

1998

**THE PARLIAMENT OF THE COMMONWEALTH
OF AUSTRALIA**

HOUSE OF REPRESENTATIVES

HUMAN RIGHTS LEGISLATION AMENDMENT BILL 1998

EXPLANATORY MEMORANDUM

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

HUMAN RIGHTS LEGISLATION AMENDMENT BILL 1998

This Bill will amend Commonwealth anti-discrimination legislation to reform the functions and structure of the Human Rights and Equal Opportunity Commission ('HREOC'). The Bill will also respond to the High Court's decision in *Brandy v HREOC* (1995) 183 CLR 245, which found that HREOC, as a non-judicial body, did not have the constitutional power to finally determine disputes.

The Bill:

- confers on the President of HREOC the role and functions of Chief Executive Officer;
- centralises complaint investigation and conciliation in the office of the President;
- simplifies the legislation by implementing, where possible, common definitions and best practice procedural provisions for complaint handling in the one Act;
- makes substantial changes to the *Disability Discrimination Act 1992*, the *Racial Discrimination Act 1975* and the *Sex Discrimination Act 1984* to remove the provisions in those Acts that currently deal with complaints;
- simplifies dispute resolution procedures in human rights matters by eliminating the second tier of review in HREOC, which was not directly enforceable;
- provides that matters which cannot be conciliated will be dealt with in the Federal Court of Australia;
- provides that the Federal Court will not be bound by technicalities or legal forms in considering proceedings brought before it under this Bill;
- enables the Judges of the Federal Court to delegate some but not all of their functions in this area to Judicial Registrars, who will be able to assist with additional caseloads; and
- makes provision for transitional arrangements for complaints which had been lodged with HREOC under the old law but which will not have been completed at the commencement of the new law, the most significant point being that where, prior to commencement of the new law, a complaint has been referred to HREOC for a substantive hearing which has commenced, the complaint will continue to be dealt with under the old law; all other complaints will be transferred to the scheme established by the new law.

The Bill also includes consequential amendments to related legislation, including the:

- Federal Court of Australia Act 1976;

- Defence Act 1903;
- Remuneration Tribunal Act 1973;
- Workplace Relations and Other Legislation Amendment Act 1996; and
- Workplace Relations Act 1996.

FINANCIAL IMPACT STATEMENT

The Bill provides for legal assistance to be sought from the Attorney-General. However, the general principles for assistance which exist under the current human rights legislation will continue to apply, that is, assistance would be granted where refusal to grant assistance would involve hardship and it is reasonable in all the circumstances. It is not expected that the amendments will significantly impact on the legal aid budget.

HREOC's determination-making functions will be transferred to the Federal Court. The transfer of this function to the Federal Court will generate savings for HREOC of \$0.6 million per year, and will trigger the budget requirement for further general savings of \$0.9 million.

Matters that are unable to be conciliated in HREOC will be determined in the Federal Court. The revised procedures will lead to an increase in workload for the Federal Court. Any additional funds necessary will be sought in the new policy process; offsetting savings may be required.

NOTES ON CLAUSES

1. In these notes, the following abbreviations are used:

DDA:	<i>Disability Discrimination Act 1992</i>
HREOC:	The Human Rights and Equal Opportunity Commission
HRA:	<i>Human Rights and Equal Opportunity Commission Act 1986</i>
RDA:	<i>Racial Discrimination Act 1975</i>
SDA:	<i>Sex Discrimination Act 1984</i>
new HREOCA:	means the Human Rights and Equal Opportunity Commission Act as amended by Schedule 1 to this Act
Old law:	refers to the provisions of the RDA, SDA, DDA and HRA prior to amendment by this Act
Starting day:	refers to the commencement day for the transitional and savings provisions contained in Part 2 of this Act.

Part 1 - Preliminary

Clause 1 - Short Title

2. This clause will provide for the Act to be cited as the *Human Rights Legislation Amendment Act 1998*.

Clause 2 - Commencement

3. Subclause (1) will provide that sections 1, 2, 3 and 21 commence on the date the Act receives Royal Assent.
4. Subclause (2) will provide that the remaining sections and the items in Schedule 1 commence on a day or days to be fixed by proclamation.
5. Subclause (3) will provide that, where a provision does not commence in accordance with subsection (2) within 6 months of the Act receiving Royal Assent, that provision will commence on the first day after that 6 month period expires.

Clause 3 - Schedules

6. This clause will provide that an Act which is specified in a Schedule is amended or repealed as set out in that Schedule.

Part 2 - Transitional and application provisions

7. This Part deals with transitional and savings provisions. Part 2 consists of three Divisions which deal with the following:
- Division 1 - Interpretation ;
 - Division 2 - Treatment of complaints lodged before starting day; and
 - Division 3 - Other transitional and application provisions.

Division 1 - Interpretation

Clause 4 - Interpretation

8. This section defines many of the terms that are used in Part 2, the most significant of which are:

“holding of an inquiry”

This term refers to an inquiry referred to in a notice under either sections 83 (DDA), 25E (RDA) or 63 (SDA), (hereafter referred to as the ‘substantive hearing’).

“purported complaint”

This term refers to a complaint which has been lodged with HREOC but HREOC has yet to decide whether it is a complaint within the meaning of the relevant Acts.

“starting day”

This term refers to the day on which the transitional and savings provisions commence.

Division 2 - Treatment of complaints lodged before the starting day
Subdivision A - Treatment of a complaint depends upon the stage it has reached

Clause 5 - Purported complaint lodged but no decision as to whether it is a complaint

9. This section deals with complaints which have been lodged with HREOC under the old law but, prior to the starting day, HREOC has not decided whether it is a complaint within the meaning of the relevant Acts. On the starting day, these complaints will be treated as if they had been lodged under section 46P of the new HREOCA.

Clause 6 - Administrative appeal on Commission's decision as to whether a complaint

10. This section deals with complaints which have been lodged with HREOC and HREOC has made a decision as to whether the complaint is a complaint within the meaning of the relevant Acts. If a party to the complaint or purported complaint has sought, or could have sought, judicial review of HREOC's decision, prior to the starting day, and, after the starting day the Court has made an order on review and remitted the matter back to HREOC for reconsideration, the purported complaint will be treated as if it had been lodged under section 46P of the new HREOCA and reconsideration will take place accordingly.

