

1993

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

LAW AND JUSTICE LEGISLATION AMENDMENT BILL 1993

EXPLANATORY MEMORANDUM

(Circulated by the authority of the Attorney-General,
the Honourable Michael Lavarch, M.P.)

CORRECTION

LAW AND JUSTICE LEGISLATION AMENDMENT BILL 1993

EXPLANATORY MEMORANDUM

CLAUSE 14 REPEAL OF DIVISIONS AND SUBSTITUTION OF NEW
DIVISIONS

Page 14, fifteenth line - omit 'National Health Act 1952' substitute 'National Health Act 1953' to correct a typographical error in the Explanatory Memorandum.

CLAUSE 23 - DISCRIMINATION IN EMPLOYMENT OR IN
SUPERANNUATION

Second line - omit 'Human Rights and Equal Opportunity Legislation Amendment Act 1992' substitute 'Human Rights and Equal Opportunity Amendment Act (No.2) 1992' to correct a typographical error in the Explanatory Memorandum.

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the Hon. Michael Lavarch, MP)



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LAW AND JUSTICE LEGISLATION AMENDMENT BILL 1993

OUTLINE

This Bill makes a number of minor amendments to the *Disability Discrimination Act 1992* ('the DDA'), the *Racial Discrimination Act 1975* ('the RDA'), the *Sex Discrimination Act 1984* ('the SDA'), the *Privacy Act 1988* and the *High Court of Australia Act 1979*.

2. The DDA, the RDA and the SDA are each to be amended to allow a respondent to a determination of the Human Rights and Equal Opportunity Commission under those Acts to seek, in exceptional circumstances, review of the determination in the Federal Court outside the normal 28 day period.

3. The definition and procedures relating to representative complaints contained in the Privacy Act are to be brought more closely into line with provisions relating to representative actions under the *Federal Court of Australia Act 1976*. Similar amendments were made to the representative complaint provisions of the DDA, the RDA and the SDA by the *Sex Discrimination and other Legislation Amendment Act 1992*.

4. The Privacy Act is to be amended to bring the procedure for enforcing determinations of the Privacy Commissioner made under that Act into line with the procedure for enforcing determinations of the Human Rights and Equal Opportunity Commission under the DDA, RDA and SDA as effected by the *Sex Discrimination and other Legislation Amendment Act 1992*.

5. The Privacy Act will be amended to provide that compensation awarded under a determination of the Privacy Commissioner for loss or damage suffered by a complainant as a result of an act or practice which is an interference with privacy will include compensation for humiliation and hurt feelings. This will bring the Privacy provisions into line with the position under the *Crimes Act 1914* (in relation to spent convictions), the DDA, the RDA and the SDA.

6. The rules governing disclosure of credit information by credit providers to State and Territory authorities are to be amended to clarify the circumstances under which such disclosures may occur.

7. The commencement date for the superannuation provisions of the SDA, which were amended by the *Sex Discrimination Amendment Act 1991*, is to be postponed to

1 July 1994 to allow superannuation funds sufficient time to offer existing fund members the option to transfer to non-discriminatory schemes.

8. There are also some technical amendments to the RDA, the SDA and the Privacy Act.

9. The amendments to the High Court of Australia Act will amalgamate the existing offices and responsibilities of the Clerk of the Court and the Registrar into one office which is to be called the "Chief Executive and Principal Registrar".

Financial Impact Statement

The Bill will have no significant impact on Commonwealth expenditure. Any additional expenses will be absorbed within agencies' existing budgets.

NOTES ON CLAUSES

PART 1 - PRELIMINARY

Clause 1 - Short title

This clause provides for the Act to be cited as the *Law and Justice Legislation Amendment Act 1993*.

Clause 2 - Commencement

This clause provides for the commencement of the Act. By subclause 2(1), where not otherwise provided, the Act will commence on the date of Royal Assent. Subclause 2(2) provides that section 13 of the *Sex Discrimination Act 1984* will be taken to have commenced on 13 January 1993. The retrospective commencement date is necessary as section 13 of the Sex Discrimination Act exempts the employees of State Governments and State instrumentalities from the sexual harassment in work provisions which were amended by the *Sex Discrimination and other Legislation Amendment Act 1992* which commenced on 13 January 1993. Subclause 2(3) provides that, subject to subclause 2(4) the amendments in Part 6 of the Act will commence on a date to be fixed by Proclamation. Subclause 2(4) provides that in the event that Part 6 of the Act does not commence within 6 months of the day on which this Act receives the Royal Assent, Part 6 will commence on the first day after the end of the 6 month period.

PART 2 - AMENDMENTS OF THE DISABILITY DISCRIMINATION ACT 1992

Clause 3 - Principal Act

Clause 3 of the Bill provides that the *Disability Discrimination Act 1992* is the Principal Act for the purposes of Part 2 of the Bill.

Clause 4 - Registered determination has effect as an order of the Federal Court

Subclause 4(1) omits existing subsections 104B(3), (4), (5) and (6) and substitutes the following subsections:

Subsection 104B(3) provides that no action for enforcement of the determination may be taken before the end of the normal review period. 'Normal application and review period' is defined in subsection 104B(11) to mean the period beginning on

registration and ending when proceedings for review of the determination are completed or otherwise terminated or, in the absence of an application for review of the determination, on the 28th day after the day the determination is registered.

