will be defined as the Human Rights and Equal Opportunity Commission;
- . the definition of "Commissioner" will be amended to refer to the Race Discrimination Commissioner, instead of the Commissioner for Community Relations; and
- . the definition of "Human Rights Commission" will be omitted.

Clause 13: Act binds the Crown

15. Section 6 in the Principal Act is to be replaced by a new provision under which the legislation will bind the Crown in right of the Northern Territory and Norfolk Island as well as in right of the Commonwealth and each of the States.

Clause 14: Race Discrimination Commissioner

16. Section 19 of the Principal Act is to be amended so as to abolish the present office of Commissioner for Community Relations and replace it with a new office of Race Discrimination Commissioner.

Clause 15: Functions of Commission

17. Section 20 of the Principal Act will be amended to refer to the Human Rights and Equal Opportunity Commission and to confer on the Commission two additional functions. The new functions are to prepare and publish guidelines for the avoidance of unlawful acts under the legislation and (with leave of the court) to intervene in proceedings that involve racial discrimination issues.

Clause 16: Functions of Commissioner

18. Section 20A of the Principal Act is to be amended by replacing references to the former Commission with references to the new Commission. Sub-section 20A(2) of the Principal Act, which provides that the Commissioner is subject to the directions of the Human Rights Commission in the performance of a function on its behalf, is to be deleted. The new Race Discrimination Commissioner will be a member of the Human Rights and Equal Opportunity Commission and will not be subject to the direction of that Commission in the performance of functions conferred on the Commissioner by the Principal Act.

Clauses 17, 18, 19 and 20

19. These clauses amend sections 21, 22, 23 and 24 of the Principal Act by replacing references to the former Commission in each of those sections with references to the new Commission.

Clause 21: Offences relating to administration of Act

20. Section 27 of the Principal Act is to be amended to update the penalties in order to bring them into line with equivalent penalties under the Sex Discrimination Act.

Clause 22: Establishment and functions of Council

21. Section 28 of the Principal Act will be amended to replace references to the former Commission with references to the new Commission.

Clause 23: Amendment of heading to Division 1 of Part VI

22. The reference to the Commissioner for Community Relations in this heading is to be replaced with a reference to the Race Discrimination Commissioner.

Clause 24

23. This clause repeals sections 29 and 30 of the Principal Act and replaces them with new sections. The new section 29 deals with the appointment of the Race Discrimination Commissioner. The Commissioner is to be appointed by the Governor-General (new section 29) for a term of up to five years, and may be re-appointed (new sub-section 30(1)). A person is not to be appointed or re-appointed if he or she is more than 65 years of age, or for a term that extends beyond the day on which he or she reaches 65 years of age (new sub-section 30(2)). The terms and conditions of the Commissioner's office not provided for in the Principal Act may be determined by the Governor-General (new sub-section 30(3)).

Clause 25: Termination of appointment

24. This clause amends section 34 of the Principal Act by omitting sub-section (3). That sub-section deems a termination of appointment by reason of physical or mental incapacity to be retirement on the ground of invalidity for the purposes of the Superannuation Act 1922. That Act has been replaced by the Superannuation Act 1976, section 7 of which has the same effect as sub-section 34(3) of the Principal Act. The sub-section is therefore no longer necessary.

Clause 26: Repeal of section 37

25. This clause repeals section 37 of the Principal Act under which the Commissioner was deemed to be required, for the purposes of sub-sections 4(3A) and (4) of the Superannuation Act 1922, to give the whole of his time to the duties of his office. Section 37 is no longer necessary in view of the provisions of the Superannuation Act 1976.

Clause 27 - Repeal of section 39

26. This clause repeals section 39 of the Principal Act, which deals with the application of the Officers' Rights Declaration Act 1928. That Act has been repealed. Section 39 is no longer necessary.

Clause 28: Delegation

27. This clause amends section 40 of the Principal Act by replacing references to the former Commission with references to the new Commission.

Clause 29: Repeal of section 44A

28. This clause repeals section 44A of the Principal Act, which deals with the protection of complainants from civil actions. This matter is to be dealt with under clause 48 of the Human Rights and Equal Opportunity Commission Act 1984.

Clause 30: Commissioner to furnish information

29. This clause amends section 45A of the Principal Act by replacing references to the former Commission with references to the new Commission.