Clause 7 - Complaint lodged but Commissioner not notified of it

11. This section deals with complaints which have been lodged with HREOC and HREOC has decided that the complaint is a complaint within the meaning of the relevant Acts, but these complaints have not been referred to the relevant Commissioner before the starting day. On the starting day these complaints will be treated as if they had been lodged under the new HREOCA and HREOC is taken to have decided that it is a complaint within the meaning of the new HREOCA.

Clause 8 - Commissioner notified of complaint but had not decided to dismiss or refer it

12. This section deals with complaints which have, before the starting day:

- been lodged with HREOC; and
- been referred to the relevant Commissioner; and
- are either awaiting, or have started a process of inquiry or conciliation.

13. These complaints will be treated as if the referral to the Commissioner was a referral to the President under the new HREOCA. Anything already done in the inquiry and conciliation process will be treated as if it had been done by the President, (see Clause 15).

Clause 9 - Commissioner decided to dismiss complaint

14. This section deals with complaints which have:

- been referred to the relevant Commissioner for inquiry and conciliation; and
- before the starting day, the Commissioner has decided not to inquire or not to continue to inquire into the complaint; and
- on the starting day a complainant could have sought: presidential review of the Commissioner's decision not to inquire or not to continue to inquire, (under the DDA, RDA or SDA); or, referral of the complaint to HREOC (under the SDA or RDA).

15. Complaints in this category will, on the starting day, be treated as if the President had terminated the complaint under section 46PH. An affected person may then pursue the matter in the Federal Court.

Clause 10 - Presidential review of Commissioner's decision to dismiss complaint

16. This section deals with complaints which have:

- been referred to the relevant Commissioner for inquiry and conciliation; and
- the Commissioner has decided not to inquire or not to continue to inquire into the complaint; and
- the complainant has sought Presidential review of the Commissioner's decision and that review has not been completed prior to the starting day.

17. On the starting day, complaints in this category will be deemed to have been terminated under section 46PH. An affected person may then pursue the matter in the Federal Court.

Clause 11- Administrative review of President's decision

18. This section deals with complaints which have, before the starting day :

- been the subject of a Presidential review and decision; and
- a party has sought judicial review of the President's decision; and
- judicial review has not been completed.

19. When an order is made on review and the decision is remitted to HREOC for re-consideration, the complaint will be treated as if it were terminated by the President under section 46PH. An affected person may then pursue the matter in the Federal Court.

Clause 12 - Complaint referred to Commission but inquiry not started

20. This section deals with complaints which, prior to the starting day, have been referred to HREOC for inquiry and hearing, the complaint has not been withdrawn and a substantive hearing has not yet commenced.

21. Complaints in this category will be treated as if they had been terminated by the President under section 46PH of the new HREOCA. An affected person may then pursue the matter in the Federal Court.

Clause 13 - Inquiry started

22. This section deals with complaints which, prior to the starting day, have:
- been referred to HREOC for inquiry and hearing;
 - a substantive hearing has commenced; and,
 - the complaint has not been withdrawn.
23. For complaints which have progressed to this stage, the old law will continue to apply.

Subdivision B - Other rules about complaints lodged before starting day

Clause 14 - Notice of termination

24. Under the new HREOCA, when a complaint is terminated by the President, the President must issue a termination notice (unless an exclusion applies). Such a notice is a requirement for making an application to the Federal Court. A number of transitional provisions also provide for the termination of complaints previously lodged under the old law (see Clauses 9, 10, 11, 12).

25. This section provides that where a complaint has been terminated under the transitional provisions, a termination notice must also be issued in the circumstances specified so as to allow an affected person to pursue the matter in the Federal Court. This notice is not required if all the complainants requested the appropriate Commissioner (as defined in the Act) not to inquire into the complaint.

Clause 15 - Work done by Commissioner is taken to have been done by President

26. This section provides that anything done by the appropriate Commissioner under the old law will be treated as if it had been done by the President under the new HREOCA. This will mean that complaints which are in the process of inquiry or conciliation will continue at that stage despite having been transferred to the new scheme (see Clause 8).

Clause 16 - Special rules apply to proceedings to enforce a determination

27. This section provides that certain provisions in the new HREOCA will apply to court proceedings for the enforcement of a determination made under the old law, if those proceedings started on or after the starting day. The additional provisions relate to assistance in the preparation of initial application forms, the limited right to representation by someone other than a barrister or solicitor, and, informality of court proceedings.

Division 3 - Other transitional and application provisions

Clause 17 - Protection from civil actions

28. This section is a savings provision made necessary by the transfer of complaint handling functions to the HRA. The section ensures that there is continuing protection for a person from an action, suit or other proceedings in the circumstances currently described in subsections 126(2) (DDA), 45(2) (RDA) and 111(2) (SDA).

Clause 18 - Referrals under the old SDA

29. This section provides specific transitional arrangements for complaints involving discriminatory awards, agreements or particular determinations lodged under the old law. In this regard, the Sex Discrimination Commissioner has the power to refer:

- an alleged discriminatory award or agreement to the Australian Industrial Relations Commission; and
- an alleged discriminatory determination to the Remuneration Tribunal or the Defence Force Remuneration Tribunal.

30. Complaints relating to a discriminatory award, agreement or determination which have been lodged with HREOC before the starting day will remain to be dealt by the Sex Discrimination Commissioner. After the starting day the President will be responsible for the initial handling of such complaints, including decisions to refer. The Sex Discrimination Commissioner's existing functions in any review proceedings, (eg. before the Australian Industrial Relations Commission), will be retained.

Clause 19 - Inquiries started by Human Rights Commissioner

31. This section provides specific transitional arrangements for complaints that have been lodged and are being dealt with by the Human Rights Commissioner before the starting day. These complaints will continue to be dealt with by the Human Rights Commissioner.

32. The transitional arrangements for complaints under the HRA are different to those which apply to complaints under either the DDA, RDA or SDA because complaints under the HRA may only result in a report to the Attorney-General.

Clause 20- When a person cannot lodge a complaint under the new HREOCA

33. The general transitional arrangements provide that a complaint which is in the process of a substantive hearing before HREOC prior to the starting day, will remain to be heard under the old law.

34. This section deals specifically with representative complaints and provides that a person who remains a class member for a representative complaint which is in the process of a substantive hearing under the old law cannot lodge a separate complaint under the new HREOCA in respect of the same subject matter.