Under subsection 104B(4), in the case of a determination made under section 103 (that is a determination made by the Human Rights and Equal Opportunity Commission after holding an inquiry), a failure by the respondent to comply with a positive requirement of the determination during the normal review period does not count as a contravention of the determination. For example, if a determination under section 103 which has been registered under section 104A specifies that the respondent should pay to the complainant damages by a date falling within the normal review period, a failure to comply with this requirement during this period would not be a contravention of the determination. On the other hand, action taken by the respondent to frustrate the terms of the determination after registration and during the normal review period may amount to contravention of the determination. A respondent who seeks a review of a determination may, however, apply to the Court for an order suspending the operation of the whole or any part of the determination (see subsection 104C(3)).

Under subsection 104B(5) the respondent to a registered determination may apply to the Federal Court for review of the determination.

Under subsection 104B(6) and subject to subsection 104B(7), the respondent's application for review of the determination must be made within 28 days after the date of registration of the determination.

Under subsection 104B(7) the respondent may apply for review outside the 28 day period only with leave of the Federal Court. The Federal Court may only grant leave for review in exceptional circumstances.

Under subsection 104B(8), if the Federal Court grants leave for review of the determination outside the 28 day period it may make one or more orders to prohibit or to suspend further action to enforce the determination or an order that failure to comply with the requirements of the determination is not a contravention of the determination. Subsection 104B(1) provides that, subject to the respondent applying for review of the determination, the determination has effect as if it were an order of the Court.

Under subsection 104B(9), the Court may make an order under subsection 104B(8) on such conditions, if any, as it thinks fit and irrespective of whether the Court has made

an interim order under subsection 104C(3) suspending the whole or part of the determination.

Under subsection 104B(10) the Court may vary or revoke an order under subsection 104B(8).

Subclause 4(2) provides that subclause 4(1) does not apply to a determination made before the commencement of this section.

Clause 5 - Assistance in proceedings before the Federal Court

Clause 5 amends section 106 to provide that a person who applies or proposes to apply to the Federal Court for leave to seek review of the determination outside the usual 28 day period, or who applies or proposes to apply for review of a determination within the usual 28 day period may apply to the Attorney-General for the provision of legal or financial assistance in connection with the proceedings.

PART 3 - AMENDMENTS OF THE PRIVACY ACT 1988

Clause 6 - Principal Act

Clause 6 of the Bill provides that the *Privacy Act 1988* is the Principal Act for the purposes of Part 3 of the Bill.

Clause 7 - Interpretation

Subsection 6(1) of the Privacy Act is to be amended to define 'class member' and 'representative complaint' for the purposes of the revised representative complaint procedure. The current definition of 'representative complaint' is to be replaced by a new definition.

'representative complaint' is to be defined to mean a complaint where the persons on whose behalf the complaint was made include persons other than the complainant. It does not include a complaint which has been lodged under new subsection 38(1) on behalf of only one person or a complaint that the Privacy Commissioner has determined should no longer be continued as a representative complaint under new section 38A.

'class member' is defined to mean any of the persons on whose behalf a representative complaint is lodged other than those persons who have withdrawn from the representative complaint under new section 38B.

Clause 8 - Acts and practices of agencies, etc.

Paragraph 7(2)(b) of the Privacy Act refers to the "Joint Intelligence Organisation". The Department of Defence has confirmed that this organisation has been renamed the "Defence Intelligence Organisation". The proposed amendment is to amend this reference accordingly.

Clause 9 - Limits on disclosure by credit providers of personal information contained in reports relating to credit worthiness, etc.

The States and Territories administer mortgage assistance schemes to facilitate the giving of mortgage credit to individuals. The schemes differ from State to State. In Western Australia, for example, the scheme allows for provision of low-interest loans to individuals on low incomes through bodies such as co-operative housing societies or terminating building societies. The societies obtain the funds used to make the loans from commercial lenders, and the State Government provides a guarantee to the commercial lenders and indemnifies the societies in respect of loans given by the societies.

The Act as it is currently worded permits a credit provider to disclose personal information about an individual's credit arrangements to an authority whose functions include giving assistance to schemes which facilitate the giving of mortgage credit to individuals for a specified purpose.

That purpose is to enable the authority to determine the extent of assistance (if any) it will give in relation to the giving of mortgage credit to the individual concerned.

However, it is important, for example, that a Government authority underwriting a particular scheme is able to know whether indemnified lenders are able to cover individual's loan repayments should borrowers be unable to meet their repayments. Not only does the Government need to know the extent of its liability at any one time, but it also needs to ensure that individuals whose loans are indemnified are given every opportunity to stay in their homes during periods in which they might experience financial difficulty.

The amendment will make it clear that a credit provider can disclose relevant personal information to a Department, or a Minister, as well as to an authority. This is in recognition of the varying natures of mortgage assistance schemes from State to State and the respective reporting requirements of different schemes and will remove any doubts as to the meaning of the word "authority".

The amendment will also specify that a credit provider can disclose credit information about individuals for the purposes of allowing the Minister, Department or authority to supervise or manage the schemes.

