Digest of Bill

Purpose

To give effect to certain provisions of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women.

To make unlawful discrimination on the grounds of sex, marital status and pregnancy in the areas of employment, accommodation, education, the provision of goods, facilities and services, the disposal of land, the activities of clubs and the administration of Commonwealth laws and programs.

To eliminate, as far as is possible, sexual harassment in the workplace and in educational institutions.

To promote recognition and acceptance within the community of the principle of the equality of men and women.

Background and Outline

Australia signed the United Nations Convention on the Elimination of All Forms of Discrimination Against Women on 17 July 1980. Since then, consultations on ratification and on the terms of the Convention have taken place between the Commonwealth and the States. The Governor-General's Speech on the Opening of the Parliament on 21 April 1983 pledged that Australia would ratify the Convention.[1] Article 2(b) of the Convention provides that States parties should

... adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;

Three States - New South Wales, South Australia and Victoria - have laws prohibiting discrimination on the grounds of sex or marital status. It is envisaged that this
State legislation should be preserved and should operate concurrently with Commonwealth legislation (Clauses 9 and 10).

On 12 October 1982, a joint statement by the Acting Attorney-General, Mr. Neil Brown and the Minister for Home Affairs and Environment, Mr. Tom McVeigh, announced that the Government planned to proceed with a Sex Discrimination (Commonwealth Employees) Bill which would complement existing State legislation and would apply to Commonwealth employees throughout Australia. However this Bill was not introduced into Parliament before the change of government in March 1983.

The Sex Discrimination Bill 1983 is similar in purpose and in many of its provisions to the Sex Discrimination Bill 1981, introduced into the Senate on 26 November 1981 by Senator Ryan as a Private Member's Bill. The 1983 Bill expands the grounds of unlawful discrimination to include pregnancy. This is in accord with the U.N. Convention on The Elimination of All Forms of Discrimination Against Women, Article 11[2]. The 1981 Bill included provision for affirmative action in public and private employment. This Part has been dropped from the 1983 Bill. Instead, options for further legislation to provide for affirmative action programs in employment are to be set out in a green paper, and public discussion and consultations are to precede the introduction of further legislation. However, clauses dealing with sexual harassment in employment and in education have been introduced into the 1983 Bill (clauses 41, 42). Other forms of sexual harassment are not dealt with in this Bill, but the Government plans to give the matter consideration and seek the views of women's organisations.[3]

Main Provisions

For the purposes of the Bill discrimination on the ground of sex or marital status is defined as having occurred

1. If the aggrieved person is treated less favourably by reason of that person's sex or marital status, or a characteristic appertaining to or generally imputed to persons of that sex or marital status (clause 5(1), clause 6(1)) or

2. If the aggrieved person is required to comply with a requirement or condition with which a substantially higher proportion of persons of the opposite sex or different marital status
are able to comply, which is not reasonable, having regard to the circumstances of the case, and with which the aggrieved person does not or is not able to comply (clause 5(2); clause 6(2))

Discrimination on the ground of pregnancy is defined as having occurred

(1) if the aggrieved person is treated less favourably by reason of her pregnancy or a characteristic appertaining to or generally imputed to pregnant women, and where the less favourable treatment is not reasonable in the circumstances (clause 7(1)) or

(2) if the aggrieved person is required to comply with a requirement or condition with which a substantially higher proportion of persons who are not pregnant comply or are able to comply which is not reasonable having regard to the circumstances of the case, and with which the aggrieved person does not or is not able to comply (Clause 7(2)).

However a man cannot claim to have been discriminated against by reason only of not being granted the same rights or privileges accorded to a woman in connection with pregnancy or childbirth (clause 28).

Part II of the Bill sets out areas in which discrimination is unlawful, including discrimination by sexual harassment. Division 1 of Part II relates to employment and makes it unlawful to discriminate against employees or applicants for employment on the ground of sex, marital status or pregnancy (clause 12). This applies also to commission agents (clause 13) and to contract workers (clause 14). In the forming of partnerships (clause 15) or for purposes of licensing or other qualifying bodies (clause 16) such discrimination is unlawful. Employment agencies (clause 18), trade unions and registered organisations under the Conciliation and Arbitration Act (clause 17) may also not deny membership, access or services on this ground.

Division 2 of Part II makes discrimination on the ground of a person's sex, marital status or pregnancy unlawful in the areas of education (clause 19), the provision of goods and services (clause 20), the availability of facilities (clause 20) or of accommodation (clause 21), and the disposal of land or in the terms and conditions applying to this disposal (clause 22). Clause 26 makes it unlawful to advertise in a way which indicates
an intention to discriminate in ways prohibited by the Bill. Clause 24 provides that the provisions apply in respect of Commonwealth laws and programs.

Clause 23 makes it unlawful for a club, or a committee of management or representative of a club, to discriminate against a member or an applicant for membership of the club on the ground of a person's sex, marital status or pregnancy. However, it is not unlawful to discriminate against a person on the ground of sex if membership of that club is available only to persons of the opposite sex (clause 23(3)), or if it is not practicable for a benefit to be used or enjoyed simultaneously or to the same extent by both men and women (clause 23(4)). In determining whether the exemptions in clauses 23(3) and 23(4) apply, the matters to be taken into account include the purposes for which the club was established, its membership, the nature of benefits it provides, the opportunities for use and enjoyment of benefits by men and women, and other relevant circumstances (clause 23(5)).