Clause 21 - Regulations

35. Subclause (1) will provide that the Governor-General has power to make regulations which are required or permitted by this Act to be prescribed, or which are necessary or convenient for the operation of the Act.

36. Subclause (2) will provide that, in particular, the regulation-making power may be used to deal with transitional provisions which arise as a result of the new legislation.

Clause 22 - Transitional - powers of a Secretary

37. Subsection 43(2) of the HRA provides that HREOC has all the powers of, or exercisable by, a Secretary under the *Public Service Act 1922*. In accordance with the change to a Presidential Chief Executive Officer, item 57 of the Schedule will amend that subsection to vest in the President the relevant powers.

38. This clause is a transitional provision and indicates that for the purposes of subsection 43(2) of the HRA, the prior exercise of the relevant powers by HREOC has effect, after the commencement of this section, as if the powers were exercised by the President.

SCHEDULE 1 - AMENDMENTS

Defence Act 1903

39. This part of the Schedule makes two consequential amendments to the *Defence Act 1903* which arise from the transfer of the legislative structure for complaint handling to the HRA.

Item 1 - Subsection 58HA(1)

40. This item will remove the reference in subsection 58HA(1) to the SDA and substitute a reference to section 46PY of the new HREOCA.

Item 2 - Section 58HB

41. This item will remove the reference in section 58HB to the SDA and substitute a reference to new section 46PY of the new HREOCA.

Disability Discrimination Act 1992

42. This part of the Schedule makes a number of consequential amendments to the DDA which arise from the transfer of the legislative structure for complaint handling to the new HREOCA.

Item 3 - Subsection 4(1) (definition of *class member*)

43. This item will repeal the definition of 'class member'. The provision is no longer necessary in the DDA as uniform complaint provisions are to be inserted in the HRA. A similar definition will be inserted in the HRA.

Item 4 - Subsection 4(1) (definition of *complaint*)

44. This item will repeal the definition of 'complaint'. The provision is no longer necessary in the DDA as uniform complaint provisions are to be inserted in the HRA. A similar definition will be inserted in the HRA.

Item 5 - Subsection 4(1) (definition of *compulsory conference*)

45. This item will repeal the definition of 'compulsory conference'. The provision is no longer necessary in the DDA as uniform complaint provisions are to be inserted in the HRA. A similar definition will be inserted in the HRA.

Item 6 - Subsection 4(1) (definition of *interim determination*)

46. This item will repeal the definition of 'interim determination'. The definition is no longer necessary as the new scheme will not make provision for HREOC to make an interim determination. To maintain the status quo pending the determination of their complaints, parties will now have to seek an interim injunction in the Federal Court.

Item 7 - Subsection 4(1) (definition of *representative complaint*)

47. This item will repeal the definition of 'representative complaint'. The provision is no longer necessary in the DDA as uniform complaint provisions are to be inserted in the HRA. A similar definition will be inserted in the HRA.

Item 8 - Subsection 4(1) (definition of *respondent*)

48. This item will repeal the definition of 'respondent'. The provision is no longer necessary in the DDA as uniform complaint provisions are to be inserted in the HRA. A similar definition will be inserted in the HRA.

Items 9 and 10 - Subsection 13(4)

49. This item is a consequential amendment made necessary by the transfer of the legislative structure for complaint handling to the HRA.

50. Under the old law, subsection 13(4) restricted a complainant from making similar complaints of disability discrimination in respect of the same act or omission under both the State and Commonwealth law. With the consolidation of the complaint handling process in the one Act, this amendment preserves that limited restriction. It does not restrict a person from making a subsequent complaint alleging, for example, sex or racial discrimination arising out of the same act or omission. A similar amendment has been made to related provisions in the RDA and SDA.

Item 11 - Paragraph 42(2)(a)

51. This item is a consequential amendment made necessary by the transfer of the legislative structure for complaint handling to the HRA.

52. Currently, paragraph 42(2)(a) provides that an act of victimisation includes, amongst other things, subjecting a person to any detriment because that person has made, or proposes to make, a complaint under the DDA. Since complaint based action will now be taken under the new HREOCA, the provision will be amended to refer to action taken under either the DDA or the new HREOCA.

Item 12 - Paragraph 42(2)(b)

53. This item is a consequential amendment made necessary by the transfer of the legislative structure for complaint handling to the HRA.

54. Currently, paragraph 42(2)(b) provides that an act of victimisation includes, amongst other things, subjecting a person to any detriment because that person has brought, or proposes to bring, proceedings under the DDA. Since complaint based action will now be taken under the new HREOCA, the provision will be amended to refer to action taken under either the DDA or the new HREOCA.

Item 13 - At the end of paragraph 42(2)(c)

55. This item is a consequential amendment made necessary by the transfer of the legislative structure for complaint handling to the HRA.

56. Currently, paragraph 42(2)(c) provides that an act of victimisation includes, amongst other things, subjecting a person to any detriment because that person has given, or proposes to give, information to a person exercising or performing any power or function under the DDA. Since complaint based action will now be taken under the new HREOCA, the provision will be amended to refer to action taken under either the DDA or the new HREOCA.

Item 14 - Paragraph 42(2)(d)

57. This item is a consequential amendment made necessary by the transfer of the legislative structure for complaint handling to the HRA.

58. Currently, paragraph 42(2)(d) provides that an act of victimisation includes, amongst other things, subjecting a person to any detriment because that person has attended, or proposes to attend a conference under the DDA. Since complaint based action will now be taken under the new HREOCA, the provision will be amended to refer to a conference held under either the DDA or the new HREOCA.

Item 15 - Paragraph 42(2)(e)

59. This item is a consequential amendment made necessary by the transfer of the legislative structure for complaint handling to the HRA.

60. Currently, paragraph 42(2)(e) provides that an act of victimisation includes, amongst other things, subjecting a person to any detriment because that person has appeared, or proposes to appear, as a witness before HREOC in proceedings under the DDA. Since complaint based action will now be taken under the new HREOCA, the provision will be amended to refer to action taken under either the DDA or the new HREOCA.

Item 16 - At the end of paragraph 42(2)(f)

61. This item is a consequential amendment made necessary by the transfer of the legislative structure for complaint handling to the HRA.

62. Currently, paragraph 42(2)(f) provides that an act of victimisation includes, amongst other things, subjecting a person to any detriment because that person has reasonably asserted, or proposes to assert, any rights under the DDA. Since complaint based action will now be taken under the new HREOCA, the provision will be amended to refer to action taken under either the DDA or the new HREOCA.

