

1986

The Parliament of the  
Commonwealth of Australia

The House of Representatives

Affirmative Action (Equal Employment  
Opportunity for Women) Bill

Explanatory Memorandum

(Circulated by the authority of the Prime Minister  
the Honourable R.J.L. Hawke A.C. M.P.)



AFFIRMATIVE ACTION (EQUAL EMPLOYMENT OPPORTUNITY FOR  
WOMEN) BILL 1986

OUTLINE

The purpose of the Affirmative Action (Equal Employment Opportunity for Women) Bill 1986 is to require certain employers to promote equal opportunity for women in employment by developing and implementing an affirmative action program. All private sector employers with 100 staff or more and all higher education institutions will be required to comply with the legislation.

2. The implementation of the Bill will be phased in. All higher education institutions will be required to commence the development and implementation of an affirmative action program for women by 1 August 1986. Companies employing more than 1,000 will be required to commence their program by 1 February 1987, companies with over 500 and under 1000 employees by 1 February 1988 and companies with over 100 and under 500 by 1 February 1989.

3. The Bill will create the statutory position of the Director of Affirmative Action.

4. The legislation is expected to come into operation in the 1986/87 financial year. The "first bids" estimates, based on staff numbers of 25, with an office in Sydney, is for \$1.5 million.

5. In the financial year 1985/86, \$100,000 has been provided for the interim operation of the office of the Director of Affirmative Action, and for the employment of four staff for three months this financial year.

6. There will be a minimal financial impact on industry, from the allocation of some staff resources to the affirmative action program. The Australian Commissioner of Taxation has ruled that expenses incurred by employers in implementing affirmative action programs for women will qualify for deduction under subsection 51(1) of the Income Tax Assessment Act 1936 (Taxation Ruling IT 2154). The legislation has been developed in close consultation with business, trade unions and other affected groups.

NOTES ON CLAUSESPART I - PRELIMINARYClauses 1 and 2

1. The first two clauses of the Bill provide for the short title and commencement of the legislation. The legislation will come into operation on a day to be fixed by Proclamation. The implementation of the legislation will be phased in and the appropriate dates are in clause 7.

Clause 3: Interpretation

2. Sub-clause 3(1) contains definition provisions. Significant words or phrases used in the legislation are detailed below.

"affirmative action program": is defined as a program which is designed to ensure that appropriate action to eliminate discrimination against women in employment matters, and that measures are taken to promote equal opportunity for women in employment matters. The actions and measures are to be taken by relevant employers.

"confidential report": is the report which a relevant employer is required to lodge annually with the Director setting out the processes undertaken under the eight step program. The Director cannot release any of the contents of this report unless the employer provides written consent to the release.

"discrimination": is defined as direct and indirect discrimination on the ground of sex, marital status or pregnancy in section 5, 6 or 7 of the Sex Discrimination Act 1984.

"Director": is defined as the Director of Affirmative Action.

"employer": is defined as a person who employs staff on a full-time, part-time, casual or temporary basis under a contract of services or under a contract for services. The implementation of the Act is to be phased in. The commencement date for an individual employer will depend on the total number of staff employed by that employer. The first public and confidential report will then be required to be lodged one year from that date.

"employment matters": is defined as including a range of personnel and other matters and the definition specifies recruitment procedures and selection criteria; promotion and transfer; training and staff development and the conditions of service.

"higher education institution": covers all universities and colleges of advanced education or other institutions of tertiary education. The definition does not cover colleges of technical and further education, as defined in the Commonwealth Tertiary Education Commission Act 1977.

"operative day" for relevant employers is the date on which they are required to commence the development and implementation of their affirmative action program. The first public and confidential report is required to be lodged with the Director one year after the operative day.

"public report" is the annual report to be lodged with the Director which will be available to the public. This material will be able to be included, in whole or in part, in the Director's annual report or any other report presented to the Minister to be tabled in Parliament.

"relevant employer" means a higher education institution or a person, body or corporation which employs 100 or more employees. The definition does not cover the Commonwealth, State or Territory, that is, any person employed by those governments. The definition does not cover any authority of the Commonwealth, State or Territory; or a voluntary body.

3 Sub-clause 3(2) provides that a corporation employs a person when they are employed by a subsidiary of that corporation, and the relationship between the corporation and the subsidiary will be determined by the principles in the Companies Act 1981. A corporation, when assessing its reporting requirements, must count the number of employees which come within its corporate structure, including subsidiaries which come within the definitions of the Companies Act. This will occur even if the subsidiary has a different operating name and is engaged in a different commercial activity than the holding corporation.

