

1995

THE PARLIAMENT OF THE COMMONWEALTH  
OF AUSTRALIA

THE SENATE

**SEXUALITY DISCRIMINATION BILL 1995**

EXPLANATORY MEMORANDUM

(Circulated by authority of Senator Sid Spindler  
Law and Justice Spokesperson for the Australian Democrats)

## **PART 1 - PRELIMINARY**

### **CL2 & CL3 Purpose and Commencement**

To eliminate, as far as possible, discrimination against people on the basis of their sexuality or transgender. The Act will commence on Royal Assent, except s.107 (Same Sex Couples) which will commence six months later.

### **CL4 Application and Constitutional Basis**

The Act will apply throughout Australia and the external territories to give effect to Australia's obligations under the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, ILO Convention No III and other international treaties.

In addition to the **external affairs power** the constitutional validity is supported by other powers under s.51 of the Constitution dealing with foreign corporations, trading and financial corporations, as well as banking, insurance and trade and commerce extending beyond the limits of one state.

### **CL5 Definitions**

'Sexuality' is defined as heterosexuality, homosexuality and bisexuality. 'Transgender' is defined as a person who assumes the characteristics of the other sex, identifies or lives as a member of the other sex or as a transsexual.

Provision is made for representative class complaints (see also CL38)

The definition of employment includes part time, temporary and contract work, as well as work done by Commonwealth and State employees.

Other definitions are discussed under the relevant clauses.

### **CL6 Discrimination whether direct or indirect on the ground of sexuality is defined as less favourable treatment in similar circumstances because of:**

- the person's sexuality; or
- a general characteristic of people of that sexuality; or
- a characteristic generally imputed to persons of the sexuality of the aggrieved person.

Similar provisions apply to transgender identified people.

(wherever the term 'discrimination' appears in these notes it is to be taken to mean 'discrimination on the ground of sexuality' or transgender identity). Members of the defence forces are included under the definition of Commonwealth employees.

### **CL7 & CL9 State and Territory Laws**

dealing with discrimination in the areas covered by this bill will operate concurrently unless inconsistent but action or prosecution will not be possible under both State and Commonwealth legislation.

State, Territory and Commonwealth Governments are bound by the Act.

**CL8 Unlawful Behaviour**

This Act does not prevent action to stop unlawful behaviour - see also Cl 108.

**PART 2 - PROHIBITION OF DISCRIMINATION**

***DIVISION 1 - Discrimination in work—Employment and Superannuation Payments***

- CL10 (1)** Discrimination in **employment** is rendered unlawful with the following
- (2) exemptions:
- (3) domestic duties at a private residence
- (4) **religious educational institutions** (including schools) acting in accordance with the tenets, beliefs or teachings of a particular religion or creed, in good faith and to avoid injury to the religious susceptibilities of adherents of that religion or creed.

Discrimination is rendered unlawful -

- CL10 (5)** by a **Superannuation Fund** in making payments.

- CL11** against **Commission Agents**

- CL12** against **contract workers**  
except by religious educational institutions, (including schools) - see also cl.10(4)

- CL13** by an existing or proposed **partnership**

- CL14** in the area of **trade or professional qualifications or authorisations**

- CL15** by organisations registered under the Industrial Relations Act (mainly **unions and employer organisations**)

- CL16** by **employment agencies**.

***DIVISION 2 Discrimination in other areas***

Discrimination is rendered unlawful -

- CL17** against **students** studying at or seeking admission to an educational institution

- CL18** in the provision of **goods, services and facilities**

- CL19** in the provision of **accommodation**  
**except:** in the case of a person's own residence or one occupied by a near relative (unless also occupied by more than three 'non family' persons).

- CL20** in the **sale or transfer of land**

- CL21 in continuing or accessing membership to a **club or incorporated association**;
- CL22 in **sporting activities**
- CL23 in the administration of **Commonwealth laws and programs**
- CL24 in the **provision of information**.
- CL25 **Official Documents** - amendment of official documents must not be refused on production of a sex reassignment certificate issued under State law.