Item 17 - Paragraph 47(1)(a)

63. This item is a consequential amendment made necessary by the transfer of the legislative structure for complaint handling to the HRA.

64. Currently, paragraph 47(1)(a) provides an exception for what would be unlawful conduct where a person acts in direct compliance with a determination or decision of HREOC. HREOC will no longer be involved in the making of decisions or determinations in relation to complaints and therefore the provision will be repealed.

65. It should be noted that protection when acting in direct compliance with an exemption granted under section 55 is provided by section 58 of the DDA.

Item 18 - Part 4 (heading)

66. This item is a consequential amendment made necessary by the transfer of the legislative structure for complaint handling to the HRA. It will change the heading of Part 4 from 'Inquiries and Civil Proceedings' to 'Functions of Human Rights and Equal Opportunity Commission'.

Item 19 - Section 66

67. This item will repeal section 66 of the DDA, which currently specifies what is meant by a reference to an unlawful act under Part 2 of that Act. With the transfer of the legislative structure for complaint handling to the HRA, the same result will be achieved by inserting in subsection 3(1) of the HRA a definition of 'unlawful discrimination' which includes those acts which are currently included by virtue of section 66 of the DDA.

Item 20 - Paragraphs 67(1)(a) and (b)

68. This item will repeal provisions which currently confer on HREOC the functions of inquiring into, attempting to conciliate, and making determinations in relation to, complaints received under the DDA. Under the new scheme, the President will undertake the functions of inquiring into and attempting to conciliate complaints lodged under Part IIB of the new HREOCA.

Item 21 - At the end of subsection 67(1)

69. This is a consequential amendment which inserts a note into the Disability Discrimination Act to inform the reader that the provisions dealing with the inquiry and conciliation of complaints of disability discrimination have been placed in Part IIB of the new HREOCA.

Item 22 - Subsection 67(3)

70. Subsection 67(3) currently places a restriction on the involvement of the Disability Discrimination Commissioner in an inquiry by HREOC under Division 3 of Part 4 of the DDA. Under the new scheme, HREOC will not undertake such inquiries. This item will repeal the provision as it is no longer necessary.

Item 23 - Sections 68, 69 and 70

71. Section 68 currently provides for the Disability Discrimination Commissioner to undertake inquiry and conciliation functions on behalf of HREOC. These functions will now be undertaken by the President. Section 68 will therefore be repealed.

72. Section 69 currently provides for the making of complaints, representative actions and assistance in the making of complaints. Under the uniform scheme, the complaint handling provisions will be in the new HREOCA. Section 69 will therefore be repealed.

73. Section 70 currently provides for the Disability Discrimination Commissioner, in certain circumstances, to be deemed to be a complainant for the purposes of an inquiry by HREOC. Under the new scheme HREOC will no longer undertake such inquiries and the provision will therefore be repealed.

Item 24 - Divisions 2, 3, 3A and 4 of Part 4

74. Divisions 2, 3, 3A and 4 of Part 4 of the DDA currently deal (respectively) with inquiry and conciliation by the Disability Discrimination Commissioner, inquiries by HREOC, enforcement of determinations involving respondents other than Commonwealth agencies and review and enforcement of determinations involving Commonwealth agencies.

75. Under the new scheme, only the inquiry and conciliation functions will remain with HREOC. These are to be undertaken by the President under Part IIB of the new HREOCA. This item will repeal the provisions which form the basis of the scheme for complaints under the DDA.

Item 25 - Section 107

76. This item is a consequential amendment made necessary by the transfer of all complaint handling functions to the President. The provision will change current references to the Disability Discrimination Commissioner to references to the President.

Item 26 - Sections 108, 109, 110, and 111

77. Sections 108, 109, 110 and 111 create offences for certain acts in relation to the inquiry and conciliation functions. As the provisions dealing with the new complaint handling scheme are to be set out in Part IIB of the new HREOCA, these provisions will be repealed from the DDA. To the extent that there is a need for similar offences in the new complaint handling scheme, provision will be made in sections 46PI, 46PJ and 46PK of the new HREOCA.

Item 27 - Section 112

78. This item is a consequential amendment made necessary by the transfer of all complaint handling functions to the President. It will amend section 112 to include within the scope of the offence the giving of false or misleading information, or the making of a false or misleading statement, to the President, in addition to the Disability Discrimination Commissioner and HREOC. This will reflect the President's role in handling complaints.

Item 28 - Subsection 123(6)

79. This provision will be repealed as it currently deals with conduct by directors, servants or agents at conferences held under Part 4 of the DDA.

Under the new scheme, the inquiry and conciliation functions are to be undertaken by the President, and the provisions dealing with the uniform complaint handling scheme will be set out in Part IIB of the new HREOCA. Subsection 46PH(6) of the new HREOCA will achieve the same result.

Item 29 - Subsection 126(2)

80. Subsection 126(2) of the DDA currently provides that a person is not liable to an action, suit or other proceedings in respect of loss, damage or injury simply because they:

- (a) have made a complaint under the DDA; or
- (b) have provided, amongst other things, a document or evidence to the Disability Discrimination Commissioner or to HREOC.

81. As complaints will no longer be lodged under the DDA, the provision will be amended to remove references to complaints. For complaints lodged under the uniform scheme in the new HREOCA, a protection already exists at section 48 of the HRA.

Item 30 - Subsection 126(2)

82. This item will remove a remaining reference to complaints not addressed by the amendment at item 29.

Item 31 - Section 130

83. This item will repeal the provision which confers jurisdiction on the Federal Court with respect to matters arising under Part 4 of the DDA. Under the new scheme the provisions dealing with the Federal Court's involvement in complaint handling will be set out in Part IIB of the new HREOCA.

Federal Court of Australia Act 1976

84. This part of the Schedule makes a number of consequential amendments to the *Federal Court of Australia Act 1976* to allow the Federal Court to delegate functions under the new scheme to Judicial Registrars.

Item 32 - Before subsection 18AB(3)

85. This item will insert before subsection 18AB(3) a new subsection 2B. The new subsection provides that, pursuant to Rules of Court, Judges may delegate to Judicial Registrars any of the Court's 'human rights legislation powers'. The term 'human rights legislation powers' means the powers of the Court in relation to proceedings arising under Part IIB of the new HREOCA. In recognition of the Constitutional limitations on the delegation of judicial power, however, the term does not include all of the Court's human rights legislation powers. In particular, the power to grant interim injunctions will not be able to be delegated.

