

2002

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

SEX DISCRIMINATION AMENDMENT (PREGNANCY AND WORK) BILL 2002

REVISED EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General,  
the Hon Daryl Williams AM QC MP)

# **SEX DISCRIMINATION AMENDMENT (PREGNANCY AND WORK) BILL 2002**

## **OUTLINE**

This Bill amends the *Sex Discrimination Act 1984* (the Act) to clarify certain provisions regarding discrimination on the grounds of pregnancy, potential pregnancy and breastfeeding.

The amendments address concerns raised in the Human Rights and Equal Opportunity Commission Report, *Pregnant and Productive: It's a Right not a Privilege to Work While Pregnant* (the HREOC Report) that some areas of the Act's coverage are not well understood. The Bill implements the Government's acceptance of recommendations 36, 37 and 43 of the HREOC Report.

The amendments contained in the Bill clarify that:

- discrimination against women who are breastfeeding is prohibited by the Act,
- questions regarding pregnancy or potential pregnancy may not be asked during recruitment processes, and
- that medical information collected from pregnant women may only be used for appropriate purposes, such as for genuine occupational health and safety reasons and not in a discriminatory manner.

The amendments will not expand the operation of the Act.

## **FINANCIAL IMPACT**

The amendments will have little, if any, impact on government revenue.

## NOTES ON CLAUSES

### Clause 1 - Short title

1. This is a formal clause which specifies that the Bill, when enacted, will be known as the *Sex Discrimination Amendment (Pregnancy and Work) Act 2002*.

### Clause 2 - Commencement

2. This clause provides that Schedule 1 of the Bill containing the amendments to be made by the Bill, when enacted, will commence on the 28th day after the Bill receives the Royal Assent. Sections 1 to 3 of the Bill, which contain procedural aspects of the Bill only, will commence on the day the Bill receives the Royal Assent.

### Clause 3 – Schedules

3. This clause provides that the items in the Schedule to the Bill amend the Acts specified in the Schedule.

## Schedule 1 – Sex Discrimination Act 1984

### Item 1 *Definition of Sex Discrimination*

Section 5 of the Act provides that for the purposes of the Act a person is discriminated against on the ground of their sex if, amongst other things, the person is discriminated against because of a characteristic that appertains generally to persons of a certain sex (see s.5(1)(b) of the Act). This item inserts a new sub-section in s.5 of the Act that will make it clear that breastfeeding (including the act of expressing milk) is a characteristic that appertains generally to women.

The new sub-section does not expand the current operation of the Act. However, it makes clear that discrimination against a breastfeeding woman will amount to unlawful discrimination on the basis of sex.

### Item 2 *Requests for information*

Currently, s.27(1) of the Act prohibits the asking of questions (whether orally or in writing) that may be used to discriminate against a person on the basis of their sex, pregnancy, potential pregnancy or marital status. The HREOC Report identified some confusion in the application of the provision.

In order to address this confusion and ensure that the operation of s.27(1) is clear, this item repeals s.27(1) of the Act and replaces it with a re-drafted sub-section to make it easier to understand. An example of the operation of the section is also added to assist in its interpretation. The heading to s.27 will also be changed from ‘Application forms’ to ‘Requests for information’, to better reflect the application and operation of the section.

These drafting amendments will not expand or diminish the current operation of the Act. Under the new s.27(1), the three elements of the current provision will be clearly set out:

- the information must be requested or required in connection with an act;
- in doing that act it would be unlawful to discriminate against the provider of the information on the grounds of the person's sex, marital status, pregnancy or potential pregnancy; and
- persons of a different sex or marital status, or who are not pregnant or potentially pregnant, would not be asked for that information.

Section 27(1) is most commonly applicable in employment recruitment situations. However, the application of this provision is not limited to employment, but extends to any situation where a person requests information connected with some future act they will perform.

The following examples set out some common situations and how the provision would operate:

*Example 1:* An employer asks female applicants whether they are pregnant or planning a family in the near future (they do not state the reason, which is that they do not want to employ a woman who will soon take maternity leave necessitating a further recruitment process).

*Example 2:* An application form for a rental property asks applicants to indicate whether they are male or female and, if female, to indicate whether they are pregnant or planning to become pregnant (it does not state the reason, which is that the lessor is concerned the applicant will be unable to pay the rent due to pregnancy).

*Example 3:* A bank loans officer asks a female loan applicant whether she is pregnant or planning to become pregnant (they do not state the reason, which is that they are concerned the applicant will default on loan repayments due to pregnancy).

In each of these examples, the person requesting the information has breached s.27(1) because:

- (a) it would be unlawful under the Act to discriminate against the female applicants on the basis of pregnancy or potential pregnancy when determining who should be offered employment, a rental lease or a loan; and
- (b) the question was not asked of male applicants.

*Example 4:* All applicants (whether male or female) in the examples set out above are asked what changes they envisage in their lives in the next 3 years.

This question would not breach s.27(1) because it was asked of all applicants, not only those who might be pregnant or potentially pregnant. However, if a

female applicant answered that they were pregnant or planning to become pregnant, it would still be unlawful to discriminate against her by not offering her employment, accommodation or a loan on the basis of her pregnancy or potential pregnancy.

**Item 3      *Information requested during medical examinations***

Sub-section 27(2) of the Act currently provides an exception to the prohibition on requesting information that allows the provision of medical information concerning the pregnancy. The reason for the exception is to allow the collection of medical information about a woman's pregnancy to address occupational health and safety concerns.

This item inserts an explanatory note after s.27(2) to explain that the exception in s.27(2) does not override those provisions of the Act which prohibit discrimination on the basis of sex or pregnancy. This will make it clear that although such information may be requested or required, it may not be used in an unlawfully discriminatory manner against the person from whom it is requested.

For example, an employer who uses radioactive substances (such as x-ray equipment) requires all applicants for a position to undergo a medical examination, during which female applicants are asked whether they are pregnant or potentially pregnant. The reason the information is requested is so that the employer can ensure that occupational health and safety requirements are satisfied and that a pregnant employee is not put at risk by exposure to radioactive substances. The employer has not breached s.27 as the information was requested for a legitimate reason. If a female applicant answers that she is pregnant or potentially pregnant it is still unlawful for the employer to discriminate against her by not offering her a job on that basis unless the employer can demonstrate genuine occupational health and safety concerns.