### ***DIVISION 3 Inciting Hatred***

- CL26 the public incitement of hatred, serious contempt or severe ridicule is rendered unlawful unless it is a 'fair' report of a public act or done reasonably and in good faith for academic, artistic, religious instruction, scientific or research or other purposes in the public interest, including public debate.

### ***DIVISION 4 - Special Measures***

- CL27 Discrimination is not unlawful if it is done to provide equal opportunities or access to facilities or services to meet the special needs of persons of a particular sexuality or transgender identity.

### ***DIVISION 5 - Exemptions***

- CL28 Discrimination provisions under Divisions 1 and 2 do not affect **Religious Bodies**, an act or practice of a body established for religious purposes that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion, including the ordination, appointment, employment, training or education of priests, ministers of religion or members of a religious order or people concerned with religious observance or practice.
- CL29 **Acts under Statutory Authority** - to anything done in direct compliance with a determination of the Human Rights and Equal Opportunities Commission, an order of the Court or a law of the Commonwealth.
- (the provision related to Commonwealth laws ceases to have effect after six months and was inserted to allow for a review and appropriate amendment of existing Commonwealth legislation).
- CL30 **Superannuation and Insurance** - differential treatment in accessing superannuation or life insurance if that discrimination is based on actuarial or statistical data and it is reasonable in all the circumstances to rely on these data.

- CL31**      **Commission may grant exemptions**  
The Human Rights Commission may grant exemptions from the anti-discrimination provisions in specified circumstances, subject to specified terms and conditions and for a period not exceeding five years
- CL32**      Exemptions granted by the Commission may be taken to the Administrative Appeals Tribunal for review.
- CL33**      The Commission must publish in the Gazette details of and reasons for the exemptions granted.

## **PART 3      INQUIRIES AND CIVIL PROCEEDINGS**

### ***DIVISION 1 - Preliminary***

- CL35**      The Human Rights and Equal Opportunity Commission is empowered to deal also with victimisation of persons in relation to making a complaint to the Commission.
- CL36**      **The functions of the Commission** include:  
inquiring, conciliating and making determinations on complaints made and matters referred by the Minister or Commissioner, **and also**  
to promote the purposes of the legislation and to undertake research and educational programs;  
to examine and report on existing and proposed legislation and on legislation needed; on its own initiative or when requested by the Minister or by a House of Parliament; to prepare and publish guidelines for the avoidance of discrimination and, with the leave of the Court, to intervene in court proceedings which involve discrimination.
- CL38**      **Complaints** may be lodged with the Commission by a person or one or more people or their representatives as well as for a class of people or by a trade union on behalf of people or a class of people.
- CL39**      **Discriminatory awards** may be referred to the Australian Industrial Relations Commission but need not be so referred if the Commissioner is of the opinion that the complaint is frivolous, vexatious, misconceived or lacking in substance.
- CL40**      The President of the Human Rights and Equal Opportunity Commission may **review** a decision of the Commissioner **not** to refer a discriminatory award to the Industrial Relations Commission.
- CL41**      Complaints about discriminatory acts under a Remuneration Tribunal determination may be referred to the Tribunal by the Commissioner but need not be referred if the Commissioner is of the opinion that the complaint is frivolous, vexatious, misconceived or lacking in substance.
- CL42**      The President may review a decision of the Commissioner not to refer a determination to the Remuneration Tribunal.

**CL.43** The Commissioner may be deemed to act as the 'complainant' in referring a matter to the Commission.

**CL.44** If the Commission receives a complaint which appears to involve an unlawful act the Commission must refer the matter to the **Commissioner** who **may inquire** into the complaint and endeavour to conciliate it **unless the Commissioner is satisfied -**

that there was no unlawful act, the complainant does not wish to pursue the complaint, more than twelve months have elapsed or the Commissioner thinks the complaint was frivolous, vexatious, misconceived or lacking in substance; or where another appropriate remedy has been sought or is available.

If the Commissioner decides not to inquire into the complaint, the Commissioner may be required to refer the complaint to the President or in certain cases to the Commission.

**CL.45** The President may review a Commissioner's decision not to investigate a complaint.

**CL.46,47** **An interim determination** preserving the status quo may be made while the President's review is in progress.