Items 33, 34 and 35 - subsections 18AB(3), 18AB(6) and 18AB(7)

86. Subsection 18AB(3) provides for the delegation of certain powers to Judicial Registrars. Currently the subsection expressly provides that it is not intended to limit the operation of subsection (1). Item 33 will amend the provision so as to indicate that it is also not intended to limit the operation of either subsection 18AB(1) or (2B).

87. Subsection 18AB(6) currently states that the *Federal Court of Australia Act 1976*, the Regulations and the Rules of Court apply to the exercise of a delegated power under subsection 18AB(1). The reference should be to all delegations under subsections 18AB(1) and (2B). Item 34 will amend the provision accordingly.

88. Subsection 18AB(7) currently refers only to delegated powers under subsection 18AB(1). The reference should be to all delegated powers under subsections 18AB(1) and (2B). Item 35 will amend the provision accordingly.

Human Rights and Equal Opportunity Commission Act 1986

89. This part of the Schedule makes a number of amendments to the new HREOCA to deal with the changes to the handling of complaints of unlawful discrimination under the DDA, the RDA and the SDA, and to deal with the change in the management structure of the HREOC.

Item 36 - Subsection 3(1)

90. This item will insert in subsection 3(1) a definition of 'affected person'. An 'affected person' is a person on whose behalf a complaint has been lodged under Part IIB of the new HREOCA. The definition is required because the class of 'affected persons' on whose behalf a complaint is lodged with HREOC may not necessarily be composed of the same people as the class of persons aggrieved by a particular act of alleged unlawful discrimination, and it is only the 'affected persons' who may bring proceedings in the Federal Court in respect of a terminated complaint. 'Complaint' is separately defined.

Item 37 - Subsection 3(1)

91. This item will insert in subsection 3(1) a definition of 'alleged unlawful discrimination'. This definition applies both to the making of a complaint to HREOC, and to the making of an application to the Federal Court in respect of a terminated complaint. In both situations the term means the 'conduct to which either the complaint or the application relates, and which if proven, would constitute unlawful discrimination'. The term 'unlawful discrimination' is separately defined.

Item 38 - Subsection 3(1)

92. This item will insert in subsection 3(1) a definition of 'class member'. This definition refers to people who form part of a 'representative complaint'. A 'class member' is any of the persons on whose behalf the complaint is lodged, but it

does not include a person who has withdrawn under section 46PC of the new HREOCA. The term 'representative complaint' is separately defined.

Item 39 - Subsection 3(1)

93. This item will insert in subsection 3(1) a definition of 'complainant'. This term means the person who lodged the complaint under Part IIB of the new HREOCA. Complaints may be lodged by a person on their own behalf or on behalf of another person or persons. The term 'complaint' is separately defined.

Item 40 - Subsection 3(1)

94. This item will insert in subsection 3(1) a definition of 'complaint'. 'Complaint' means a complaint lodged under Division 1 of Part IIB of the new HREOCA. The definition of 'complaint' will not apply to new Part IIC, which relates to the referral of certain discriminatory awards and agreements and determinations to relevant bodies.

Item 41 Subsection 3(1)

95. This item will insert in subsection 3(1) a definition of 'compulsory conference', which means a conference under new section 46PJ.

Item 42 - Subsection 3(1) (definition of *discrimination*)

96. This item will exclude from the existing definition of 'discrimination' in subsection 3(1) of the HRA the procedure for redress for 'unlawful discrimination' set out in Part IIB of the new HREOCA. This amendment is necessary because 'discrimination' has a specific meaning for the purposes of the remainder of the new HREOCA. 'Unlawful discrimination' is separately defined.

Item 43 - Subsection 3(1)

97. This item will insert in subsection 3(1) a definition of 'Federal Court'. It means the Federal Court of Australia.

Item 44 - Subsection 3(1)

98. This item will insert in subsection 3(1) a definition of 'representative complaint', which means a complaint lodged on behalf of at least one other person who is not a complainant. 'Complainant' is separately defined.

Item 45 - Subsection 3(1)

99. This item will insert in subsection 3(1) a definition of 'respondent' in relation to a complaint. 'Respondent' means the person (or persons) against whom a complaint is made. See also the definition of 'complaint'.

Item 46 - Subsection 3(1)

100. This item will insert in subsection 3(1) a definition of 'terminate' as it relates to a complaint. To 'terminate' a complaint means to decline to inquire

into, or to discontinue an inquiry into, the complaint. New sections 46PE and 46PH will outline the grounds upon which a complaint may be terminated. 'Complaint' is separately defined.

Item 47 - Subsection 3(1)

101. This item will insert in subsection 3(1) a definition of 'trade union'. It means:

- (a) an organisation of employees that is a registered organisation within the meaning of the *Workplace Relations Act 1996*; or
- (b) a trade union within the meaning of any State or Territory law; or
- (c) any other similar body.

Item 48 - Subsection 3(1)

102. This item will insert in subsection 3(1) a definition of 'unlawful discrimination'. 'Unlawful discrimination' means any acts, omissions or practices that are unlawful under Part 2 of the DDA, Parts II or IIA of the RDA or Part II of the SDA. The definition also covers conduct that is an offence by virtue of certain provisions of those Acts.

Item 49 - Section 4

103. This item will replace the existing section 4 of the HRA which relates to the operation of State and Territory laws.

104. Subsection (1) provides that the new HREOCA is not intended to limit the operation of a law of a State or Territory that is capable of operating concurrently with the new HREOCA. This differs from the current text of section 4, in that it does not include a specific reference to State and Territory laws that further the objects of the Discrimination (Employment and Occupation) Convention 1958 (see subsection 3(1) and Schedule 1).

105. Subsection (2) provides that where a law of a State or Territory deals with a matter dealt with by the new HREOCA, and an act or omission by a person that constitutes an offence against that law also constitutes an offence against the new HREOCA, nothing in section 4 renders a person liable to be punished more than once in respect of the same act or omission.

Item 50 - Subsection 8(6)

106. This item and the next item will amend subsection 8(6) of the HRA. That subsection deals with certain functions of HREOC which are currently performed by the Human Rights Commissioner.

