

1992

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**HUMAN RIGHTS AND EQUAL OPPORTUNITY LEGISLATION
AMENDMENT BILL (NO. 2) 1992**

EXPLANATORY MEMORANDUM

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





HUMAN RIGHTS AND EQUAL OPPORTUNITY LEGISLATION
AMENDMENT BILL (NO. 2) 1992

Outline

This Bill provides for a number of amendments to various Acts as set out in the Schedule to the Bill.

1. The first amendments set out in the first part of the Schedule relate to the creation of the office of the Aboriginal and Torres Strait Islander Social Justice Commissioner as part of the Human Rights and Equal Opportunity Commission.
2. To provide for this new Commissioner a new Part of the *Human Rights and Equal Opportunity Commission Act 1986* has been created. The Commissioner's major function is to be the preparation of a report on a yearly basis on the enjoyment and exercise of human rights by Aboriginal persons and Torres Strait Islanders in Australia. The Commissioner also has other functions designed to promote respect for the human rights of Aboriginal persons and Torres Strait Islanders.
3. The Commissioner is to be appointed on similar terms and conditions to the other Commissioners of the Human Rights and Equal Opportunity Commission. The Commissioner has the power to obtain the information and documentation from government agencies that he/she will require to produce the report or to perform any of the Commissioner's other functions.
4. The report is to be presented to the Attorney-General who must then table the report in each House of the Parliament and send a copy to each State and Territory Attorney-General within certain time limits.
5. This Bill further provides for an amendment to the *Sex Discrimination Act 1984* to prohibit an employee being dismissed from his or her employment on the ground of family responsibilities.
6. Family responsibilities is defined with close attention having been paid to the terms of the Convention on which this amendment is based, i.e. the International Labor Organisation Convention 156 'A Convention Concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities', or 'ILO 156'. ILO 156 applies to workers with family responsibilities in relation to their dependent children as well as such workers'

responsibilities for the care and support of other members of their immediate families. An 'immediate family member' is then further defined to include a number of related persons. However this list is not intended to be exhaustive.

7. Discrimination is defined to include less favourable treatment i.e. direct discrimination only, and is defined to be by reason of the family responsibilities of the employee, or characteristics that appertain generally or are imputed generally to a person with family responsibilities.
8. Discrimination is restricted to discrimination which takes the form of dismissal of an employee.

Financial Impact Statement

The establishment of the office of Aboriginal and Torres Strait Islander Social Justice Commissioner and the setting up of the necessary support unit is expected to cost \$704,000 in the first year.

In relation to the amendments to the Sex Discrimination Act relating to the implementation of ILO Convention 156 additional temporary staffing resources for the Attorney-Generals Department will amount to \$139,000 in the first year. These amendments will impose some additional costs on the Human Rights and Equal Opportunity Commission which are difficult to quantify.

Notes on Clauses

Clause 1 - Short Title

This legislation, when it is enacted, is to be called the Human Rights and Equal Opportunity Legislation Amendment Act (No. 2) 1992.

Clause 2 - Amendment of Acts

This clause provides that the Acts which are set out in the Schedule to the Bill are amended in the manner described in the Schedule.

Schedule

Amendments of Acts

Human Rights and Equal Opportunity Commission Act 1986

The following sections of the Human Rights and Equal Opportunity Commission Act are amended as shown.

Subsection 3(1)

There are two definitions added to this section.

Aboriginal person - has the same meaning as in the *Aboriginal and Torres Strait Islander Commission Act 1988* and means a person of the Aboriginal race of Australia.

Torres Strait Islander - this term is defined to mean a descendant of the indigenous inhabitants of the Torres Strait Islands.

Subsection 8(1)

The word 'and' is added to the end of paragraphs (a), (b) and (c).

Subsection 8(1)

A new paragraph is added to this subsection to make the Aboriginal and Torres Strait Islander Social Justice Commissioner a member of the Human Rights and Equal Opportunity Commission.

Subsection 8(7)

This amendment is self-explanatory and consequential.

Subsection 19(2)

This provision is designed to make it clear that the Commission can delegate its powers to a member of the Commission.

