

2010

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**SEX AND AGE DISCRIMINATION LEGISLATION
AMENDMENT BILL 2010**

EXPLANATORY MEMORANDUM

(Circulated by the authority of the Attorney-General,
the Hon Robert McClelland MP)

SEX AND AGE DISCRIMINATION LEGISLATION AMENDMENT BILL 2010

Outline

The Sex and Age Discrimination Legislation Amendment Bill 2010 (the Bill) contains two measures:

- amendments to the *Sex Discrimination Act 1984* (SDA) to strengthen protections in the legislation; and
- amendments to the *Age Discrimination Act 2004* (ADA) to establish an Age Discrimination Commissioner in the Australian Human Rights Commission.

The SDA makes discrimination on the grounds of sex, marital status, pregnancy and family responsibilities unlawful in specified areas of public life. It has been in place for over 25 years and has been an important tool in addressing discrimination and changing attitudes about the participation of women and men in a range of areas of public life. The SDA, similar to other anti-discrimination laws, has been an important mechanism in changing community perceptions and setting appropriate standards to recognise that men and women should be able to fully participate in the social, economic and public life of Australian society.

These amendments give effect to recommendations of the Senate Standing Committee on Legal and Constitutional Affairs (the Senate Committee) in its 2008 report into the effectiveness of the Sex Discrimination Act in eliminating discrimination and promoting gender equality (the Senate Report). These amendments address issues of significant community concern by strengthening protections for Australians in the workplace, including workers with family responsibilities, as well as providing specific protections for women who are breastfeeding.

The Senate Report also recommends a number of significant changes to the SDA which are relevant to all federal anti-discrimination laws. These recommendations will be considered as part of the work on Australia's Human Rights Framework to streamline federal anti-discrimination legislation into a single, comprehensive Act.

The key amendments made by this Bill will:

- extend protections from discrimination on the grounds of family responsibilities to both women and men in all areas of work;
- provide greater protection from sexual harassment for students and workers;
- ensure that protections from sex discrimination apply equally to women and men; and
- establish breastfeeding as a separate ground of discrimination.

The ADA makes discrimination on the grounds of age unlawful in specified areas of public life but does not provide for a dedicated Age Discrimination Commissioner to advocate for the rights of people, particularly older Australians, who experience age discrimination.

This Bill creates a stand-alone position of Age Discrimination Commissioner for the first time at the federal level.

The Commissioner will also engage with stakeholders, including industry and community representatives, to tackle discrimination in workplaces and in the community, promote respect and fairness and tackle the attitudes and stereotypes that can contribute to age discrimination.

Financial Impact

The establishment of the Age Discrimination Commissioner will cost \$1.0m per year from 2011-12, when the position is to be established.

The other amendments in this Bill have negligible financial implications.

NOTES ON CLAUSES

Clause 1—Short title

1. This clause provides a short title for the Act, the *Sex and Age Discrimination Legislation Amendment Act 2010*.

Clause 2—Commencement

2. This clause provides that the amendments to the SDA in the first Schedule to the Bill will commence on the day after the Act receives the Royal Assent.

3. This clause also provides that the amendments to establish the Age Discrimination Commissioner will commence on a day fixed by Proclamation, or at the end of 6 months after Royal Assent if the amendments have not commenced earlier.

Clause 3—Schedule(s)

4. This clause provides that each Act specified in a Schedule to the Bill will be amended or repealed as set out in the Schedules.

Schedule 1—Amendments relating to sex discrimination

Part 1—Amendment of the Sex Discrimination Act 1984

Division 1—Amendments

Sex Discrimination Act 1984

Item 1

5. This Item will amend the long title of the SDA to reflect the insertion of breastfeeding as a separate ground of discrimination in new section 7AA by Item 17 of this Bill.

Item 2

6. This Item will amend the preamble to the SDA to reflect the insertion of breastfeeding as a separate ground of discrimination, and the expanded coverage of family responsibilities discrimination.

Item 3

7. This Item will amend the objects of the SDA to provide that the objects include giving effect to provisions of other relevant international instruments in addition to the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). This reflects the broadened constitutional support for the SDA which will be brought about by the amendment to subsection 9(10) of the SDA by Item 24.

8. A definition of ‘relevant international instruments’ will be inserted into subsection 4(1) by Item 10.

Item 4

9. This Item will amend the objects of the SDA to include the elimination, so far as is possible, of discrimination against persons on the ground of breastfeeding in specified areas of public life, to reflect the insertion of breastfeeding as a separate ground of discrimination in new section 7AA by Item 17.

Item 5

10. This Item will amend the objects of the SDA to include the elimination, so far as possible, of discrimination on the ground of family responsibilities in the area of work. The removal of the reference to dismissal, and the reference to ‘the area of work’ rather than ‘employees’ reflect the broadened prohibition of discrimination on the ground of family responsibilities which will be brought about by the new definition of family responsibilities in section 7A inserted by Item 18, and the amendments to Division 1 of Part II of the SDA made by Items 37 and 39–44.