**Powers of the Commissioner** include:

**CL.48** to obtain **relevant information and relevant documents**, and

**CL.49** to **direct people to attend a compulsory conference** (and be paid a reasonable attendance fee), which

**CL.50** a compulsory conference must be held in private, and be attended in person (unless the presiding officer consents to a representative appearing) and, if a body corporate, by an officer or employee of the body.

**CL.51** if conciliation inappropriate or unsuccessful or the Commissioner considers the matter should be referred to the Commission, the Commissioner must so refer the matter.

**DIVISIONS 3 and 4, clauses 52 to 88** contain provisions governing the procedures for Inquiries by the **Human Rights and Equal Opportunity Commission**, the enforcement of determinations in the **Federal Court** and the review and enforcement of determinations involving Commonwealth agencies.

The provisions are based on the Sexuality Discrimination Act and take into account the effect of the High Court decisions in Brandy's case.

## **PART 4 OFFENCES**

**CL.90** **Advertisements** contrary to the anti-discrimination provisions of Parts 1 and 2 are prohibited - maximum penalty: 10 penalty units.

**CL.91** **Failure to attend conference** without reasonable excuse - maximum penalty: 10 penalty units.

- Cl.92**      **Failure to provide information** or produce documents - maximum penalty: 10 penalty units.
- Cl.93**      Failure by witnesses to attend Commission, to refuse or fail without reasonable excuse to be sworn or make an affirmation, to answer questions or produce documents - maximum penalty: 10 penalty units.
- For anyone to disturb or obstruct proceedings of Commission - maximum penalty: 10 penalty units.
- Cl.94**      **Self-incrimination**  
Persons who are parties to the complaint must provide information or documents which may incriminate them but that information is not admissible in any civil or criminal proceedings.
- Cl.95**      To knowingly provide false or misleading information carries a maximum penalty: 25 penalty units.
- Cl.96**      **Victimisation**  
Threats or actions of any detriment are prohibited if they are made against complainants or witnesses before the Commission (unless these are provoked by false allegations) - maximum penalty: 25 penalty units.
- Cl.97**      **Vilification**  
Inciting hatred, serious contempt or severe ridicule in public on the ground of sexuality or transgender identity of a person or a group of persons by means that include threats of physical harm to persons or to their property or inciting others to make such threats is prohibited - maximum penalty: 50 penalty units or imprisonment for six months or both.
- Cl.98**      **Obstruction** of a person exercising power or performing a function under this Act is prohibited - maximum penalty: 10 penalty units.

## **PART 5      SEXUALITY DISCRIMINATION COMMISSIONER**

- Cl.99** -      This part provides for the appointment of a Sexuality Commissioner in terms similar to the other Commissioners of the Human Rights and Equal Opportunity Commissioner.

## **PART 6      SAME SEX COUPLES**

- Cl.107**      This part confers rights, entitlements and responsibilities on same sex couples similar to those applying to de facto couples or partners of the opposite sex.

Under Cl.2 of the Bill this provision comes into effect six months after the Act has passed into law to enable the necessary amendments to other Acts to be made.

## **PART 7 MISCELLANEOUS DELEGATION**

### **Cl.108 Unlawful Acts**

This section confirms that this Act does not lend support in any way to unlawful sexual behaviour.

**Cl.109** Powers of the Commission may be delegated.

**Cl.110** Persons causing or permitting acts of discrimination are equally responsible.

### **Cl.111 Vicarious Liability**

Employers or principals are liable for actions of employees or agents unless they have taken all reasonable steps to prevent acts defined as discriminatory under Division 1 and 2.