107. This item will amend subsection 8(6) to add to the functions listed in the subsection the functions of inquiring into, and attempting to conciliate, complaints of unlawful discrimination made under Part IIB of the new HREOCA, and of dealing with complaints relating to discriminatory awards and agreements and determinations under Part IIC of the new HREOCA. The terms 'unlawful discrimination' and 'complaint' are separately defined.

Item 51 - Subsection 8(6)

108. This item will amend subsection 8(6) to provide that the functions of HREOC listed in that subsection, relating to complaints made under the new HREOCA, are to be performed by the President.

Item 52 - Subsections 8A(3) and (4)

109. This item will repeal subsections 8A(3) and (4) which were inserted by the *Human Rights Legislation Amendment Act 1995*, and which set out the main functions and powers of the President conferred by the DDA, the HRA, the RDA and the SDA.

110. This item will also insert a new subsection 8A(3), which provides that the President is responsible for managing the administrative affairs of HREOC.

Item 53 - After paragraph 11(1)(a)

111. Section 11 of the HRA sets out the functions of HREOC. This item will add two new paragraphs to subsection 11(1).

112. New paragraph 11(1)(aa) will add the function of inquiring into, and attempting to conciliate, complaints of unlawful discrimination made under Part IIB of the new HREOCA.

113. New paragraph 11(1)(ab) will add the function of dealing with complaints relating to discriminatory awards and agreements and determinations under Part IIC of the new HREOCA.

Item 54 - Subsection 16(2A)

114. This item will amend subsection 16(2A) to provide that where an arrangement has been made with a State for the performance of the functions of HREOC and an act has been done by or in relation to a State, or an instrumentality of a State (whether on a joint basis or otherwise), under such an arrangement, the act is deemed to have been done by, or in relation to, the President. This is consistent with the President's central role in relation to complaint handling, and in relation to co-operative arrangements with the States and Territories.

Item 55 - After subsection 19(2)

115. Section 19 deals with the delegation of HREOC functions. This item will amend the section to insert three new subsections.

116. Subsection (2A) provides that the President cannot delegate to another member of HREOC his or her powers under Parts IIB or IIC of the new HREOCA, which are those powers relating to the handling of complaints of unlawful discrimination, and to the referral of discriminatory awards and agreements and determinations to relevant bodies. This is to ensure that the President retains control of the complaint handling functions of HREOC. It will also ensure that the individual Commissioners are not involved in complaints before HREOC, so that they are able to perform in an impartial way their

function under section 46PV of appearing as *amicus curiae* in proceedings before the Federal Court.

117. Subsection (2B) provides that the President cannot delegate his or her powers relating to the functions of HREOC under paragraphs 11(1)(f) and (p), or under paragraphs 31(b) and (k), to a member of HREOC other than the Human Rights Commissioner.

118. Subsection (2C) provides that the requirement in subsection (2) for HREOC to approve a delegation does not apply to a delegation by the President under that subsection. This is to ensure that the President's ability to retain control over complaint handling is not compromised.

Item 56 - Subsections 19(3) and (4)

119. This item will repeal subsections 19(3) and 19(4) of the HRA as a consequence of the amendments to section 19 made in item 55.

Item 57 Subsection 43(2)

120. Section 43 of the HRA deals with the employment of staff of HREOC. This item will amend subsection 43(2) to provide that it is the President who shall have the relevant powers rather than HREOC. This follows from item 52, which will amend subsection 8A(3) to provide that it is the President of HREOC who is responsible for managing the administrative affairs of HREOC. The effect of this amendment will be to confer on the office of the President the role and functions of a Chief Executive Officer of HREOC, with responsibility for the day-to-day management of the affairs of HREOC.

Item 58 - After Part IIA

121. This item will insert in the HRA two new Parts (Parts IIB and IIC) dealing (respectively) with redress for unlawful discrimination, and referral of discriminatory awards and agreements and determinations to relevant bodies.

122. Part IIB provides for the handling by HREOC of complaints of unlawful discrimination, and the handling by the Federal Court of proceedings arising from complaints terminated by the President of HREOC.

123. Part IIC provides for the handling by HREOC of complaints relating to certain discriminatory awards and agreements and determinations, and the referral by the President of those awards and agreements or determinations to other relevant bodies.

New Part IIB - Redress for unlawful discrimination

New Division 1 - Conciliation by the President

New section 46P - Lodging a complaint

124. This section sets out the circumstances in which a complaint of unlawful discrimination may be lodged with HREOC. In relation to the categories of persons who may lodge a complaint, it is modelled on section 69 of the DDA. However, it also incorporates features of section 50 of the SDA and section 22 of the RDA.

125. Subsection (1) sets out the basic conditions for lodging a complaint, namely that the complaint be in writing and that it allege unlawful discrimination.

126. Subsection (2) sets out who may lodge a complaint with HREOC. There are essentially three categories of persons by whom a complaint may be lodged:

- (a) a person aggrieved by the alleged unlawful discrimination, either on their own behalf, or on behalf of themselves and one or more other persons aggrieved by the alleged unlawful discrimination;
- (b) two or more persons aggrieved by the alleged unlawful discrimination, either on their own behalf, or on behalf of themselves and one or more other persons aggrieved by the alleged unlawful discrimination;
- (c) a person (who may or may not be aggrieved by the alleged unlawful discrimination) or trade union on behalf of one or more other persons aggrieved by the alleged unlawful discrimination.

127. In two significant respects, this subsection alters the current law. Firstly, in relation to complaints which allege unlawful discrimination under the RDA or the SDA, it will now be possible for a person who is not aggrieved by the alleged unlawful discrimination to lodge a complaint on behalf of persons who are so aggrieved. Currently, only a trade union may lodge this sort of complaint.

128. Secondly, in relation to complaints which allege unlawful discrimination under the DDA, this subsection will make it clear that a trade union is entitled to lodge a complaint on behalf of a person or persons aggrieved by alleged unlawful discrimination. Currently, section 69 of the DDA provides only that a complaint may be lodged by 'a person on behalf of another person or persons aggrieved by [an] act'.

129. Subsection (3) provides that a person who is a class member for a representative complaint is not entitled to lodge a separate complaint in respect of the same subject matter. However, if a person withdraws from a complaint (under subsection 46PC(1)), he or she is no longer a 'class member', and can therefore lodge a separate complaint.