Division 3 of Part II makes provision for exemptions. General exemptions listed in clause 27(2) cover such matters as where particular physical attributes of one sex are necessary to the duties of the position or for a dramatic or entertainment role, where duties involve fitting of clothing or searching of persons, where necessary sanitation or sleeping facilities are not available and it is not reasonable to expect them to be provided, or where the duties involve the custody of, or provision of personal services to, members of one sex.

Charities, voluntary bodies and religious bodies are exempt from the provisions of Divisions 1 and 2 of Part II which prohibit discrimination in work and in other areas (clauses 30, 31 and 32). The ordination or appointment of priests, ministers of religion or members of any religious order, and their training or education are matters which are thus exempt from the provisions.

It is not unlawful to discriminate on the ground of sex in the terms on which an annuity, a life assurance policy or other insurance policy is offered or obtained where the discrimination is based on reliable actuarial or statistical data or other relevant factors (clause 34(3)).

Again, it is not unlawful to exclude persons of one sex from participating in any sporting activity, but this exemption does not apply to the coaching or administration of sport and does not apply to the exclusion of persons from participating in any prescribed sporting activity (clause 35).
Discrimination against a woman on the ground of sex is not unlawful in connection with duties in the Defence Force in positions involving the performance of combat duty, or combat-related duties (clause 36).

Some exemptions are subject to a 2-year limit. Clause 33 provides that actions are not unlawful if in compliance with Federal State or Territory laws or regulations in force at the commencement of this Act, or in compliance with a determination of a court or tribunal (clause 33(1)). However except in relation to certain Acts which are listed, this exemption ceases to apply after 2 years. Terms or conditions applying to a superannuation or provident fund or scheme in operation at the commencement of the Act are also exempt from the discrimination provisions of Division 1 and 2 for a period of 2 years. (Clause 34(1) and (2)).

Division 4 of Part II makes sexual harassment in employment and in education unlawful. Sexual harassment here is defined as an unwelcome sexual advance, or an unwelcome request for sexual favours, or other unwelcome conduct of a sexual nature directed to a person, where that person has reason to believe that rejecting or refusing the advance or request or taking objection to the conduct would disadvantage that person in any way in connection with employment or work, or possible employment or work, or in connection with the person's studies or application for admission to an educational institution as a student (clause 41(3) and clause 42(2)).

Part III, in Division 1, sets out the functions of the Human Rights Commission and of the Sex Discrimination Commissioner. Functions of the Commission include inquiring into and making determinations on matters referred by the Minister or Commissioner, granting exemptions (clauses 37, 70), promoting understanding and acceptance of, and compliance with this Act, examining enactments or proposed enactments to ensure consistency with the Act, and reporting to and advising the Minister on matters relating to discrimination on the grounds of sex, marital status or pregnancy or discrimination involving sexual harassment (clause 43). Complaints should be in writing and may be lodged by a person, group or a trade union (clause 45). The Commissioner is to inquire into alleged infringements of Part II and endeavour to effect a settlement by conciliations (Clauses 44(1), 43(1)(a) and 47(1)).

The Commissioner may decide not to inquire into an act if satisfied the act is not unlawful, is of the opinion that the aggrieved person or persons does not or do not desire the inquiry to continue, if more than 12 months has
elapsed since the act or if of the opinion that the complaint is frivolous, vexatious or lacking in substance (clause 47(2)). If the Commissioner decides not to inquire, or continue to inquire, into a complaint, the complainant is to be informed in writing of that decision and the reasons for it, and of the complainant's right to serve notice in writing within 21 days requiring the Commissioner to refer the complaint to the Commission. (Clause 47(3)(4)(5)). The Commissioner may obtain information from such persons and make such inquiries as thought fit (clause 47(6)), may require the furnishing of relevant information and documents (clause 49(1)), and may require attendance at a compulsory conference (clause 50).

Division 3 of Part III deals with inquiries referred to the Commission by the Minister, the Commissioner or by complainants. When the subject matter of two or more complaints is substantially the same, a single inquiry may be held (clause 55). Clauses 61, 62, and 63 enable the Commission to determine that a complaint should be dealt with as a representative complaint and set out the criteria for this.

The Commission is required to endeavour to resolve a complaint by conciliation and amicable arrangements (clause 65). However, if necessary, the Commission or complainant may institute proceedings in the Federal Court to enforce a determination of the Commission, and orders made by the Federal Court may give effect to a determination of the Commission (clause 74).

Part IV of the Bill provides penalties for offences in relation to the Commission and in relation to victimisation of any complainant, witness or person required to attend a conference. Failure to provide information or actuarial of statistical data, failure to attend a conference as directed and obstruction of the Commission are offences under the Bill and penalties of $1000 for individuals or $5000 for organisations or groups may be incurred (clauses 78, 79, 80 and 85). Penalties of $2500 or imprisonment for 3 months for an individual, and $10000 for a body corporate, are set for offences of false or misleading information or victimisation (clauses 83, 84).

Part V of the Bill establishes the position of a Sex Discrimination Commissioner and sets the terms and conditions of appointment.

Part VI of the Bill deals with miscellaneous matters including delegation of powers of the Commission (clause 94) liability of employers, principals and bodies for actions of their employees or agents (clauses 96 and
97), and provisions to ensure non-disclosure of private information provided to the Commission (clause 102). All Commonwealth employees are deemed to be employed by the Commonwealth (clause 98).

Clause 101 provides protection for members of the Commission, the Commissioners and persons acting for them against proceedings for damages for actions made in good faith in the performance of any of their functions. Clause 99 provides that conciliation and arbitration awards inconsistent with this Bill be not made.

For further information, if required, contact:

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References

2. The Convention is included in the Schedule of the Bill. See Article 11 2(a)-(d) on p.45 of the Bill.