**Cl.112** Conduct by a person for a body corporate is taken to be the conduct of the body corporate.

**Cl.113** Commonwealth employees are taken to act on behalf of the Commonwealth.

**Cl.114** No Awards are to be made under the Industrial Relations Act which are inconsistent with this Act.

**Cl.115** Unless expressly provided unlawful acts under Part 2 do not generate a right of civil action.

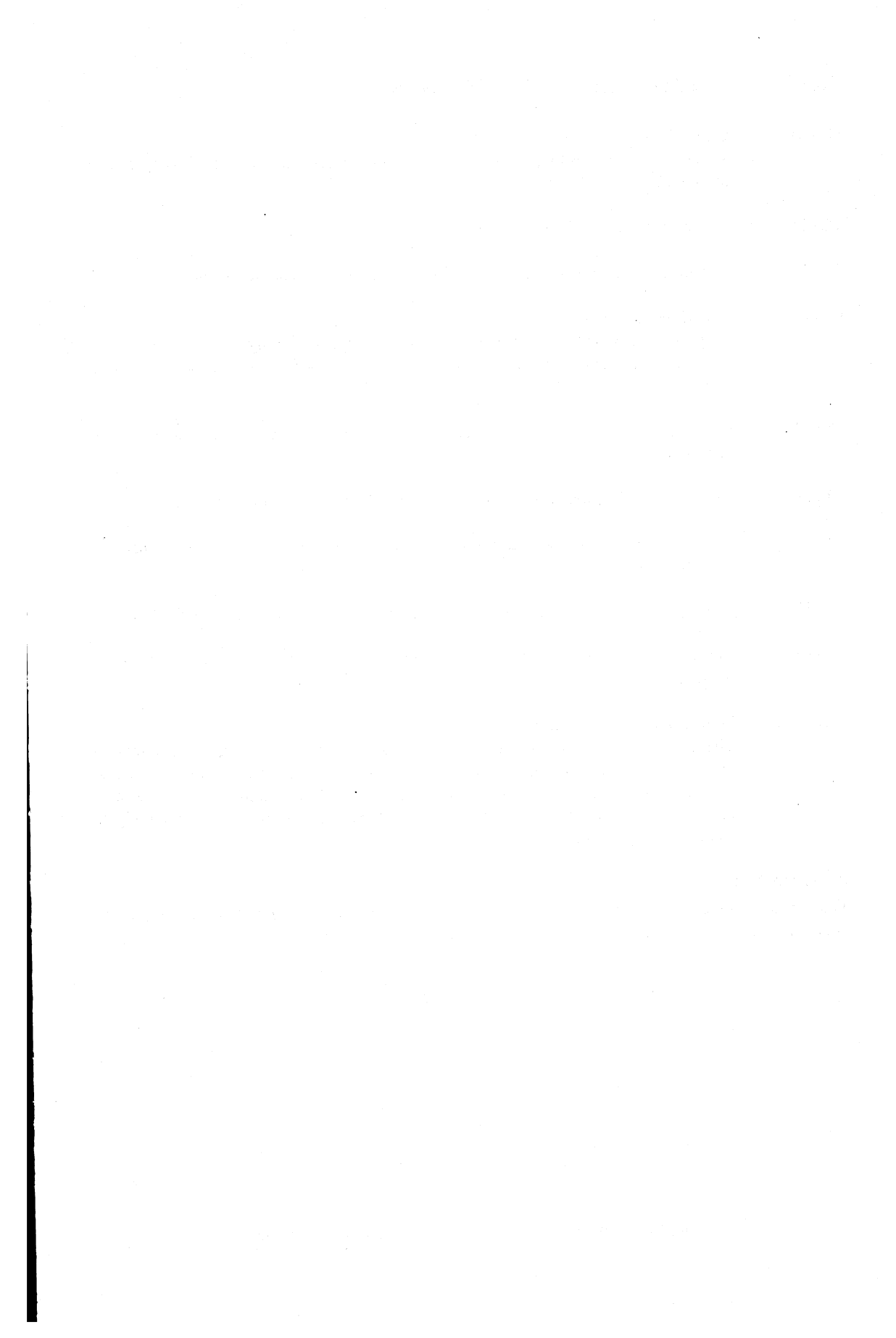
**Cl.116** The Commission, Commissioners or delegates have immunity for acts or omissions done in good faith.