4. Sub-clause 3(3) provides that if the Act is extended to Norfolk Island, then all references to "Australia" include a reference to Norfolk Island.

5. Sub-clause 3(4) states that nothing in the Act shall be taken to require a relevant employer to take any action incompatible with the principle that employment matters should be dealt with on the basis of merit.

Clause 4: Extension to Norfolk Island

6. Clause 4 provides that the Act can be extended to Norfolk Island if it is prescribed in the regulations.

Clause 5: Application of Act

7. Clause 5 provides that the legislation is to apply throughout Australia and the sub-clauses describe the extent of the application of the legislation in specific areas of Commonwealth constitutional responsibility.

PART II - AFFIRMATIVE ACTION PROGRAMS

Clause 6: Employers required to develop etc. affirmative action programs

8. This clause sets out the basic requirement under the legislation, which is for a relevant employer to commence the development and implementation of an affirmative action program on the operative day. A relevant employer is required to have an affirmative action program, unless the workforce falls below 80 employees.

Clause 7: Timing for development, etc., of affirmative action programs

9. Clause 8 sets out the "operative day" for relevant employers covered by the legislation to commence the development and implementation of an affirmative action program. All higher education institutions are required to commence this process by 1 August 1986, and their first public and confidential reports will have to be lodged with the Director by 1 August 1987. All private sector employers with 1,000 or more employees will be required to commence this process by 1 February 1987. Employers with 500 or more employees but not more than 999 employees will be required to commence by 1 August 1988 and employers with 100 or more but not more than 499 by 1 February 1989.

10. Under sub-clause 7(2), if a new higher education institution starts after the commencement of the Act, then it will be required to lodge its first public and confidential report on 1 August in the calendar year after the year it started. If a new private sector employer starts after the commencement of the Act, or increases its workforce to 100 or more employees, it will be required to lodge its first public and confidential report on 1 February in the calendar year after the year it started.

Clause 8: Contents of affirmative action program

11 This clause sets out the eight steps or stages which form part of an affirmative action program. These steps are based on the material contained in the Affirmative Action Implementation Manual (Second Edition, AGPS, 1986). The clause is an outline of the minimum requirements of a program, which are:

- (a) the issuing of a statement by a senior manager to all employees that an affirmative action program will be developed and implemented in accordance with the Act;
- (b) appointing a person or persons with sufficient authority and status within the organisation to be responsible for developing and implementing the program. The Implementation Manual recommends that a senior officer, the Affirmative Action Co-ordinator, be appointed to have overall management responsibility for the program, and that an Affirmative Action Officer be appointed to carry out the day-to-day tasks involved in the program;
- (c) consulting with trade unions which have members affected by the program;
- (d) consulting with employees, particularly women employees;
- (e) collecting and recording statistics and related information on the employment profile of the organisation; including a breakdown on the number of employees, by gender, in each job classification. The Implementation Manual sets out the major occupational classifications which can be used in this analysis. It sets out other analysis which can be undertaken, including lines of progression, salary and wage levels, educational qualifications, assessment of under-utilisation, future employment trends and applicant flow;
- (f) a review of policies and practices to identify any which discriminate against women and any patterns (whether demonstrated by statistics or otherwise) of lack of equality of opportunity for women. As the definition of "employment matters" demonstrates, this review will be wide-ranging covering

recruitment and selection procedures, matters connected with promotion and transfer of employees, the training and staff development of employees, and the conditions of service;

- (g) setting objectives and making forward estimates. This step is undertaken after the preceeding six steps have been completed or certain discrete parts in the steps have been completed. The material forms the basis for the objectives and forward estimates. The terms "objectives" and "forward estimates" are defined in sub-clause 8(3);
- (h) monitoring and evaluating the implementation of the program and assessing the achievement of the objectives and forward estimates. This process needs to be undertaken annually to enable the forthcoming year's objectives and forward estimates to be set. Each year's objectives and forward estimates will represent the activities and achievements of the preceding year.

12. Sub-clause 8(2) provides that an affirmative action program may contain other material which is not inconsistent with the other provisions of the program or with the purposes of the Act.

13. Sub-clause 8(3) defines the terms "objectives" and "forward estimates", which are used in sub-clause 8(1)(g). A "forward estimate" is defined as a quantitative measure or aim, which can be expressed in numerical terms, that can reasonably be implemented by the relevant employer. The measure or aim is designed to achieve equality of opportunity for women in employment matters.