Item 6

11. This Item will amend the interpretation provisions of the SDA to signpost that breastfeeding has a meaning described in subsections 7AA(3) and (4). Under these subsections, which will be inserted by Item 17, breastfeeding is defined inclusively to include the act of expressing milk, single acts of breastfeeding, and breastfeeding over a period of time.

Item 7

12. This Item will repeal the definition of ‘Convention’ in subsection 4(1) of the SDA. ‘Convention’ is currently defined to mean CEDAW. However, amendments to subsection 9(10) by Item 24, to widen the number of international instruments which are relevant to the SDA, will make this definition redundant.

Item 8

13. This Item will insert a definition of ‘disability’ into subsection 4(1) of the SDA by reference to the meaning of that term in the *Disability Discrimination Act 1992*, to support the reference to disability in the list of factors which may be relevant in determining whether a sexual harasser should have anticipated the possibility that the person harassed would be offended, humiliated or intimidated which will be inserted by Item 54.

Item 9

14. This Item will insert a definition of ‘official record of a person’s sex’ into subsection 4(1) of the SDA to support the amendments which will be made by Item 62.

Item 10

15. This Item will insert a definition of ‘relevant international instrument’ into subsection 4(1) of the SDA. This amendment is necessary to support the amendment to subsection 9(10) which will be made by Item 24, which widens the number of international instruments which are relevant to the SDA.

Items 11–14

16. These Items will amend section 4A as a consequence of the application of discrimination on the ground of family responsibilities to all of the areas of work identified in Division 1 of Part II of the SDA by Items 37 and 39–44. The new wording will ensure that the definition of family responsibilities applies appropriately to all of the areas of work in Division 1 of Part II.

Item 15

17. This Item will repeal subsection 5(1A) of the SDA. Subsection 5(1A) is an avoidance of doubt provision, which clarifies that breastfeeding (including the act of expressing milk) is a characteristic that appertains generally to women; the purpose of the provision was to ensure that discrimination against breastfeeding women was unlawful as a form of sex discrimination. Subsection 5(1A) will no longer be necessary as a consequence of the insertion of new subsection 7AA by Item 17, which provides breastfeeding as a separate stand-alone ground of discrimination under the SDA.

Item 16

18. This Item will amend the definition of indirect pregnancy discrimination in subsection 7(2) to remove the word ‘also’. The inclusion of this word is unnecessary. Removal of the word ensures that subsection 7(2) is consistent with new subsection 7AA(2).

Item 17

19. This Item will insert a new ground of discrimination in relation to breastfeeding. This ground of discrimination is only available to women who are breastfeeding. The ground is not available to men, or to women who are not breastfeeding. The ground extends to both direct discrimination (subsection 7AA(1)) and indirect discrimination (subsection 7AA(2)), and applies subject to the reasonableness test for indirect discrimination in section 7B and the authorisation of special measures intended to achieve equality in section 7D (subsection 7AA(5)). This amendment addresses Recommendation 12 of the SDA Report.

20. Subsection 7AA(1) relates to direct discrimination against women who are breastfeeding. Direct discrimination occurs where a person treats someone less favourably than another person. The subsection provides that it is discriminatory to treat a woman who is breastfeeding less favourably than someone who is not breastfeeding in the same or similar circumstances. For example, it would be discriminatory for an employer to refuse to hire any woman who is breastfeeding, or for a restaurateur to decline to serve a patron who is breastfeeding. Subsection 7AA(1) is modelled on existing subsection 7(1) (direct discrimination on the ground of pregnancy).

21. Subsection 7AA(2) relates to indirect discrimination against women who are breastfeeding. Indirect discrimination arises where an apparently neutral condition, requirement or practice has the effect of disadvantaging a particular group, in this case women who are breastfeeding. For example, an employer may impose a requirement on all employees that they must not take any breaks for set periods during the day under any circumstances. Such a condition would particularly disadvantage women who need to express milk. This subsection provides that it is discriminatory to impose, or propose to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging women who are breastfeeding. This prohibition of indirect discrimination has effect subject to the reasonableness test in section 7B (see subsection 7AA(5)). Subsection 7AA(2) is modelled on existing subsection 7(2) (indirect discrimination on the ground of pregnancy or potential pregnancy).

22. Subsections 7AA(3) and (4) clarify the meaning of breastfeeding. Subsection 7AA(3) provides that a reference to breastfeeding includes the act of expressing milk. Subsection 7AA(4) provides that a reference to breastfeeding includes individual acts of breastfeeding, as well as the fact that a woman may be breastfeeding over a period of time (for example, for a period of months following childbirth). Subsection 7AA(4) is intended to avoid a respondent claiming that their discriminatory act was lawful because the complainant was not actually breastfeeding at the time that the act took place.