The sorts of supervisory and management functions undertaken by the authority, Department or Minister which may require access to personal information about borrowers covers such things as

receiving reports from credit providers as required (under legislation or otherwise);

mediating between borrowers and societies when called upon;

responding to and providing information for the responsible Minister to enable replies to borrowers' queries.

Clause 9 of the Bill provides that section 18N of the Principal Act will be amended at paragraph (1)(bd) by omitting the existing paragraph and substituting new paragraphs (1)(bd) and (bda)

New paragraph 18N(1)(bd) is a re-enactment of existing paragraph 18N(1)(bd) with the clarification that disclosures may be made to appropriate Departments or Ministers (as discussed above). Thus, a credit provider will be able to disclose a report or information to a Minister or a Department or authority, where the Minister, Department or authority has functions or responsibilities that include giving mortgage assistance and the disclosure is for the purpose of determining the extent of assistance (if any) it will give in relation to the giving of mortgage credit to individuals.

New paragraph 18N(1)(bda) will allow for the management and supervision of State and Territory mortgage assistance schemes. The new paragraph will allow a credit provider to disclose information to a Minister, Department or authority whose functions or responsibilities include management or supervision of mortgage assistance schemes where the disclosure is necessary to enable the Minister, Department or authority to manage or supervise schemes or arrangements under which mortgage assistance is given.

Clause 10 - Complaints

Section 36, which provides for the making of complaints, will be cross-referenced to the new provisions for representative complaints (see discussion under clause 11 below).

Clause 11 - Repeal of sections and substitution of new sections

Sections 38 and 39 of the Act are to be repealed by this clause and replaced by new provisions governing the lodgment and determination of representative complaints. The new provisions draw, where appropriate, on the representative proceedings provisions in Part IVA of the *Federal Court of Australia Act 1976* which came into force in 1992 and will bring the Privacy Act into line with amendments made to the representative complaints provisions of the Disability Discrimination Act, Racial Discrimination Act and Sex Discrimination Act in 1992 as part of the reform of the determination procedures under those Acts.

Section 38 - Conditions for making a representative complaint

New section 38 provides the conditions that must be satisfied in order for a representative complaint to be lodged under section 36 of the Act. All the persons concerned must have complaints against the same person; the complaints of all the members of the class must be in respect of, or arise out of, the same, similar, or related circumstances; and they must give rise to a substantial common issue of law or fact.

The new section also provides for the additional information (description of the class, nature of the class members' claims, nature of the relief sought and the common issues for determination) that must be set out in the representative complaint lodged with the Privacy Commissioner. In describing or otherwise identifying class members it will not be necessary to name, or specify the number of, class members.

Under the new section a representative complaint can be lodged without the consent of class members.

Section 38A - Commissioner may determine that a complaint is not to continue as a representative complaint

New section 38A enables the Privacy Commissioner to determine that a complaint no longer continue as a representative complaint where he or she is satisfied that it is in the interests of justice to do so because it falls within one of the four criteria set out in subsection 38A(2). These criteria are that it would be less costly to have separate proceedings; that the complaints of class members will not be efficiently and effectively dealt with by the representative complaint; that the complaint was not brought in good faith as a representative complaint or it is otherwise inappropriate that the complaints be pursued by means of a representative complaint.

Subsection 38A(3) enables a complainant, where the Privacy Commissioner determines that a complaint not continue as a representative complaint, to continue the complaint as an individual complaint. The subsection will also enable the Privacy Commissioner to join a class member as a complainant.

Section 38B - Additional rules applying to the determination of representative complaints

New section 38B contains additional rules for the determination of representative complaints. It will enable the Privacy Commissioner to substitute another class member as complainant where he or she considers that the complainant is not able to adequately represent the interests of the class members.

Subsection 38B(2) enables a class member to withdraw from a representative complaint at any time before the Privacy Commissioner begins his or her inquiry.

Subsection 38B(3) empowers the Privacy Commissioner to direct that notice of any matter be given to class members.

Section 38C - Amendment of representative complaints

New section 38C empowers the Privacy Commissioner to alter the class of persons in a complaint so that it may be dealt with as a representative complaint.

Section 39 - Class member for representative complaint not entitled to lodge individual complaint

Section 39 (individual complaints not precluded by representative complaints) is to be repealed and replaced by a new provision which will, in effect, prevent a person who is a class member in a representative complaint from lodging an individual complaint unless that person withdraws from the representative complaint.

Clause 12 - Determination of the Commissioner

Subparagraph 52(1)(b)(iii) is to be amended to remove the restriction on the Privacy Commissioner making a declaration for the payment of damages on a representative complaint.

New subsection 52(1A) is to be inserted to provide that loss or damage for which compensation may be awarded under a determination of the Privacy Commissioner includes injury to the complainant's feelings or humiliation suffered by the complainant. This will bring the Privacy Act provisions into line with the position

under the Crimes Act (in relation to spent convictions), Disability Discrimination Act, Racial Discrimination Act and Sex Discrimination Act.

Consistent with the position under the Disability Discrimination Act, Racial Discrimination Act and Sex Discrimination Act, new subsection 52(1B) will provide that a determination of the Commissioner under section 52 will not be binding or conclusive between any of the parties to the determination. The new rules for determinations proposed by this Bill will provide for the enforcement and review of determinations.