An "objective" is defined as a qualitative measure or aim, expressed as a general principle, that can reasonably be implemented by the relevant employer. The measure or aim is designed to achieve equality of opportunity for women in employment matters.

The Report of the Working Party on Affirmative Action Legislation contains further information on ways of expressing and achieving objectives and forward estimates (see Appendix B, pp. 32-35).



### PART III - OFFICE, FUNCTIONS AND POWERS OF DIRECTOR

#### Clause 9: Office of Director

14. This clause creates the position of the Director of Affirmative Action.

#### Clause 10: Functions and powers of Director

15. Clause 10 confers a number of specific functions on the Director; including advising and assisting employers, issuing guidelines, monitoring the lodging of reports, monitoring and evaluating the effectiveness of programs and research and community education activities. The Director has the capacity to report to the Minister on such matters as the Director thinks fit.

16. Sub-clause 10(2) provides the Director with the power to do all things necessary and convenient for or in connection with these functions.

#### Clause 11: Directions by Minister

17. Sub-clause 11(1) provides that the Minister may provide general instructions to the Director, and these must be in writing. The Director is required to exercise all powers and perform all functions in accordance with any instructions given by the Minister.

18. Sub-clause 11(2) provides that if the Minister provides a general instruction under sub-clause 11(1), then the Minister shall cause a copy of the direction to be laid before each House of Parliament within 15 sitting days after it is given.

#### Clause 12: Director to submit reports to Minister

19. Sub-clause 12(1) requires the Director to submit an annual report, on the operations of the Director, to the Minister as soon as practicable after each 31 May. The report is required to be submitted within six months after each 31 May. The material contained in the public report of each employer will be able to be included in this report, in full or in part.

20. Sub-clause 12(2) enables the Director to submit other reports to the Minister on the operations of the Director or on any other matter arising under this Act. This provision enables the Director to prepare special reports on any relevant matter which may arise during the course of a year and to have such a report presented to Parliament, through the Minister.

21. Sub-clause 12(3) requires the Minister to cause a copy of a report received from the Director to be laid before each House of Parliament within 15 sitting days after receipt of the report.

#### PART IV - REPORTS BY RELEVANT EMPLOYERS

##### Clause 13: Public reports

22. Under sub-clause 13(1), a relevant employer will be required to lodge a public report annually. The first report will be due one year after the operative day. Higher education institutions' first report will be required to be lodged on 1 August 1987, and private sector employers with 1,000 or more employees will be required to be lodged on 1 February 1988. A further public report on the relevant employer's affirmative action program will be required to be lodged annually on the appropriate date.

23. Under sub-clause 13(2), a relevant employer will have three months from the appropriate date to lodge the public report.

24. Under sub-clause 13(3), the public report will contain information in two categories. The first category is the statistics and other related information of the organisation's employment patterns; including the number of employees, analysed by gender and by job classification or by jobs undertaken. The Implementation Manual lists the main jobs classifications which could be used in this analysis. The second category is an outline of the processes undertaken by the relevant employer, which will contain information on the eight step affirmative action program.

##### Clause 14: Confidential reports

25. Clause 14(1) requires a relevant employer to lodge a confidential report with the Director at the same time as the public report is lodged.

26. Clause 14(2) provides that the confidential report will provide a detailed analysis of the processes undertaken by a relevant employer. The employer will be required to provide information on the activities undertaken under each of the paragraphs listed in sub-clause 8(1), and that this report will contain material which the employer may not want to make public. For example, some material under sub-paragraph 8(1)(e), in the statistical analysis, may be commercially sensitive as it indicates future recruitment requirements. The contents of this report will remain confidential between

the employer and the Director, and so no commercial advantage to a competitor could result. Clause 32 makes disclosure of a confidential report or confidential information an offence, and creates a penalty.

27. Under sub-clause 14(3), it is provided that a relevant employer can choose to provide a more detailed public report which meets the requirements for reporting under clause 13 and sub-clause 14(1). This would mean that an employer would not be required to lodge a separate, confidential report and the Director would be able to release the entire contents of the report to the public.

#### Clause 15: Use of public report

28 Under sub-clause 15, the public report may be made public either by an application to the Director or by the Director referring to it in the annual report to the Parliament or in any special report to Parliament. For example, the Director may choose to publish only certain parts of an individual employer's public report to highlight a particular approach or issue.

Alternatively, the Director's report may contain some sections of an individual employer's report and the entire report may be contained in an appendix.