After Subsection 24(1)

This provision will provide a new subsection (IA) to this section so that in relation to the performance of functions of the Aboriginal and Torres Strait Islander Social Justice Commissioner a relevant State or Territory Attorney-General may give a certificate that information or documents sought by the new Commissioner should not be given as the information or documents relate to the State or Territory equivalent to the matters set out in paragraphs (c) - (h) of subsection 24(1).

Part IIA - Aboriginal and Torres Strait Islander Social Justice Commissioner

Division 1 - Establishment and functions

New Clause 46A - Interpretation

This clause defines two terms for the purposes of this new Part - "Commissioner" and "human rights". "human rights" this term has been defined separately in this new Part of the Act because it is intended that the new Commissioner be able to consider those human rights which exist under the International Convention on the Elimination of All Forms of Racial Discrimination as well as under the other instruments set out in the definitions.

New Clause 46B - Aboriginal and Torres Strait Islander Social Justice Commissioner

This clause provides that there is to be an Aboriginal and Torres Strait Islander Social Justice Commissioner to be appointed by the Governor-General.

Subclause (2) provides that to be appointed a person must be able to satisfy the Governor-General that the person has significant experience in the community life of Aboriginal persons or Torres Strait Islanders.

New Clause 46C - Functions of the Commission that are to be performed by the Commissioner

This clause sets out the functions which are conferred on the Human Rights and Equal Opportunity Commission but which are to be performed by the new Commissioner on behalf of the Commission.

There are essentially four functions set out in this new clause.

Firstly, there is to be submitted to the Minister as soon as practicable after 30 June each year a report relating to the enjoyment and exercise of human rights by Aboriginal persons and Torres Strait Islanders. The report is to include recommendations as to what action might need to be taken to ensure the enjoyment and exercise of those rights.

There are also functions relating to: the promotion of discussion and awareness of human rights in this area, the undertaking of research and educational programs and other programs for promoting respect for such rights and the enjoyment and exercise of those rights and, finally, the examining of enactments and proposed enactments to ensure they appropriately recognise and protect these rights. The Commissioner must report to the Minister the results of any such examination of enactments.

When performing these functions the new Commissioner must, as appropriate, consult the Aboriginal and Torres Strait Islander Commission and may consult various other organisations as set out in subclause 3.

Subclause 4 sets out the international instruments which the new Commissioner must have regard to when performing his or her functions. The provision also requires the Commissioner to have regard to the object of the *Council for Aboriginal Reconciliation Act 1991*.

Division 2 - Administrative provisions

New Clause 46D - Terms and Conditions of appointment

This clause provides that the new Commissioner is to be appointed for a term not exceeding 7 years and can be reappointed. There is also provision for the Governor-General to set other terms and conditions which are not detailed in the legislation.

New Clause 46E - Remuneration

This clause provides that the Commissioner is to be paid such remuneration as determined by the Remuneration Tribunal or as prescribed. The Commissioner is to be paid such allowances as are prescribed.

New Clause 46F - Leave of Absence

The Commissioner will receive such recreation leave as is determined by the Remuneration Tribunal and the Minister has power to grant other leave.

New Clause 46G - Outside Employment

This clause is self-explanatory.

New Clause 46H - Resignation

The Commissioner may resign by giving written notice to the Governor-General.

New Clause 46I - Termination of appointment

This provision provides that where the Commissioner seriously misbehaves or suffers from a disability which means that he or she cannot do the job, the Governor-General may terminate the Commissioner's appointment.

Subclause 2 sets out a number of situations when the Governor-General must terminate the appointment of the Commissioner.

New Clause 46J - Acting Commissioner

This clause provides that the Minister may appoint a person to act as the Commissioner where there is a vacancy or the Commissioner is either absent from duty, or overseas, or is not able to carry out his or her functions.

Subclause (2) provides that the validity of anything done by a person appointed by the Minister under this section is not to be questioned because there were certain technical difficulties with that appointment.