23. Subsection 7AA(5) provides that section 7AA has effect subject to section 7B (reasonableness test for indirect discrimination). As a result, a condition, requirement, or practice which has the effect of disadvantaging women who are breastfeeding is not discriminatory if the condition, requirement, or practice is reasonable in the circumstances (subsection 7B(1)). For example, it may be reasonable in some circumstances to impose a requirement not to take breaks during certain periods if it is a requirement of the job to operate dangerous machinery which cannot be left

unattended. Subsection 7AA(5) also provides that section 7AA has effect subject to section 7D (special measures intended to achieve equality).

Item 18

24. The existing prohibition of discrimination on the grounds of family responsibilities in the SDA only protects employees from termination on the ground of family responsibilities (see subsection 14(3A)) and is limited to direct discrimination.

25. Item 18 will repeal the existing definition of discrimination on the ground of family responsibilities in section 7A and replace it with a new definition modelled on the existing definition of discrimination on the ground of pregnancy or potential pregnancy in section 7. This ground of discrimination is intended to be equally available to both women and men. The ground does not allow complaints to be brought by people without family responsibilities in relation to rights, privileges, or other conditions which recognise the special needs of people with family responsibilities. This amendment addresses Recommendation 13 of the SDA Report.

26. ‘Family responsibilities’ is defined in section 4A to mean responsibilities of an employee to care for or support a dependent child, or any other immediate family member who is in need of care and support. This definition is not substantially affected by this Bill, although, as noted at Items 11–14 above, some changes are required as a consequence of the broadened application of the ground within Division 1 of Part II of the SDA which will be effected by Items 37 and 39–44.

27. Subsection 7A(1) relates to direct discrimination against a person with family responsibilities. Direct discrimination occurs where a person treats someone less favourably than another person. Subsection 7A(1) provides that it is discriminatory to treat a person (of either sex) who has family responsibilities less favourably than the discriminator treats or would treat someone who does not have family responsibilities, in the same or similar circumstances. For example, it would be discriminatory for an employer to terminate a person’s employment before they return to work from parental leave, on the basis that they consider that the employee’s new family responsibilities will interfere with their work. Subsection 7A(1) is modelled on existing subsection 7(1) (direct discrimination on the ground of pregnancy or potential pregnancy).

28. Subsection 7A(2) relates to indirect discrimination against people with family responsibilities. Indirect discrimination arises where an apparently neutral condition, requirement or practice has the effect of disadvantaging a particular group, in this case people with family responsibilities. For example, an employer who refused to contemplate flexible working arrangements under any circumstances would particularly disadvantage people with family responsibilities. This subsection provides that it is discriminatory to impose, or propose to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging people who have family responsibilities. Subsection 7A(2) is modelled on existing subsection 7(2) (indirect discrimination on the ground of pregnancy or potential pregnancy).

29. This prohibition on indirect discrimination has effect subject to the reasonableness test in section 7B (see subsection 7A(3)). As a result, a condition, requirement, or practice which has the effect of disadvantaging people with family responsibilities is not discriminatory if the condition, requirement, or practice is reasonable in the circumstances (subsection 7B(1)).

30. Subsection 7A(3) provides that section 7A has effect subject to sections 7B (reasonableness test for indirect discrimination) and 7D (special measures intended to achieve equality).

Item 19

31. This Item will amend subsection 7B(1) as a consequence of the insertion of new grounds of indirect discrimination in relation to breastfeeding and family responsibilities by Items 17 and 18. The amendment to subsection 7B(1) in Item 19 will ensure that indirect discrimination on the ground of breastfeeding or family responsibilities cannot arise where the condition, requirement or practice complained of is reasonable in the circumstances.

Items 20 and 21

32. These Items will amend section 7D as a consequence of the insertion of new grounds of discrimination in relation to breastfeeding and family responsibilities by Items 17 and 18.

33. Section 7D authorises ‘special measures’ intended to achieve substantive equality in specific circumstances. Section 7D provides for special measures in relation to all of the existing grounds of discrimination in the SDA except for family responsibilities (where it is not required due to the very limited nature of the existing protection).

34. The amendments to section 7D in these Items will ensure that special measures can be taken to address the particular needs of persons who are breastfeeding or who have family responsibilities without producing claims of unlawful discrimination under new sections 7AA or 7A.

Item 22

35. This Item will amend section 8 as a consequence of the insertion of new grounds of discrimination in relation to breastfeeding and family responsibilities by Items 17 and 18.

36. Section 8 affects the causal requirement for direct discrimination that the act complained of be ‘by reason of’ or ‘because of’ a protected attribute. It provides that where the discriminator had two or more reasons for doing a discriminatory act, the discriminatory reason need only be *one* of the reasons for the act, whether or not it is the dominant or substantial reason for the doing of the act. This test for causation applies to all of the existing grounds of discrimination in the SDA.