Subsection 52(4) of the Act (which defines 'complainant' for the purposes of the section) is to be repealed and replaced with a provision enabling the Privacy Commissioner, when making a declaration for payment of damages, to provide either for specified amounts of damages or for such amounts to be worked out in a specified manner. For example, the Privacy Commissioner may wish to make an award consisting of amounts determined by reference to a mathematical formula or by reference to records of the respondent.

Under new subsection 52(5), where the Privacy Commissioner makes a declaration for the payment of damages on a representative complaint, he or she may give directions as to the way in which a class member is to establish an entitlement to compensation and the means by which any disputes about entitlement are to be determined.

New subsection 52(6) defines 'complainant' in a representative complaint for the purposes of the section to mean class members.

Clause 13 - Repeal of section and substitution of new section

Section 53 - Determination must identify the class members who are to be affected by the determination

Section 53 (service of determination) is to be repealed. New section 53 provides that a determination under section 52 on a representative complaint must describe or otherwise identify the class members who will be affected by it.

Clause 14 - Repeal of Divisions and substitution of new Divisions

Existing Divisions 3 and 4 of Part V, which provide for review and enforcement of determinations, are to be repealed. They will be replaced by the new rules providing for the review and enforcement of determinations.

Part V - Division 3 - Registration of determinations in Federal Court

New Division 3 of Part V will provide for the registration of determinations in the Federal Court where the respondent to the determination is not a Commonwealth agency or the principal executive of a Commonwealth agency.

Section 54 - Registration of determination.

New subsection 54(1) provides that the section applies to a determination made under section 52 except where the respondent is a Commonwealth agency or the principal executive of a Commonwealth agency. Under section 52, after the Privacy Commissioner finds the complaint substantiated, he or she may make a determination which may include a number of declarations.

Under new proposed subsection 54(2) the Privacy Commissioner will be required to lodge the determination, as soon as practicable after the determination is made, in a Registry of the Federal Court.

Under new subsection 54(3) a Registrar must register the determination upon lodgement. 'Registrar' is defined to have the same meaning as in section 35A of the *Federal Court of Australia Act 1976*.

Under new subsection 54(4) the Privacy Commissioner will be required to forward a written notice of the registration to the complainant and respondent to the determination within 7 days of registration. The notice must specify the date of registration and must include a copy of the determination. The notice requirement is to ensure that the parties to the inquiry have notice of the date of registration. The date of registration of the determination is particularly important as under the proposed subsection 55(5) the respondent, if he or she wishes to review a determination, must apply to the Federal Court for review of the determination within 28 days after the date of registration of the determination, subject to the other provisions of section 55 allowing an extension of the 28 day time limit.

Section 55 - Registered determination has effect as an order of the Federal Court.

Under subsection 55(1), upon registration of a determination under section 54, the determination of the Privacy Commissioner will have effect as if it were an order made by the Federal Court, but subject to the qualifications set out in the rest of section 55.

Subsection 55(2) will ensure that where a determination was made on a representative complaint, each class member described or identified as being affected by the determination is bound by it and may take action to enforce it.

Subsection 55(3) provides that no action for enforcement of the determination may be taken before the end of the normal review period. 'Normal application and review period' is defined in subsection 55(11) to mean the period beginning on registration and ending when proceedings for review of the determination are completed or otherwise terminated or, in the absence of an application for review of the determination, on the 28th day after the day the determination is registered.

Under subsection 55(4), in the case of a determination made under section 52 (that is a determination made by the Privacy Commissioner after holding an inquiry), a failure by the respondent to comply with a positive requirement of the determination during the normal review period does not count as a contravention of the determination. For example, if a determination under section 52 which has been registered under new section 54 specifies that the respondent should pay to the complainant damages by a date falling within the normal review period, a failure to comply with this requirement during this period would not be a contravention of the determination. On the other hand, action taken by the respondent to frustrate the terms of the determination after registration and during the normal review period may amount to contravention of the determination. A respondent who seeks a review of a determination may, however, apply to the Court for an order suspending the operation of the whole or any part of the determination (see new subsection 56(3)).

Under subsection 55(5) the respondent to a registered determination may apply to the Federal Court for review of the determination.

Under subsection 55(6) and subject to subsection 55(7), the respondent's application for review of the determination must be made within 28 days after the date of registration of the determination.

Under subsection 55(7) the respondent may apply for review outside the 28 day period only with leave of the Federal Court. The Federal Court may only grant leave for review in exceptional circumstances.

Under subsection 55(8), if the Federal Court grants leave for review of the determination outside the 28 day period it may make one or more orders to prohibit or to suspend further action to enforce the determination or an order that failure to comply with the requirements of the determination is not a contravention of the

determination. New subsection 55(1) provides that, subject to the respondent applying for review of the determination, the determination has effect as if it were an order of the Court.

Under new subsection 55(9), the Court may make an order under subsection 55(8) on such conditions, if any, as it thinks fit and irrespective of whether the Court has made an interim order under new subsection 56(3) suspending the whole or part of the determination.

Under new subsection 55(10) the Court may vary or revoke an order under new subsection 55(8).

Section 56 - Review of registered determination

New subsection 56(1) states that the section applies if an application is made to the Federal Court under new section 55 for review of a determination.

Under new subsection 56(2) the parties to the review are the applicant, who was the respondent to the registered determination, and the complainant to the determination, who will be the respondent to the application for review.