Division 3 - Miscellaneous

New Clause 46K - Commissioner may obtain information from government agencies

This provision gives the new Commissioner power to obtain information and documents from government agencies where the Commissioner believes that the agency has information or documents relevant to the performance of the functions set out in new clause 46C.

Subclause 2 provides that the information and documents are to be sought by the giving of a notice in writing which must set out certain details.

Under subclause 3 an agency which gets such a notice must not, when responding, provide information or produce a document that would reveal the identity of a particular individual unless that individual has consented to that information being given or the document being produced.

Subclause 4 provides that where it is possible to provide a copy of a document with the information about the identity of an individual removed that copy should be provided.

Government agency is defined to include Commonwealth, State and Territory authorities. The word 'authority' is defined in section 3 of the Act.

New Clause 46L - Commissioner must give information to the Commissioner

This clause provides that the Commissioner must give to the Commission information about the Commissioner's activities that the Commission may ask for.

New Clause 46M - Minister must table etc the report of Commissioner

This clause makes it clear that the Minister, after he or she receives a copy of the report presented by the Commissioner, must cause the report to be laid before each House of the Commonwealth Parliament within 15 sitting days of the particular House.

The clause requires that the Minister must send the report to each State and Territory Attorney-General within 7 days after the report has been first laid before a House of the Commonwealth Parliament.

Sex Discrimination Act 1984

Amendment: Long Title

The long title is expanded to cover the ground of family responsibilities.

Amendment: Section 3 Objects

Section 3 is amended to add a new paragraph (ba) to include, as an object of the Act, the elimination of discrimination involving dismissal of employees on the ground of family responsibilities.

Amendment: Subsection 4(1): Definitions

Subsection 4(1) is amended to include 'family responsibilities' as a definition in the Act and will have the meaning given to it by the new section 4A.

New Clause 4A: Meaning of Family Responsibilities

The definition of family responsibilities is divided into the responsibilities of an employee to care for or support, (1) a dependent child of the employee or, (2) any other immediate family member who is in need of care and support. These two groups are then further defined as follows -

“child” is defined to include an adopted child, a step-child or an ex-nuptial child.

“Dependent child” is defined as a child who is wholly or substantially dependent on the employee;

“immediate family member” is defined to include the spouse of the employee and spouse is defined to include a de-facto and former (including a former de-facto spouse) spouse as well as a number of persons who have a family relationship with the employee including adult children, parents, grandparents, grandchildren or siblings of the employee or of the employee's spouse.

This definition is not intended to be exhaustive. In a situation in which an employee has assumed the responsibility for, and therefore can be said to have a special relationship of responsibility for, the care and support of any other member of his or her family, the provisions of this Act are intended to apply.

Example, if an employee assumes the responsibility for the care and support of an aged aunt who has been regarded by the employee as a “substitute” parent, or for a cousin who has been brought up with the employee and who has a debilitating illness

and for whom no other family member is able to provide that care and support, this amendment is intended to provide protection against discrimination which takes the form of dismissal for that employee on the ground of his or her family responsibilities.

Example: if a non-custodial parent has responsibility for the care of his or her dependent children for a particular period of time (e.g. school holidays etc.), the amended Act will provide protection against discrimination which takes the form of dismissal on the ground of family responsibilities.

New Clause 7A Discrimination on the Grounds of Family Responsibilities

This provision defines what is meant by direct discrimination against an employee on the grounds of the employee's family responsibilities. Direct discrimination occurs when an employee is treated less favourably on the basis of his or her family responsibilities in circumstances that are the same or not materially different, than an employee without family responsibilities.