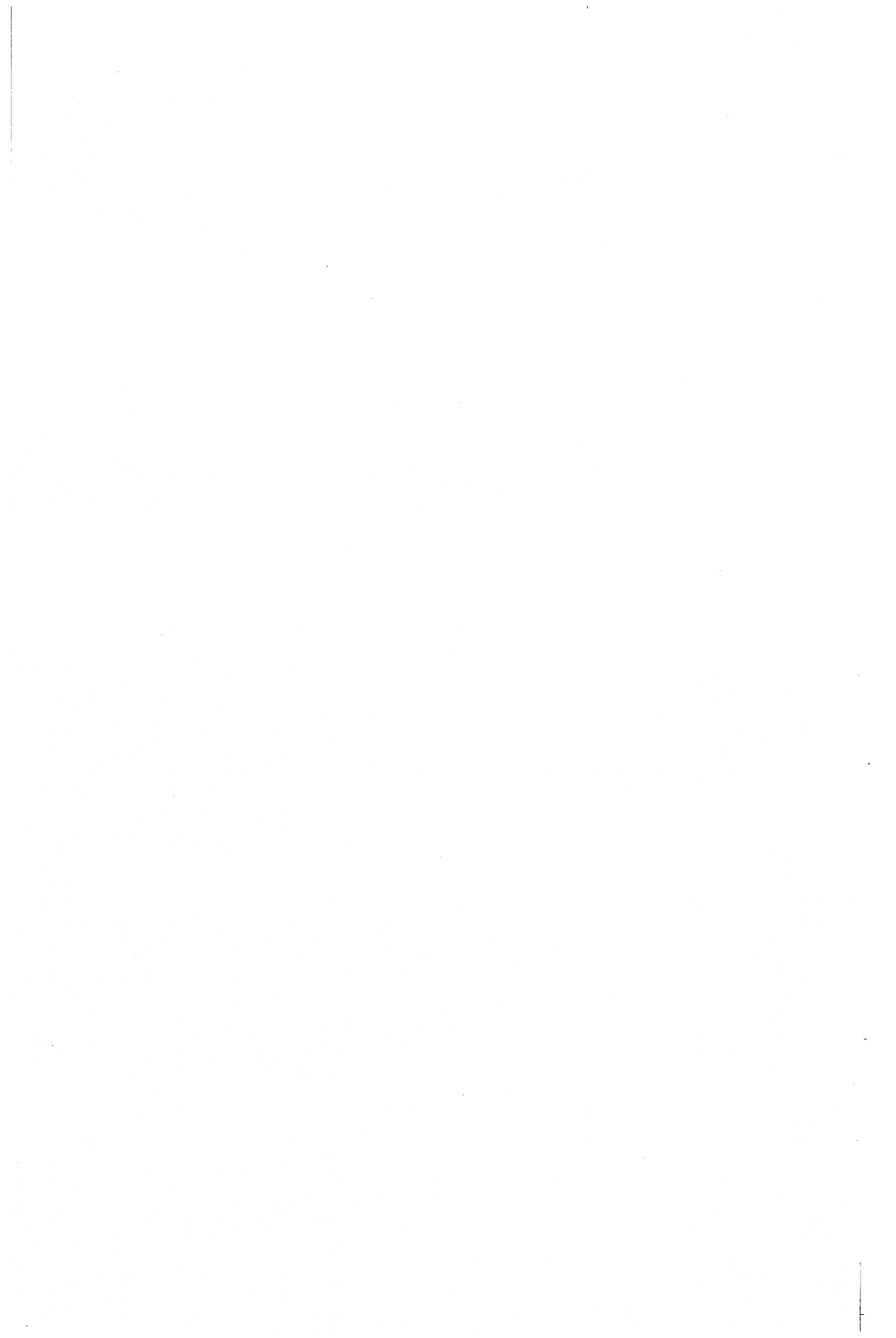
### **Cl.117 Non-disclosure of private information**

The Commission, Commissioners or delegates must not divulge private information obtained during the performance of their duties - maximum penalty: 50 penalty units, or imprisonment for 1 year, or both - and must not be required to divulge such information except for the purposes of this Act and under s.16 of the Human Rights and Equal Opportunity Commission Act 1986.

## **SCHEDULE**

The Schedule contains amendments to the Human Rights and Equal Opportunity Act consequential upon the creation of the office of Sexuality Discrimination Commissioner.











2000

2000



9 780644 345637