New subsection 56(3) provides that the Court may at any time make an interim order that suspends the operation of the whole or any part of the determination. This will enable the applicant to seek a suspension of the operation of the whole or any part of the determination pending the outcome of the review of the determination. If the Court makes an interim order under this subsection, the order may be made on such conditions, if any, as the Court thinks fit.

Under new subsection 56(4) the Court, in reviewing the determination, may review all issues of fact and law.

Under new subsection 56(5) a party cannot adduce new evidence in the review of the determination except by the leave of the Court.

New subsection 56(6) provides that the Court, after reviewing the determination, may make such orders as it thinks fit, including a declaration of right. The orders may confirm a determination that has been registered under section 54.

New subsection 56(7) provides that the Court may dismiss the application for review at any time if it considers that the applicant is not prosecuting the application with due dispatch. The Court may do this either of its own motion or on the application of the respondent. The aim of this provision is to ensure that the applicant for the review of

the determination prosecutes the application with appropriate speed. This provision is necessary as action for enforcement of a determination that has been registered under section 54 may not be taken before the end of the review period (subsections 55(3) and (8)).

Part V - Division 4 - Review and enforcement of determinations involving Commonwealth agencies.

New Division 4 of Part V will put in place new provisions for review and enforcement of determinations against Commonwealth agencies. The procedures are not significantly different from those which currently apply to Commonwealth agencies for complaints about breaches of the Information Privacy Principles (IPP complaints). The effect of the new division is that all determinations against Commonwealth agencies will be dealt with in the same way, regardless of whether they arise from, for example, IPP complaints, file number complaints, alleged breaches of relevant parts of the *Data-matching Program (Assistance and Tax) Act 1990* or guidelines issued under section 135AA of the *National Health Act 1952*.

Section 57 - Application of Division

New section 57 provides that the new division will apply only to determinations where the respondent is either a Commonwealth agency or a principal executive of a Commonwealth agency.

Section 58 - Obligations of respondent agency

Under this new section, Commonwealth agencies which are respondents to determinations covered by this division must cease, and not repeat, any conduct which led up to the determination and must perform any act or course of conduct that the determination may require. This provision does not cover an award of compensation under paragraph 52(1)(b)(iii) or expenses under subsection 52(3) of the Act as that matter is dealt with in new section 61.

Section 59 - Obligation of principal executive of agency

New section 59 requires that a principal executive of a Commonwealth agency who is the respondent to a determination must take all reasonable steps to ensure that the terms of the determination are brought to the notice of all members, officers and employees of the agency who may be engaged in conduct to which the determination relates.

Further the principal executive must take all reasonable steps to ensure that relevant officers etc. cease and do not repeat conduct subject to a declaration under paragraph 52(1)(b)(i) and, finally, where actions or a course of conduct is required by a determination (paragraph 52(1)(b)(ii)), that that act or conduct is actually performed.

Section 60 - Compensation and expenses

New subsection 60(1) provides that where the payment of compensation under paragraph 52(1)(b)(iii) or expenses under subsection 52(3) is part of a determination against a Commonwealth agency, the complainant is entitled to be paid that amount.

Subsection 60(2) makes those damages a debt due to the complainant by either a Commonwealth agency which has the capacity to sue and be sued or by the Commonwealth where an agency does not have that capacity.

Subsection 60(3) provides that, for the purposes of new section 60, 'complainant', in relation to a representative complaint, means a class member.

Section 61 - Review of determinations regarding compensation and expenses

New subsection 61(1) makes provision for an application to be made to the Administrative Appeals Tribunal (AAT) for review of a determination relating to a decision to provide or not provide for compensation or expenses.

Under subsection 61(2) a Commonwealth agency or a principal executive officer of such an agency can only seek review by the AAT where the Minister has given permission.

Where the AAT considers such an application, subsection 61(3) provides, subject to subsection 21(1A) of the *Administrative Appeals Tribunal Act 1975*, that the Tribunal must be made up of a presidential member who is a Judge, and 2 other members who are not Judges.

New subsection 61(4) ensures that terms used in subsection 61(3) have the same meaning as in the Administrative Appeals Tribunal Act.

Section 62 - Enforcement of determination against an agency

Under subsections 62(1) and (2) where a Commonwealth agency or a principal executive of such an agency fails to carry out their obligations in relation to a determination as set out in sections 58 or 59, respectively, then an application can be

made to the Federal Court for an order directing that either the agency or the principal executive complies.

New subsection 62(3) provides that an application under subsection 62(1) or (2) may be made by the Privacy Commissioner or the complainant. In the case of a representative complaint, complainant for this purpose means a class member.

Where an application is made under subsections 62(1) or (2), new subsection 62(4) provides that the Federal Court may make such orders as it thinks fit with a view to securing compliance by the respondent.

New subsection 62(5) indicates that an application under section 62 cannot be made until either the time for making an application for review to the AAT under section 61 has expired or any decision of the AAT, should an application be made, has come into operation.

Clause 15 - Insertion of new section

Section 63 - Legal and financial assistance

New section 63 relating to legal assistance for file number complaints will re-enact existing section 63 in the same terms as that section. That is, a respondent to a complaint about a breach of the Tax File Number Guidelines may apply to the Attorney-General for financial assistance if the complaint is dismissed (new subsections 63(1) and (3)).