37. The amendments in Item 22 apply this test for causation to the grounds of discrimination in new sections 7AA and 7A.

Items 23–29

38. These Items of this Bill will amend section 9 of the SDA. Section 9 limits the application of certain provisions of the SDA in accordance with specified powers of the Commonwealth under the Commonwealth Constitution.

39. Section 9 limits the application of two groups of provisions in the SDA, defined in subsection 9(1) as follows:

- the *prescribed provisions of Division 3 of Part II* is defined to include all of the SDA’s sexual harassment provisions except for sections 28D and 28L.
- the *prescribed provisions of Part II* is defined to include all of the SDA’s unlawful discrimination provisions except for sections 19, 26 and 27.

40. Subsection 9(4) provides that these two groups of provisions only have effect as provided by subsections 9(3) and 9(5) and following subsections. A person alleging unlawful discrimination or

sexual harassment must therefore in almost all cases find support for their complaint in these sections. If they cannot, their claim will fail even if it would have been valid, had subsection 9(4) not been applied.

41. Section 9 ensures that the SDA is within the constitutional power of the Commonwealth. Items 23–29 will amend section 9 to incorporate additional powers which have not previously been relied on, and expand the extent to which powers already specified are relied upon.

42. The most important problem addressed by these amendments is the situation in which none of the limited application provisions, other than subsection 9(10), applies. Subsection 9(10) provides that the discrimination and sexual harassment provisions of the SDA apply in relation to discrimination against women, to the extent that the provisions give effect to CEDAW. CEDAW generally only supports protection for women against discrimination. Therefore there are situations in which women enjoy greater protection against discrimination than men under the SDA. The amendment in Item 24 aims to address these situations by specifying additional relevant international conventions to which Australia is a party which prohibit discrimination against men, as well as women. The amendment addresses Recommendation 7 of the SDA Report.

43. Other amendments are designed to ensure that the expanded protections against sexual harassment inserted by Items 53–59 are appropriately supported by section 9.

44. Item 23 will amend subsection 9(9) to support protection from sexual harassment committed against:

- Commonwealth employees in connection with their duties as Commonwealth employees, and
- Members of staff of an educational institution established by a law of the Commonwealth or a law of a Territory in connection with their duties as a member of the staff of such an educational institution.

45. Item 24 will repeal existing subsections 9(10) and (10A) and replace them with a new subsection 9(10). Existing subsection 9(10) supports the anti-discrimination and sexual harassment provisions of the SDA to the extent that they give effect to CEDAW. Existing subsection 9(10A) supports the existing family responsibilities provisions of the SDA to the extent that they give effect to a broader range of international instruments. New subsection 9(10) amalgamates these provisions, and provides support for both the anti-discrimination and sexual harassment provisions of the SDA to the extent that they give effect to a ‘relevant international instrument’. A supporting definition of ‘relevant international instrument’ will be inserted into subsection 4(1) by Item 10. As a result of this amendment, the limited application provisions of the SDA will be better supported where the other provisions of section 9 do not apply.

46. Items 25 and 27 will amend subsections 9(11) and 9(13) to expand reliance on the corporations power in section 51(xx) of the *Constitution* to support the anti-discrimination provisions of the SDA. The expanded subsections will apply the protections of the SDA to discriminatory acts committed against officers or employees of foreign corporations, or of trading or financial corporations formed within the limits of the Commonwealth, in addition to discriminatory acts committed by those officers or employees.

47. Items 26 and 28 will amend subsections 9(12) and 9(14) to expand reliance on the corporations power in section 51(xx) of the *Constitution* to support the sexual harassment provisions of the SDA. The expanded subsections will apply the protections of the SDA to sexual harassment committed against officers or employees of foreign corporations, or of trading or

financial corporations formed within the limits of the Commonwealth, in addition to sexual harassment committed by those officers or employees.

48. Item 29 will insert a new subsection 9(21) into the SDA. New subsection 9(21) will rely on the postal, telegraphic, telephonic and other like services in section 51(v) of the *Constitution* to support the sexual harassment provisions of the SDA. This power has gained significant relevance in the context of sexual harassment given the ubiquity of new technologies such as social networking websites, e-mail, SMS communications, and mobile telephone cameras.

Item 30

49. This Item will amend subsection 10(1) as a consequence of the repeal of subsection 9(10A) by Item 24.

Item 31

50. This Item will amend subsection 10(2) as a consequence of the insertion of new grounds of discrimination in relation to breastfeeding and family responsibilities by Items 17 and 18.

51. Section 10 preserves the operation of State and Territory anti-discrimination laws by clarifying that the SDA is not intended to exclude or limit the operation of an anti-discrimination law of a State or Territory that is capable of operating concurrently with the SDA (see subsection 10(3)).

52. Amendment of subsection 10(2) to include references to the new grounds of discrimination is necessary to ensure that this provision preserves the operation of State and Territory laws which also relate to the new grounds of discrimination.