130. Subsection (4) imposes on HREOC an obligation to assist persons who wish to make complaints. If it appears to HREOC that a person wishes to make a complaint under subsection (1), and that he or she requires assistance to formulate the complaint or to reduce it to writing, HREOC must take reasonable steps to assist that person.

New section 46PA - Amendment of complaint

131. This section provides that, with leave of the President, a complainant may amend the particulars of a complaint at any time. This is intended to allow a complaint to be amended to refer to, amongst other things, additional acts, practices or conduct which arise out of the same or similar circumstances. It will therefore assist in ensuring that all relevant matters are raised and dealt with in one proceeding. (Section 46PF(3) already makes specific provision for amendment to add a person as a respondent.)

New section 46PB - Conditions for lodging a representative complaint

132. This section specifies a number of conditions, in addition to those set out in section 46P, which apply to representative complaints. It should be noted that the conditions for lodging with HREOC a representative complaint differ from those applying to representative proceedings under Part IVA of the *Federal Court of Australia Act 1976*. Complainants will have to comply with the latter conditions if they wish to continue representative proceedings in the Federal Court after their complaint has been terminated by HREOC.

133. A 'representative complaint' will be defined in subsection 3(1) of the new HREOCA as 'a complaint lodged on behalf of at least one person who is not a complainant'. In terms of subsection 46P(2), therefore, it is only complaints lodged under sub-paragraphs (a)(ii) and (b)(ii), and paragraph (c) of that subsection which will be 'representative complaints' within the meaning of that term.

134. Subsection (1) provides that a representative complaint may only be lodged if each of the following conditions is satisfied:

- (a) the class members all have complaints against the same person;
- (b) all the complaints are in respect of, or arise out of, the same, similar or related circumstances;
- (c) all the complaints give rise to a substantial common issue of law or fact.

135. Subsection (2) sets out certain matters which must be addressed in a representative complaint. It provides that a representative complaint must:

- (a) describe or otherwise identify the class members; and
- (b) specify the nature of the complaints made on behalf of the class members; and
- (c) specify the nature of the relief sought.

136. Subsection (2) departs from the current scheme for making representative complaints (sections 89 of the DDA, 25L of the RDA and 69 of the SDA) by removing the requirement that the complaint 'specify the questions of law or fact that are common to the complaints of the class members'. This requirement will be removed because it imposes on complainants at an early stage of complaint handling an onerous burden which is not justified by the nature of the inquiry and conciliation process.

137. It should be noted that any complainants who wish to continue representative proceedings in the Federal Court after their complaint has been terminated by HREOC will have to specify the common questions of law and fact in their originating process in the Federal Court: section 33H of the *Federal Court of Australia Act 1976*. However, the inquiry and conciliation processes in HREOC may assist complainants to identify these common questions prior to the commencement of proceedings in the Federal Court.

138. Subsection (3) makes it clear that in describing or otherwise identifying the class members (pursuant to paragraph (2)(a)), it is not necessary either to name them or to specify how many there are.

139. Subsection (4) makes it clear that a representative complaint may be lodged without the consent of class members.

New section 46PC - Additional rules applying to representative complaints

140. This section sets out additional rules which relate to representative complaints lodged under section 46P.

141. Subsection (1) provides for the withdrawal of a class member from a representative complaint. A class member may, by sending a written notice to HREOC, withdraw from a representative complaint at any time before the President terminates the complaint under section 46PH. If they do so, they will no longer be prevented (by subsection 46P(3)) from lodging a separate complaint in respect of the same subject matter.

142. Subsection (2) which allows the President, on application by an affected person, to replace a complainant. Replacement of a complainant may become necessary if, for example, a complainant decides not to, or is unable to continue with a complaint because of injury or sickness. The new provision permits the replacement of a representative complainant when necessary and ensures the complaint can continue at the appropriate stage with a new representative complainant on the record.

143. Subsection (3) gives the President the power at any stage to direct that notice of any matter be given to class members. While the subsection gives the President an unfettered discretion in this regard, it is envisaged that the President would usually direct the complainant to give a notice to class members, and that the sorts of matters about which notices might be required to be given would include the fact that a representative complaint had been lodged and the fact that a settlement was proposed.

New section 46PD - Referral of complaint to President

144. This section provides that if a complaint is made to HREOC under section 46P, HREOC must refer the complaint to the President.

New section 46PE - Complaints against the President, Commission or a Commissioner

145. This section provides additional mechanisms for dealing with complaints where the respondent is the President, the Commission or a Commissioner. They

are designed to address concerns about a perceived or actual conflict of interest or bias which may arise in such circumstances.

146. The section provides that a complainant will be able to request that the President terminate a complaint of this type in order to allow the complaint to be taken directly to the Federal Court.

147. The President must terminate the complaint if satisfied that all affected persons agree. However, if the President is not so satisfied, the complaint remains in HREOC. This ensures that those who wish to continue with conciliation can do so without interruption. Those who unsuccessfully sought to have the complaint terminated may, if they wish, withdraw from the complaint, re-lodge and seek immediate termination in order to access the Federal Court.

148. The section will also provide that the President may delegate the inquiry and conciliation of such complaints to a person independent of HREOC, pursuant to s. 19(2)(b) of the new HREOCA.

New section 46PF - Inquiry by President

149. This section sets out some of the President's general powers in relation to the inquiry and conciliation process.

150. Subsection (1) provides that the President is obliged to inquire into, and to attempt to conciliate, complaints referred to him or her by HREOC under section 46PD.

151. Subsection (2) gives the President the power to combine the inquiry or conciliation processes in relation to two or more complaints if he or she thinks that the complaints arise out of the same or substantially the same circumstances or subject.

152. Subsection (3) provides for the amendment of complaints to add further respondents. It provides that any complainant or respondent may, with the leave of the President, amend the complaint to add as a respondent any person who is alleged to have done the unlawful discrimination on which the complaint is based. This will allow the addition of any other person who is potentially responsible for the alleged unlawful discrimination, including a person who is deemed (by operation of sections 122 or 123 of the DDA, sections 18A or 18E of the RDA, or sections 105, 106 or 107 of the SDA) to be responsible for the alleged unlawful discrimination.

153. Although subsection (3) makes specific provision for the amendment of a complaint to add a respondent, this is not intended to imply that other particulars of the complaint may not be amended subsequent to lodgement and prior to termination.