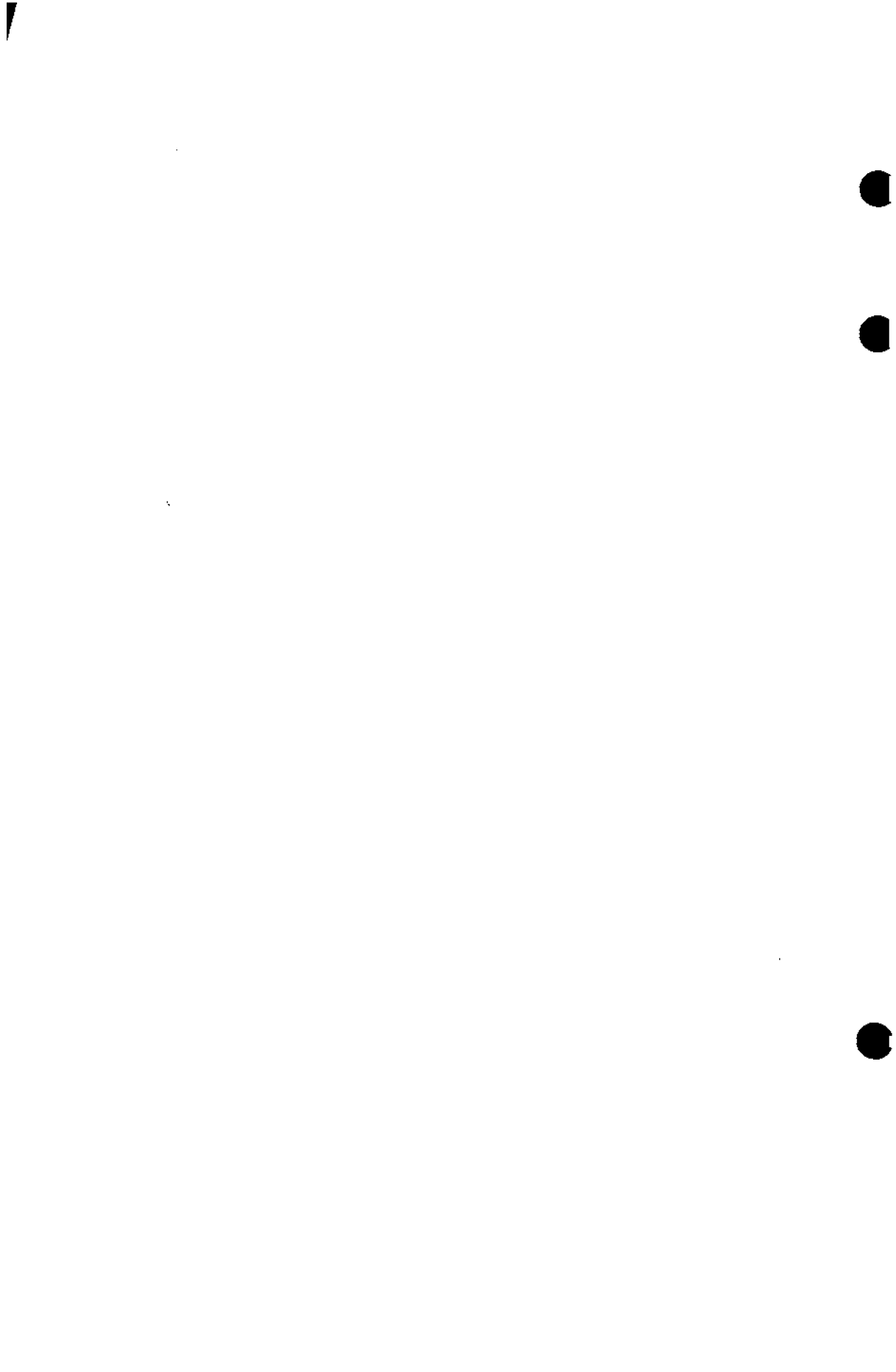
Amendment: Section 8: Act Done for Two or More Reasons

This section is amended to include the new section 7A and is consequential.

Amendment: Section 14: Discrimination Against Applicants and Employees

The section is amended by the addition of a new subsection (4) to make it unlawful for an employer to discriminate against an employee on the ground of the employee's family responsibilities by dismissing the employee.

This new provision is intended to apply only to a dismissal on the ground of the existence of family responsibilities or of a characteristic that appertains generally or is imputed generally to persons with family responsibilities (see New Clause 7A and the examples provided above). It is not intended to necessarily cover, for example, the dismissal of an employee because that employee is unwilling to change a shift, or has a period of unauthorised leave, even though both may be due to family responsibilities.



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