In addition, new subsections 63(2) and (3) will provide that a person who applies or proposes to apply to the Federal Court for leave to seek review of the determination outside the usual 28 day period, or who applies or proposes to apply for review of a determination within the usual 28 day period or is a respondent to such an application may apply to the Attorney-General for the provision of legal or financial assistance in connection with the proceedings.

New subsections 63(3), (4) and (5) provide the Attorney-General with power to order that assistance be given where he considers it appropriate.

Clause 16 - Application of amendments

Subclause 16(1) specifies that the amendments to the Privacy Act in relation to the enforcement of the Privacy Commissioner's determinations as if they were orders of the Federal Court will not apply to determinations made before the commencement of the amendment. This has the effect of ensuring that determinations which have been

made by the Privacy Commissioner before the commencement of the enforcement amendments will not be subject to the new procedures concerning registration of the determinations in the Federal Court. Determinations made under the existing legislation will still be able to be enforced under the existing enforcement provisions.

Subclause 16(1) also specifies that the amendments made to the Privacy Act in relation to the enforcement of determinations of the Privacy Commissioner as if they were orders of the Federal Court will not apply to a determination made after the commencement of the amendment in respect of a representative complaint lodged before the commencement of the amendment.

Subclause 16(2) specifies that the amendments made to the Privacy Act in relation to the review and enforcement of determinations involving Commonwealth agencies does not apply to determinations made before the commencement of the amendment. This has the effect of ensuring that determinations involving a Commonwealth agency which have been made by the Privacy Commissioner before the commencement of the new review and enforcement provisions will not be subject to the new review and enforcement provisions. In this regard, the new provisions do not differ in significant respects from the existing provisions.

Subclause 16(2) also specifies that the amendments made to the Privacy Act in relation to the review and enforcement of determinations involving Commonwealth agencies do not apply to a determination made after the commencement of the amendment in respect of a representative complaint lodged before the commencement of the amendment.

Subclause 16(3) provides that the new scheme for representative complaints under the Privacy Act will not apply to complaints lodged before the commencement of the amendment. Any existing complaints will still be subject to the existing legislative provisions.

Subclause 16(4) provides that new subsection 52(1A), providing that loss or damage includes humiliation and hurt feelings, does not apply to determinations made before the commencement of the amendment.

Subclause 16(4) also specifies that new subsection 52(1A) will not apply to a determination made after the commencement of the amendment in respect of a representative complaint lodged before the commencement of the amendment.

PART 4 - AMENDMENTS OF THE RACIAL DISCRIMINATION ACT 1975

Clause 17 - Principal Act

Clause 17 of the Bill provides that the *Racial Discrimination Act 1975* is the Principal Act for the purposes of Part 4 of the Bill.

Clause 18 - Registered determination has effect as an order of the Federal Court

Subclause 18(1) omits existing subsections 25ZAB(3), (4), (5) and (6) and substitutes the following subsections:

Subsection 25ZAB(3) provides no action for enforcement of the determination may be taken before the end of the normal review period. 'Normal application and review period' is defined in subsection 25ZAB(11) to mean the period beginning on registration and ending when proceedings for review of the determination are completed or otherwise terminated or, in the absence of an application for review of the determination, on the 28th day after the day the determination is registered.

Under subsection 25ZAB(4), in the case of a determination made under section 25Z (that is a determination made by the Human Rights and Equal Opportunity Commission after holding an inquiry), a failure by the respondent to comply with a positive requirement of the determination during the normal review period does not count as a contravention of the determination. For example, if a determination under section 25Z which has been registered under section 25ZAA specifies that the respondent should pay to the complainant damages by a date falling within the normal review period, a failure to comply with this requirement during this period would not be a contravention of the determination. On the other hand, action taken by the respondent to frustrate the terms of the determination after registration and during the normal review period may amount to contravention of the determination. A respondent who seeks a review of a determination may, however, apply to the Court for an order suspending the operation of the whole or any part of the determination (see subsection 25ZAC(3)).

Under subsection 25ZAB(5) the respondent to a registered determination may apply to the Federal Court for review of the determination.

Under subsection 25ZAB(6) and subject to subsection 25ZAB(7), the respondent's application for review of the determination must be made within 28 days after the date of registration of the determination.

Under subsection 25ZAB(7) the respondent may apply for review outside the 28 day period only with leave of the Federal Court. The Federal Court may only grant leave for review in exceptional circumstances.

Under subsection 25ZAB(8), if the Federal Court grants leave for review of the determination outside the 28 day period it may make one or more orders to prohibit or to suspend further action to enforce the determination or an order that failure to comply with the requirements of the determination is not a contravention of the determination. Subsection 25ZAB(1) provides that, subject to the respondent applying for review of the determination, the determination has effect as if it were an order of the Court.

Under subsection 25ZAB(9), the Court may make an order under subsection 25ZAB(8) on such conditions, if any, as it thinks fit and irrespective of whether the Court has made an interim order under subsection 25ZAC(3) suspending the whole or part of the determination.

Under subsection 25ZAB(10) the Court may vary or revoke an order under subsection 25ZAB(8).

Subclause 18(2) provides that subclause 18(1) does not apply to a determination made before the commencement of this section.