Item 32

53. This Item will amend subsection 11(2) as a consequence of the insertion of new grounds of discrimination in relation to breastfeeding and family responsibilities by Items 17 and 18.

54. Section 11 preserves the operation of State and Territory anti-discrimination laws by clarifying that the SDA is not intended to exclude or limit the operation of an anti-discrimination law of a State or Territory that furthers the objects of CEDAW and is capable of operating concurrently with the SDA (see subsection 11(3)).

55. Amendment of subsection 11(2) to include references to the new grounds of discrimination is necessary to ensure that this provision preserves the operation of State and Territory laws which also relate to the new grounds of discrimination.

Item 33–35

56. These Items will amend section 11 as a consequence of the amendment to subsection 9(10) by Item 24.

57. Section 11 preserves the operation of State and Territory laws that further the objects of CEDAW. This is achieved by clarifying that the SDA is not intended to exclude or limit the operation of laws of the States and Territories that further the objects of CEDAW and are capable of operating concurrently with the SDA.

58. Given the expanded reliance on other international instruments in amended subsection 9(10) of the SDA, it is appropriate to also preserve the operation of State and Territory laws that further the objects of all of the relevant international instruments relied on in subsection 9(10). These Items therefore replace references in section 11 to CEDAW with references to relevant international instruments.

Item 36

59. This Item will repeal section 11A as a consequence of the expanded application of section 11 to State and Territory laws that further the objects of relevant international instruments rather than only CEDAW which will be brought about by Items 33–35.

Items 37, 39–44

60. These Items will amend provisions of Division 1 of Part II of the SDA as a consequence of the insertion of new grounds of discrimination in relation to breastfeeding and family responsibilities by Items 17 and 18. The amendments will apply the prohibitions of discrimination on the grounds of breastfeeding and family responsibilities in the following areas of work:

- Employment (Item 37)
- Commission agents (Item 39)
- Contract workers (Item 40)
- Partnerships (Item 41)
- Qualifying bodies (Item 42)
- Registered organisations under the *Fair Work (Registered Organisations) Act 2009* (Item 43), and
- Employment agencies (Item 44).

61. The amendments ensure that discrimination on the ground of breastfeeding and family responsibilities are prohibited in all areas of work regulated by the SDA. The application of the protection against discrimination on the ground of family responsibilities to all areas of work implements Recommendation 13 of the SDA Report.

Item 38

62. This Item will repeal subsection 14(3A) as a consequence of the coverage of discrimination on the ground of family responsibilities in all aspects of employment covered by section 14 by Item 37.

Item 45–50

63. These Items will amend provisions of Division 2 of Part II of the SDA as a consequence of the insertion of a new ground of discrimination in relation to breastfeeding by Item 17. The amendments will apply the prohibition of discrimination on the ground of breastfeeding in the following areas of public life:

- Education (Item 45)
- Goods, services and facilities (Item 46)

- Accommodation (Item 47)
- Land (Item 48)
- Clubs (Item 49), and
- Administration of Commonwealth laws and programs (Item 50).

Item 51 and 52

64. These Items will amend section 27 as a consequence of the insertion of new grounds of discrimination in relation to breastfeeding and family responsibilities by Items 17 and 18.

65. Section 27 makes it unlawful for a person to request or require another person to provide information if the information would enable the requester to unlawfully discriminate. For example, it is unlawful for an employer to ask prospective female employees about their children but not to ask the same question of prospective male employees, in order to avoid hiring women with caring responsibilities.

66. The amendments in Items 51 and 52 will ensure that requests for information in connection with discrimination on the grounds of family responsibilities or breastfeeding are also unlawful.

Item 53

67. This Item will amend the test for sexual harassment provided by section 28A of the SDA.

68. Section 28A provides that sexual harassment arises where:

- a person makes a sexual advance, request for sexual favours, or engages in other conduct of a sexual nature in relation to another person
- that conduct is unwelcome, and
- in the circumstances a reasonable person, having regard to all the circumstances, would have anticipated that the person harassed would be offended, humiliated or intimidated.

69. During its inquiry into the SDA, the Senate Committee heard evidence that this existing definition may be too narrow, because it may require that a reasonable person anticipate that the person harassed *would* be offended, humiliated or intimidated by the conduct.

70. This amendment will strengthen the protection against sexual harassment in the SDA, by requiring that a reasonable person need only anticipate the *possibility* that the person harassed would be offended, humiliated, or intimidated by the conduct.

71. This amendment is modelled on the test in section 119 of the *Anti-Discrimination Act 1991* (Qld). This Item addresses Recommendation 15 of the SDA Report.

Item 54

72. This Item will amend the test for sexual harassment provided by section 28A of the SDA by inserting a new subsection 28A(1A). This subsection will provide an indicative list of circumstances which may be relevant to determining whether a reasonable person would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.