#### Clause 16: Request to relevant employer

29. Clause 16 enables the Director to make a written request to a relevant employer to enable certain, specified information which has been included in the confidential report to be made available to the public. The employer may grant written consent to the Director, and may specify any conditions. This provision enables the Director to analyse particular confidential reports, and if some of their contents is relevant to other material to be included in an annual or other report to Parliament to request permission to release such information. The provision enables the Director to focus a publication on a particular area, and to seek to have access to the more detailed information which has been lodged by an individual employer. The employer would have complete control of access to this information, and could decline to consent to its release if it was considered inappropriate.

#### Clause 17: Director may grant extensions

30. Clause 17 enables a relevant employer to apply to the Director for an extension for the time limit of lodging a public report. Such an application must be made within three months from the date the public report was due, that is by 1 November for institutions and by 1

June for companies. If there appears to be reasonable grounds, the Director may grant the application for up to six months. This provision allows for special circumstances, for example, a takeover or a substantial increase in staffing or commercial activity, which may mean that it is not reasonable for the employer to comply by the due date.

Clause 18: Request for further information

31. Under clause 18, where the Director has received a public or confidential report which fails to comply with the material required under sub-clause 13(3) or 14(2), then the Director may request further information. The notice must be in writing and must specify the period for the supply of such information.

Clause 19: Failure to submit report or further information

32. Clause 19 provides that where, without reasonable excuse, a relevant employer fails to lodge a public or confidential report or fails to provide further information after a written request from the Director, the Director may name the employer in an annual report or other report to be presented to the Parliament.

PART V - DIRECTOR OF AFFIRMATIVE ACTION

Clause 20: Appointment of Director

33. Clause 20 provides for the appointment by the Governor-General of the Director of Affirmative Action.

Clause 21: Tenure of Director

34. This clause provides for the appointment of the Director for a period not exceeding five years.

Clause 22: Remuneration and allowances

35. This clause provides for the remuneration of the Director.

Clause 23: Leave of absence

36. This clause provides for the granting of leave of absence to the Director.

Clause 24: Outside employment

37. This clause provides that the Director may not, except with the approval of the Minister, engage in paid employment outside the duties of the Director.

Clause 25: Resignation

38. This clause provides that the Director may resign from office by writing delivered to the Governor-General.

Clause 26: Termination of appointment

39. This clause provides the conditions under which the Governor-General may terminate the appointment of the Director.

Clause 27: Disclosure of interest

40. This clause provides that the Director shall give written notice to the Minister of all direct or indirect pecuniary interest the Director has in a relevant employer.

Clause 28: Acting appointment

41. This clause provides for the appointment of an acting Director by the Minister in certain circumstances.

PART VI - MISCELLANEOUS

Clause 29: Staff

42. This clause enables staff to be appointed or employed under the Public Service Act 1922 and for the Director to have the powers of a Secretary under that Act.

Clause 30: Consultants

43. This clause enables the Director to engage consultants.

Clause 31: Advisory committees

44. This clause enables the Minister, after consulting the Director, to establish advisory committees. The Director can provide the Minister with a list of names of persons representing industry or business; trade unions; higher education institutions; organisations representing women and people with specialist knowledge or interest in the area.

The advisory committees will provide advice to the Minister and to the Director.

Clause 32: Non-disclosure of confidential information

45. Sub-clause 32(1) provides that any person who is or has been the Director, a member of staff, or who is or has been authorised to perform or exercise any function or power of the Director or on behalf of the Director, shall not, directly or indirectly, except in the performance or exercise of any duty, function or power under or in connection with the legislation, shall not record, divulge or communicate any confidential report or confidential information or make use of such information or produce it except under this Act. The penalty for this offence is a fine of up to \$2,500 or imprisonment for three months or both.

46. Sub-clause 32(2) provides that the persons mentioned in sub-clause 32(1) cannot be required to divulge such confidential report or confidential information to a court except where to do so is necessary for the purposes of this legislation.

47. Sub-clause 32(3) sets out certain definitions for the purposes of the clause.

Clause 33: Delegation

48. Sub-clause 33(1) provides that the Director may delegate powers and functions under the legislation to a member of staff. This delegation must be in writing.

49. Sub-clause 33(4) enables the Minister to make an arrangement with a Minister of a State for the exercise of powers or the performance of functions of the Director to an officer of a State. Under sub-clause 33(7), such an arrangement must be published in the Gazette.

Clause 34: Regulations

50. This clause provides for a regulation-making power.