Clause 19 - Assistance in proceedings before the Federal Court

Clause 19 amends section 25ZC to provide that a person who applies or proposes to apply to the Federal Court for leave to seek review of the determination outside the usual 28 day period, or who applies or proposes to apply for review of a determination within the usual 28 day period may apply to the Attorney-General for the provision of legal or financial assistance in connection with the proceedings.

Clause 20 - Acting Commissioner

Clause 20 rectifies a drafting error of the amendment of section 36 in the *Human Rights and Equal Opportunity Legislation Amendment Act 1992* to remove the requirement that an acting Race Discrimination Commissioner shall not continue so to act for more than 12 months.

PART 5 - AMENDMENTS OF THE SEX DISCRIMINATION ACT 1984

Clause 21 - Principal Act

Clause 21 of the Bill provides that the *Sex Discrimination Act 1984* is the Principal Act for the purposes of Part 5 of the Bill.

Clause 22 - Extent to which the Act applies to State instrumentalities

Clause 22 rectifies a drafting omission in the *Sex Discrimination and other Legislation Amendment Act 1992*. Clause 22 will amend the reference in subsection 13(2) of the Act from section 28 to section 28B, thereby restoring the exemption from the sexual harassment in work provisions for employees of a State or a State instrumentality. As noted above in respect of subclause 2(2), this amendment will be taken to have commenced on 13 January 1993, which is the date that the *Sex Discrimination and other Legislation Amendment Act* commenced.

Clause 23 - Discrimination in employment or in superannuation

Clause 23 will rectify a drafting error to re-number subsection 14(4) inserted by section 2 of the *Human Rights and Equal Opportunity Legislation Amendment Act 1992* to subsection 14(3A). This amendment is necessary because subsections 14(4) to 14(6) were inserted in the Act in 1991 by the *Sex Discrimination Amendment Act 1991*.

Clause 24 - Delaying commencement of new sections 41, 41A and 41B

Clause 24 delays the commencement of new sections 41, 41A and 41B, which amend the exemptions from the Act for insurance and superannuation funds, to 1 July 1994 and section 9 of the *Sex Discrimination Amendment Act 1991* is taken not to have commenced on 25 June 1993.

Clause 25 - Registered determination has effect as an order of the Federal Court

Subclause 25(1) omits existing subsections 82B(3), (4) (5) and (6) and substitutes the following subsections:

Subsection 82B(3) provides no action for enforcement of the determination may be taken before the end of the normal review period. 'Normal application and review period' is defined in subsection 82B(11) to mean the period beginning on registration and ending when proceedings for review of the determination are completed or

otherwise terminated or, in the absence of an application for review of the determination, on the 28th day after the day the determination is registered.

Under subsection 82B(4), in the case of a determination made under section 81 (that is a determination made by the Human Rights and Equal Opportunity Commission after holding an inquiry), a failure by the respondent to comply with a positive requirement of the determination during the normal review period does not count as a contravention of the determination. For example, if a determination under section 81 which has been registered under section 82A specifies that the respondent should pay to the complainant damages by a date falling within the normal review period, a failure to comply with this requirement during this period would not be a contravention of the determination. On the other hand, action taken by the respondent to frustrate the terms of the determination after registration and during the normal review period may amount to contravention of the determination. A respondent who seeks a review of a determination may, however, apply to the Court for an order suspending the operation of the whole or any part of the determination (see subsection 82C(3)).

Under subsection 82B(5) the respondent to a registered determination may apply to the Federal Court for review of the determination.

Under subsection 82B(6) and subject to subsection 82B(7), the respondent's application for review of the determination must be made within 28 days after the date of registration of the determination.

Under subsection 82B(7) the respondent may apply for review outside the 28 day period only with leave of the Federal Court. The Federal Court may only grant leave for review in exceptional circumstances.

Under subsection 82B(8), if the Federal Court grants leave for review of the determination outside the 28 day period it may make one or more orders to prohibit or to suspend further action to enforce the determination or an order that failure to comply with the requirements of the determination is not a contravention of the determination. Subsection 82B(1) provides that, subject to the respondent applying for review of the determination, the determination has effect as if it were an order of the Court.

Under subsection 82B(9), the Court may make an order under subsection 82B(8) on such conditions, if any, as it thinks fit and irrespective of whether the Court has made

an interim order under subsection 82C(3) suspending the whole or part of the determination.

Under subsection 82B(10) the Court may vary or revoke an order under subsection 104B(8).

Subclause 25(2) provides that subclause 25(1) does not apply to a determination made before the commencement of this section.

Clause 26 - Assistance in proceedings before the Federal Court

Clause 26 amends section 84 to provide that a person who applies or proposes to apply to the Federal Court for leave to seek review of the determination outside the usual 28 day period, or who applies or proposes to apply for review of a determination within the usual 28 day period may apply to the Attorney-General for the provision of legal or financial assistance in connection with the proceedings.

PART 6 - CHANGES TO THE ADMINISTRATIVE ARRANGEMENTS OF THE HIGH COURT OF AUSTRALIA

Part 6 of the Act amends the *High Court of Australia Act 1979* and makes other consequential amendments to other Acts.

Division 1- Amendments of the High Court of Australia Act 1979.

Clause 27 - Principal Act

Clause 27 provides that, in this Division, the Principal Act is the *High Court of Australia Act 1979*.