The list is not intended to be exhaustive of all the circumstances which may be relevant to this assessment.

73. The factors identified in new subsection 28A(1A) are based on the factors identified in section 120 of the *Anti-Discrimination Act 1991* (Qld). However, some terms have been updated for greater consistency with Commonwealth anti-discrimination law. For example, references to ‘impairment’ have been replaced with references to ‘disability’, which will be defined by reference to the definition in the *Disability Discrimination Act 1992* (see Item 8). In addition, the list has been expanded to include additional factors of particular relevance to the particular forms of harassment that some people may face. These include marital status, sexual preference and religious belief. This Item addresses Recommendation 16 of the SDA Report.

Item 55

74. This Item will amend subsection 28B(6) of the SDA to provide that sexual harassment between workplace participants need only occur at the workplace of *one* of the workplace participants.

75. Section 28B makes sexual harassment unlawful in the workplace. Generally, workplace sexual harassment is prohibited between specified classes of workplace participants, including:

- Employers against employees/prospective employees (subsection 28B(1))
- Employees against fellow employees/prospective employees (subsection 28B(2))
- A person against their existing or prospective commission agents or contract workers (subsection 28B(3))
- Commission agents or contract workers against their fellow existing or prospective commission agents or contract workers (subsection 28B(4))
- Partners against other partners, or people seeking to become partners in the same partnership (subsection 28B(5)), and
- Workplace participants against other workplace participants at a place that is a workplace of *both* the workplace participants (subsection 28B(6)).

76. Subsection 28B(6) is necessary to ensure that protection against sexual harassment is prohibited between combinations of classes of workplace participants which are not covered by subsections 28B(1)–(5) (for example, employees against contract workers). However, subsection 28B(6) is limited to sexual harassment which occurs at a place which is the workplace of *both* the workplace participants.

77. Item 55 will amend subsection 28B(6) to remove the requirement that the harassment must occur at the workplace of both of the workplace participants, to encompass sexual harassment which arises between people employed by different organisations.

78. Item 55, along with Item 59, addresses Recommendation 18 of the SDA Report.

Item 56

79. This Item will amend paragraph 28F(2)(a) to remove the requirement that a student who suffers sexual harassment must be an ‘adult’ student (that is, a student who has attained the age of 16 years) for the sexual harassment to be unlawful. After the amendment, sexual harassment of a student by an adult student at the same educational institution will be unlawful irrespective of the

age of the student harassed. Item 56 addresses the first limb of Recommendation 17 of the SDA Report.

Item 57

80. This Item will amend section 28F to insert new subsections 28F(2A) and 28F(2B), which will prohibit sexual harassment of a student by a member of staff of another educational institution, and sexual harassment by an adult student of students or staff at another educational institution.

81. These amendments are intended to prohibit sexual harassment which occurs at inter-school activities, such as sporting carnivals, debating competitions, or joint school theatrical productions, and where educational institutions are co-located or share facilities. As noted by the Senate Committee in its Report, the SDA presently does not protect students or staff from harassment by persons attached to different educational institutions.

82. Subsection 28F(2A) will make it unlawful for a member of staff of an educational institution to sexually harass a student at another educational institution, if the sexual harassment occurs in connection with the harasser being a member of staff of their educational institution. The subsection does not prohibit sexual harassment between members of staff of different institutions, because this will be appropriately regulated by subsection 28B(6) (as amended by Item 55).

83. Subsection 28F(2B) will make it unlawful for an adult student at an educational institution to sexually harass a member of staff or a student at a different educational institution, if the sexual harassment occurs in connection with the harasser being a student at their educational institution. Item 57 addresses the second limb of Recommendation 17 of the SDA Report.

Item 58

84. This Item will amend section 28G as a consequence of the insertion of a new subsection 28G(2) by Item 59.

Item 59

85. This Item will amend section 28G, which prohibits sexual harassment in the provision of goods, services and facilities.

86. At present, section 28G only protects customers and clients against sexual harassment from service providers. Service providers are not afforded the same protection against sexual harassment from their customers and clients.

87. New subsection 28G(2) will make it unlawful for a person to sexually harass another person in the course of seeking, or receiving, goods, services or facilities from the harassed person. This will provide protection to service providers against sexual harassment by customers and clients, in addition to the existing protection for customers and clients in what will become subsection 28G(1). Item 59, along with Item 55, addresses Recommendation 18 of the SDA Report.

Item 60

88. This Item will amend the exemption in section 31 to ensure that a man cannot bring a complaint of unlawful sex discrimination by reason only of the fact that a person grants to a woman rights or privileges in connection with breastfeeding. The amendment recognises that breastfeeding

may give rise to special needs, such as for private areas for breastfeeding, or hygienic areas for storage of expressed milk, that should not be subject to complaints of unlawful discrimination.

Item 61

89. This Item will amend the exemption for voluntary bodies in section 39 as a consequence of the insertion of the new grounds of discrimination in relation to breastfeeding and family responsibilities by Items 17 and 18.