Clause 31: Amendments of certain provisions of the Principal Act

31. The Schedule to the Bill sets out a series of additional, minor formal amendments to the Principal Act. The majority of these amendments are designed to render the language of the Principal Act gender neutral.

Clause 32: Operation of Racial Discrimination Act

31. Sub-clause 32(1) saves complaints made to the former Commission and not finally dealt with before the legislation comes into operation. Such complaints will be dealt with as if they had been made to the new Commission. Under sub-clause 32(2), the new Commission or the new Commissioner will be able to continue and complete the performance of a function begun to be performed but not completed by the former Commission or Commissioner (as the case may be) before the legislation comes into operation.

Clause 33: Consents by former Commission

32. Under this clause, a consent given by the former Commission to a conciliation committee performing the function of endeavouring to effect a settlement of a matter will be deemed to have been given by the new Commission after the legislation has come into operation.

Clause 34: Certificates by former Commission

33. Certificates given to a person and signed by a member of the former Commission or the former Commissioner under sub-section 24(3) of the Principal Act will be deemed to have been signed by a member of the new Commission or by the new Commissioner. This will enable the person to institute proceedings on the basis of the certificate if he or she has not already done so before the legislation comes into operation.

Clause 35: Delegations by former Commission and former Commissioner

34. This clause has the effect of saving delegations made by the former Commission or the former Commissioner and not revoked before the commencement of the legislation.

PART IV - AMENDMENTS OF THE SEX DISCRIMINATION ACT 1984

Clause 36: Principal Act

35. This clause defines "Principal Act" for the purposes of Part IV as the Sex Discrimination Act 1984.

Clause 37: Interpretation

36. This clause amends certain definitions in section 4 of the Principal Act. "Commission" is to be defined as the Human Rights and Equal Opportunity Commission and "President" as the President of the Commission. References to the Human Rights Commission Act in the definitions of "enactment" and "proposed enactment" are to be replaced with references to the Human Rights and Equal Opportunity Commission Act.

Clause 38: Functions of Human Rights and Equal Opportunity Commission

37. Section 48 of the Principal Act is to be amended by replacing references to the former Commission with references to the new Commission and to confer on the Commission two additional functions. The new functions are to prepare and

publish guidelines for the avoidance of discriminatory acts and to intervene (with the leave of the court) in proceedings that involve issues of discrimination. A consequential amendment of sub-section 48(3) of the Principal Act is also to be made in view of the fact that the Sex Discrimination Commissioner is to be a member of the new Commission.

Clause 39: Functions of Commissioner

38. Section 49 of the Principal Act is to be amended by removing sub-sections (2) and (3) under which the Commissioner is subject to the directions of the Commission in performing functions on behalf of the Commission. The Commissioner will be a member of the new Commission and these provisions are no longer appropriate.

Clause 40: Amendment to heading of Division 3 of Part III

39. The reference to the Human Rights Commission which occurs in this heading is to be replaced with a reference to the Human Rights and Equal Opportunity Commission.

Clause 41: Minister may appoint persons to participate in inquiries

40. This clause inserts a new section 57A into the Principal Act.

41. Under the new section, the Minister may appoint such persons as he considers necessary to perform and exercise the functions and powers of a member of the Commission. Persons so appointed will be available, when called upon by the President of the Commission, to assist the Commission in the performance of its determination functions under the Principal Act.

42. An appointment under this provision is to be for a maximum period of 5 years and the Minister will have power to determine the terms and conditions of appointment. The Minister will also have power to enter into an arrangement with an appropriate State Minister to secure the services of the holder of a judicial office of that State. Such an arrangement may provide for reimbursement to the State. The appointment of a person who is the holder of a Commonwealth judicial office will not affect the various entitlements or privileges to which the person is entitled as the holder of that judicial office.

Clause 42: Quorum for purpose of inquiry

43. This clause amends section 60 of the Principal Act by replacing the reference to the former Commission in sub-section 60 (1) with a reference to the new Commission. A new sub-section 60(2) is to be inserted into the Principal Act in order to ensure that wherever one or more legally qualified persons are present at a meeting of the Commission when it is performing its inquiry function, such a person will preside over the meeting. The amendment is necessary because the President of the Human Rights and Equal Opportunity Commission, unlike the Chairman of the Human Rights Commission, is not required to be a legally qualified person.