Clause 28 - Interpretation

Section 4 of the Principal Act provides for definitions of terms used in the Act.

Clause 28 will amend the definitions contained in subsection 4(1) to provide that the Deputy Registrar, Deputy Marshal and Marshal are officers appointed under subsection 26(1) of the Act. These amendments are as a consequence of the insertion of new subsection 26(1).

Clause 28 will amend section 4 by omitting the definition of "Clerk" and "Registrar" and inserting a definition of "Chief Executive and Principal Registrar". The responsibilities of the offices of Clerk and Registrar are to be assumed by the office of

Chief Executive and Principal Registrar, the occupant of which will be appointed under section 18.

Clause 28 also inserts a definition of "Senior Registrar". This position will be subordinate to the Chief Executive and Principal Registrar to assist in the administration of Registry functions. The Senior Registrar is also given functions under new subsection 26(7).

Clause 29 - Changing references to Clerk to Chief Executive and Principal Registrar

Clause 29 will amend the Principal Act by omitting all references to "Clerk" and substituting "Chief Executive and Principal Registrar".

Clause 30 - Officers and Employees

Subclause 30(a) will amend the Principal Act by omitting subsections 26(1) and (2) and substituting a new subsection 26(1) which will provide that the Chief Executive and Principal Registrar is to appoint such other officers of the High Court as the Court considers necessary. The Chief Executive and Principal Registrar will assume the responsibilities of the Clerk for appointing officers of the Court, including positions such as the Marshal and Deputy Marshal.

Subclause 30(b) will amend the Principal Act by replacing subsection 26(5). New subsection 26(5) will provide that officers appointed under new subsection 26(1) will not be covered by the *Remuneration Tribunal Act 1973*.

Subclause 30(c) will replace subsection 26(7) of the Principal Act. The new subsections 26(7) will provide that the Senior Registrar and Deputy Registrars are to perform such duties in relation to proceedings before the Court as are assigned to them by Rules of Court, by order of the Court, or by the Chief Executive and Principal Registrar.

Clauses 31, 32 and 33

Clauses 31, 32 and 33 will amend sections 28, 30 and 33 of the Principal Act by substituting references to "Registrar" with "Chief Executive and Principal Registrar".

Clause 34 - Transitional

Subclause 34(1) will provide that, for the purposes of section 25B of the *Acts Interpretation Act 1901*, subclause 29 is taken to alter the name of the office of Clerk

of the High Court to “Chief Executive and Principal Registrar”. Section 25B provides for the continuation of bodies and offices in existence where names are altered.

Subclause 34(2) will provide that from the commencement of the Part, where in any document listed in that subclause, there is a reference to the Registrar of the High Court, that reference is taken to be a reference to the Chief Executive and Principal Registrar.

Subclause 34(3) will provide that where, before the commencement of the Part, a person held the office of Registrar, that person will, after the commencement of the Part, be taken to have been appointed as Senior Registrar under new subsection 26(1). A person to whom this subclause applies will continue to hold office as Senior Registrar on the same terms and conditions on which that person held office as Registrar. This provision means that if a person is the Registrar at the time the amendment takes effect, that person does not immediately lose his or her job but is transferred to another position (the Senior Registrar). This allows for smoother transition to other new arrangements.

Subclause 34(4) will provide that where any person, apart from the Registrar, held an office under subsection 26(1) that person will continue to hold office under new subsection 26(1) as if that person was appointed after commencement of that Part.

Division 2 - Consequential Amendments of the Commonwealth Electoral Act 1918

This Division provides for consequential amendments to the *Commonwealth Electoral Act 1918* as a result of amendments to the *High Court of Australia Act 1979*.

Clause 35 - Principal Act

Clause 35 provides that in this Division the Principal Act is the *Commonwealth Electoral Act 1918*.

Clause 36 - Deposit as security for costs

Clause 36 provides that section 356 of the Principal Act will be replaced. New section 356 will reflect the change in the administrative structure of the High Court as made by the amendments contained in Division 1.

Clause 37 - Court to report cases of illegal practices

Clause 37 provides that section 363 of the Principal Act will be amended by substituting the reference to "Registrar" with "Chief Executive and Principal Registrar".

Clause 38 - Copies of petition and order of Court to be sent to House affected, Governor General and Speaker

Clause 38 provides that section 369 of the Principal Act will be amended by substituting the reference to "Registrar" with "Chief Executive and Principal Registrar".

Clause 39 - Copies of petition and order of Court to be sent to House affected, Governor General and Speaker

Clause 39 provides that section 380 of the Principal Act will be amended by substituting the reference to "Registrar" with "Chief Executive and Principal Registrar".

Division 3 - Consequential Amendments of other Acts

This Division provides for consequential amendments to other Acts as a result of amendments to the *High Court of Australia Act 1979*.

Clause 40 - Certain signatures etc. to be judicially noticed

Clause 40 provides that section 4 of the *Evidence Act 1904* will be amended by inserting references to "Chief Executive and Principal Registrar" and "Senior Registrar" as persons of whose official signatures a court can take judicial notice.

Clause 41 - Register of Practitioners

Clause 41 provides that section 55C of the *Judiciary Act 1903* will be amended by substituting the references to "Registrar" with "Chief Executive and Principal Registrar".

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