90. As a consequence of the amendment, it will not be unlawful for a voluntary body to discriminate against a person on the ground of their breastfeeding or family responsibilities, in connection with:

- the admission of persons as members of the body, or
- the provision of benefits, facilities, or services to members of the body.

Item 62

91. This Item will amend section 40 to include an exemption to preserve the operation of State and Territory laws regarding official records of a person's sex.

Items 63–65

92. These Items will amend the exemption in relation to new superannuation fund conditions in section 41A as a consequence of the insertion of the new ground of discrimination on the basis of family responsibilities by Item 18. These amendments are necessary to preserve existing policy in relation to superannuation fund conditions.

Items 66 and 67

93. These Items will amend the exemption in relation to existing superannuation fund conditions in section 41B as a consequence of the insertion of the new ground of discrimination on the basis of family responsibilities by Item 18. These amendments are necessary to preserve existing policy in relation to superannuation fund conditions.

Item 68

94. This Item will amend paragraphs 48(1)(g), (ga) and (gb) as a consequence of the insertion of the new grounds of discrimination in relation to breastfeeding and family responsibilities by Items 17 and 18.

95. The amendments will ensure that the Australian Human Rights Commission's powers to produce reports, guidelines, and intervene in proceedings appropriately extend to the new grounds of discrimination. The amendment to paragraph 48(1)(gb) addresses Recommendation 30 of the SDA Report.

Division 2—Application of amendments

Item 69

96. This Item provides that the amendments of the SDA made by Part 1 of this Bill will not have retrospective effect by providing that the amendments will apply only in relation to acts or omissions occurring after the commencement of Part 1 of this Bill.

Part 2—Consequential amendments

Equal Opportunity for Women in the Workplace Act 1999

Item 70

97. This Item will amend the definition of ‘discrimination’ in subsection 3(1) of the *Equal Opportunity for Women in the Workplace Act 1999* as a consequence of the insertion of the new grounds of discrimination in relation to breastfeeding and family responsibilities by Items 17 and 18.

Schedule 2—Amendments relating to age discrimination

Part 1—Amendment of the Age Discrimination Act 2004

Age Discrimination Act 2004

Item 1

98. This Item will amend the outline of the *Age Discrimination Act 2004* (ADA) to refer to the establishment of the Age Discrimination Commissioner in the new Part 6A inserted by Item 3 of Schedule 2 to the Bill.

Item 2

99. This Item will insert a definition of Age Discrimination Commissioner to mean the person appointed under new section 53A inserted by Item 3.

Item 3

100. This Item will insert a new Part 6A to establish the office of the Age Discrimination Commissioner. The new Part also contains provisions on how the Commissioner is to be appointed, the terms and conditions of appointment, salary and allowances, leave, outside employment, resignation, termination of appointment and arrangements for the appointment of an acting Commissioner.

101. This Part is based on equivalent provisions governing the Disability Discrimination Commissioner, the Race Discrimination Commissioner and the Sex Discrimination Commissioner in the *Disability Discrimination Act 1992* (DDA), the *Racial Discrimination Act 1975* (RDA) and the *Sex Discrimination Act 1984* (SDA) respectively. There are, however, some minor differences to reflect current drafting practice.

102. The Government is currently undertaking a project to consolidate Commonwealth anti-discrimination legislation to remove unnecessary regulatory overlap and address inconsistencies. As part of this project, the administrative provisions relating to the Commissioners will be harmonised and outdated provisions will be removed.

103. For example, there are provisions in the DDA, RDA and SDA which relate to non-operative, historical functions of the Commissioners. As the Commissioners no longer have these functions and the Age Discrimination Commissioner will not either, there is no reason for these provisions to be included in the ADA.

New section 53A

104. This section establishes the office of Age Discrimination Commissioner and provides that the Commissioner is to be appointed by the Governor-General, but only if the Minister is satisfied that the person has appropriate qualifications, knowledge or experience. In this regard, the current minister responsible for the ADA is the Attorney-General.

105. Under subsection 33(4A) of the *Acts Interpretation Act 1901*, a person appointed to the position of Age Discrimination Commissioner is eligible for reappointment.

New section 53B

106. This section provides that the Age Discrimination Commissioner is to hold office for a period of up to seven years. This is consistent with the appointment provisions in the DDA, RDA and SDA. In practice, Commissioners are normally initially appointed for a period of five years, consistent with the Australian Public Service Commission's policy *Merit and transparency: Merit-based selection of APS agency heads and APS statutory office holders*.¹ Commissioners are eligible for reappointment after this period.

107. Section 53B provides that the Commissioner holds office on a full-time basis. While the DDA, RDA and SDA do not expressly include an equivalent provision, each Commissioner is appointed on a full-time basis. It is current drafting practice to expressly refer to statutory positions as full-time or part-time appointments.