Clause 43: Making of interim determination

44. References to the Chairman of the Human Rights Commission which occur in section 80 of the Principal Act are to be replaced with references to the President of the Human Rights and Equal Opportunity Commission.

Clauses 44: Particulars of complaints not to be communicated

45. Section 92 of the Principal Act protects the confidentiality of complaints. It is to be amended to take account of the fact that the power under section 11 of the Human Rights Commission Act to make an arrangement with a State or Northern Territory Minister is to be replaced by an equivalent power under section 16 of the Human Rights and Equal Opportunity Commission Act.

Clause 45: Non-disclosure of private information

46. This clause amends section 112 of the Principal Act, which prohibits the disclosure of private information acquired by certain persons by reason of the persons' office or employment under or for the purposes of the Principal Act. The penalty under sub-section (1) is to be increased. Sub-section 112(3) is to be replaced by two new sub-sections, 112(3) and (3A). The changes introduced by the new provisions are as follows:

- a person will be able to make a record of information that is required or permitted by an Act to be recorded, if the record is made for the purposes of that Act (new paragraph 112(3)(a));

- the provision which allows the divulging or communicating of any information, or the producing of a document in accordance with an arrangement under section 11 of the Human Rights Commission Act, is to be replaced with a similar provision referring to an arrangement made under section 16 of the Human Rights and Equal Opportunity Commission Act (new paragraph 112(3)(b));

- persons will only be entitled to divulge or communicate information or produce a document under an Act which requires or permits such divulging, communicating or producing, if they are acting for the purposes of or pursuant to that Act (new paragraph 112(3)(c)); and

- it is to be made clear that a person may be required, for the purposes of or pursuant to an Act, to divulge or communicate information or to produce a document (new sub-section 112(3A)).

Clause 46: Operation of Sex Discrimination Act

47. Sub-clauses 46(1) and (2) save complaints made or referred to the former Commission before the legislation comes into operation. Such complaints will be dealt with as if they had been made or referred to the new Commission. Under sub-clause

46(3), acts done by or to, or an instrument made by or given to, the former Commission or a member of the former Commission will be treated as having been done or given by or to the new Commission or a member of the new Commission.

48. Sub-clause 46(4) will ensure that victimization on the grounds of appearance as a witness before the Human Rights Commission will continue to be subject to the sanctions set out in sub-section 94(1) of the Principal Act.

49. Sub-clause 46(5) will ensure that the non-disclosure provisions of section 112 of the Principal Act will continue to apply to persons who acquired protected information as members of the former Commission, as members of the staff of the former Commission or as persons authorized to perform or exercise any function or power of the former Commission.

50. The new Commission will be empowered by sub-clause 46(6) to continue and complete the performance of any function which the former Commission has commenced to perform, but has not completed performing, before the legislation comes into operation.

Clause 47: Operation of provisions of Sex Discrimination Act

51. Sub-clause 47(1) concerns the publication of notices in relation to decisions made by the former Commission to grant exemptions from the operation of specified provisions of Division 1 or 2 of Part II of the Principal Act. Where no notice setting out certain prescribed details in relation to any such decision by the former Commission is published before the legislation comes into operation, the new Commission is to be required to publish such a notice in the Gazette within one month.

52. Sub-clause 47(2) provides that where a notice has been served under sub-section 52(4) of the Principal Act on the Commissioner, requiring the Commissioner to refer a complaint to the former Commission, and the Commissioner has not so referred the complaint before the legislation comes into operation, the Commissioner will be required to refer the complaint to the new Commission.

53. Sub-clause 47(3) provides that where a person has been served with a notice requiring the disclosure to the former Commission of the source of certain actuarial or statistical data, and the 28-day period for compliance under section 87 of the Principal Act has not expired when the legislation comes into operation, the person will be required to make the disclosure to the new Commission within 28 days of the service of the notice.

54. Sub-clause 47(4) will save any delegations made by the former Commission under section 104 of the Principal Act and not revoked before the commencement of the legislation.

55. Sub-clause 47(5) ensures that the former Commission, its members and all persons acting under its direction or authority, will continue, after the commencement of the legislation, to be protected from civil actions in respect of acts and things done before the commencement of the legislation in the actual or purported performance of functions or powers under the Principal Act.