108. The Commissioner is to hold office on terms and conditions, if any, that are determined by the Governor-General.

New section 53C

109. This section provides that the Commissioner is to be paid the amount determined by the Remuneration Tribunal. Where there is no such determination by the Remuneration Tribunal, the Commissioner is to be paid the amount set out in regulations. Remuneration Tribunal Determinations for full-time statutory office holders can be found at <<http://remtribunal.gov.au/>>.

110. The Commissioner is also to be paid any allowances as set out in the regulations. This provision is included for consistency with the DDA, RDA and SDA, although in practice, the Remuneration Tribunal sets allowances for statutory office holders.

New sections 53D to 53H

111. These sections are standard provisions governing statutory office holders and provide for recreational leave, paid employment outside the office of the Commissioner, resignation, termination and the appointment of an acting Commissioner. These provisions mirror the relevant provisions in the DDA, RDA and SDA.

112. The DDA, RDA and SDA do not specify when the resignation of the Commissioner is to take effect. However, consistent with current drafting practice, section 53F of this Bill sets out that the resignation will take effect either on the day it is received by the Governor-General or on a later day specified by the Commissioner in the written notice.

Items 4 to 6

113. These Items make consequential amendments to paragraph 55(a), subsection 58(1) and subsection 60(6) to insert references to the Commissioner.

114. Item 4 amends paragraph 55(a) to ensure that the Commission can delegate any of the powers provided by the ADA to the Commissioner, in addition to the other members and staff of the Commission.

¹ These guidelines are available at: <http://www.apsc.gov.au/publications08/meritandtransparency.htm> (accessed 20 September 2010).

115. Item 5 amends subsection 58(1) to ensure that the Commissioner receives the same protection from civil actions or other proceedings for damages for acts done in good faith in the course of his or her duties as the other Commissioners.

116. Item 6 amends subsection 60(6) to include the Commissioner in the definition of persons who may not disclose private information received in the course of their employment with the Commission.

Part 2—Consequential amendments

Division 1—Amendments

Australian Human Rights Commission Act 1986

Item 7

117. This Item will amend subsection 3(1) of the *Australian Human Rights Commission Act 1986* (AHRC Act) to insert a definition of Age Discrimination Commissioner as the person appointed under the ADA.

Items 8

118. Like all Commissioners, the Age Discrimination Commissioner will also be a member of the Commission. In this capacity, the Commissioner will be involved with the President and other Commissioners in setting the strategic direction of the Commission and promoting and protecting human rights for all Australians.

119. This Item will amend subsection 8(1) to include the Age Discrimination Commissioner as a member of the Commission.

Item 9

120. This Item will make a consequential amendment to subsection 8(7) to include the Age Discrimination Commissioner in the list of positions in the Commission. Subsection 8(7) provides that the powers and functions of the Commission are not affected by a vacancy in any of the positions in the Commission.

Item 10

121. This Item will amend subsection 46PV(3) to include the Age Discrimination Commissioner in the definition of special purpose Commissioners for the purpose of section 46PV. This section provides the special purpose Commissioners with a power to assist the Federal Court and Federal Magistrates Court as *amicus curiae* in certain proceedings under Division 2 of the AHRC Act.

Fair Work Act 2009

Item 11

122. This Item will insert a definition of Age Discrimination Commissioner in section 12 of the *Fair Work Act 2009* as the person appointed under the ADA.

Items 12 and 13

123. Items 12 and 13 will amend paragraphs 161(2)(a) and 218(2)(a) of the *Fair Work Act 2009* respectively to replace the existing reference to the Australian Human Rights Commission with a reference to the Age Discrimination Commissioner.

124. Sections 161 and 218 of the Fair Work Act provide that Fair Work Australia (FWA) must review a modern award or an enterprise agreement respectively, if they are referred to FWA by the Australian Human Rights Commission. The Commission may refer these instruments to FWA or review under Part IIC of the AHRC Act where it considers the instruments contain discriminatory provisions.

125. For instruments which contain provisions which potentially discriminate on the basis of disability or sex, the relevant Commissioner is able to make submissions to FWA. In the absence of an Age Discrimination Commissioner, the Commission has the power to make submissions in relation to age discrimination. These amendments will allow the Commissioner to make submissions in relation to age discrimination instead of the Commission.

126. Where a review has already commenced but has not been completed prior to the amendments coming into force, it is expected that the Commissioner could make a submission unless the Commission had already done so.

Division 2—Application of amendments

Item 14

127. This Item provides that amendments of the AHRC Act in relation to the *amicus curiae* function of the Age Discrimination Commissioner made by Item 10 of this Bill apply to proceedings that commence on or after the amendments come into force or that have already commenced but have not been completed when the amendments come into force.

128. As this power is subject to leave of the court, the court will be able to determine if proceedings which are already on foot would be unduly delayed by permitting the Commissioner to exercise this function.