154. Subsection (4) makes it clear that a complaint may not be amended (pursuant to subsection (3)) after it has been terminated by the President under section 46PH.

New section 46PG - Withdrawal of complaint

155. This section makes provision for the withdrawal of complaints with leave of the President. Withdrawal covers situations where, for example, the affected person(s) wish to discontinue with their complaint, or where a conciliated agreement has been reached. If a complaint is withdrawn, a notice of termination will not issue and the affected person(s) will not be able to access the Federal Court to pursue the matter further.

156. The President must be satisfied that all the affected persons want the complaint withdrawn before giving leave for the complaint to be withdrawn. If the President is not so satisfied, the complaint remains in HREOC. This ensures that those who wish to continue with the complaint can do so without interruption. Those who sought unsuccessfully to have the complaint withdrawn may withdraw from the complaint.

New section 46PH - Termination of complaint

157. This section sets out the grounds on which the President may terminate a complaint, along with certain procedural requirements relating to the termination of a complaint.

158. Subsection (1) is modelled on the grounds for the Disability Discrimination Commissioner deciding not to proceed with the handling of a complaint, which are currently set out in subsection 71(2) of the DDA. The new subsection provides that the President may terminate a complaint on any of the following grounds:

- (a) the President is satisfied that the alleged unlawful discrimination is not unlawful discrimination;
- (b) the complaint was lodged more than 12 months after the alleged unlawful discrimination took place;
- (c) the President is satisfied that the complaint was trivial, vexatious, misconceived or lacking in substance;
- (d) in a case where some other remedy has been sought in relation to the subject matter of the complaint - the President is satisfied that the subject matter of the complaint has been adequately dealt with. This ground gives the President a discretion to terminate a complaint in a wide range of circumstances. By way of example, this ground might be used where the complainants and/or the affected persons have already obtained appropriate redress in relation to the subject matter of the complaint, or where the complainants and/or the affected persons have already pursued (with or without success) a number of other avenues for dealing with their complaint;
- (e) the President is satisfied that some other more appropriate remedy in relation to the subject matter of the complaint is reasonably available to each affected person;
- (f) in a case where the subject matter of the complaint has already been dealt with by HREOC or another statutory authority - the President is satisfied that the subject matter of the complaint has been adequately dealt with;

- (g) the President is satisfied that the subject matter of the complaint could be more effectively or conveniently dealt with by another statutory authority;
- (h) the President is satisfied that the subject matter of the complaint involves an issue of public importance that should be considered by the Federal Court. This ground might be used by the President where a complaint raises issues of such importance (for example, for the human rights of a particular group, or for the administration of the human rights legislation) that a settlement of those issues as between the parties would not be in the public interest;
- (i) the President is satisfied that there is no reasonable prospect of the matter being settled by conciliation. This ground is intended to cover both those situations in which the President forms a view at an early stage that a matter is unlikely to be capable of successful conciliation, and those situations in which the President attempts to settle a matter by conciliation but is unsuccessful.

159. Subsection (2) imposes on the President an obligation to notify the complainants in writing of his or her decision to terminate a complaint, and to provide reasons for that decision. The provision of a notice under this subsection is one of the pre-conditions to the making of an application to the Federal Court under section 46PO.

160. The requirement to provide reasons for the decision to terminate must be read in the light of section 25D of the *Acts Interpretation Act 1901*. That section provides as follows:

Where an Act requires a tribunal, body or person making a decision to give written reasons for the decision, whether the expression "reasons", "grounds" or any other expression is used, the instrument giving the reasons shall also set out the findings on material questions of fact and refer to the evidence or other material on which those findings were based.

161. Subsection (3) provides that the President must, on request, give to any affected person who is not also a complainant (and therefore entitled to be given a notice directly) a copy of a notice provided under subsection (2). This provision is intended to deal with the situation in which an affected person wishes to commence proceedings in the Federal Court without the assistance of a person who was a complainant during the inquiry and conciliation processes, but does not have access to a copy of the notice for the purposes of complying with subsection 46PO(1).

162. Subsection (4) will give the President the discretion to re-open a complaint which had previously been terminated pursuant to section 46PH(1). However, the revocation of termination must take place before an affected person makes an application to the Federal Court.

163. The power could be exercised if, for example, information pertinent to a complaint is found subsequent to termination. This would allow the parties a further opportunity to make use of the less formal and inexpensive conciliation process in HREOC. The revocation provision has the potential to deflect matters away from the Court, giving parties another chance to attempt conciliation.

New section 46PI - President's power to obtain information

164. This section deals with the President's power to require the production of information or documents which may be relevant to the inquiry process. Section 46PM provides that it is an offence to refuse or fail, without reasonable excuse, to give information, or to produce a document, when required to do so under this section.

165. Subsection (1) provides that the section applies where the President has reason to believe that a person is capable of providing information (defined as 'relevant information') or producing documents (defined as 'relevant documents') relevant to an inquiry under this Division.

166. Subsection (2) gives the President the power to serve a written notice on a person to whom the section applies. That notice can require the person to do either or both of the following within a specified time period, or at a specified date and time (each of which must be reasonable):

- (a) give the President a signed document containing any relevant information required by the notice;
- (b) produce to the President any relevant documents specified in the notice.

167. Subsection (3) provides that where a notice is served on a body corporate, any document containing relevant information that is required by the notice (ie. a document under paragraph (2)(a)) must be signed by an officer of the body corporate.

168. Subsection (4) deals with documents produced to the President in accordance with a requirement in this section. It provides that the President may do any of the following in relation to such documents:

- (a) take possession of the documents;
- (b) make copies of the documents or take extracts from them;
- (c) retain possession of the documents for as long as is necessary for the purposes of the inquiry to which the documents relate.

169. Subsection (5) applies to those documents of which the President retains possession. It provides that the President must allow such documents to be inspected, at any reasonable time, by any person who would be entitled to inspect the documents if they were not in the possession of the President.

New section 46PJ - Directions to attend compulsory conference

170. This section provides for the holding of a compulsory conference for the purpose of dealing with a complaint of alleged unlawful discrimination. Section 46PL provides that it is an offence to fail to attend a compulsory conference when required to do so under this section.

171. Subsection (1) gives the President a general discretion to hold a conference. Such a conference must be presided over either by the President or by another suitable person (other than a member of HREOC) appointed by the President.

172. Subsection (2) provides that a conference under this section must be held at a reasonable time and place.

173. Subsection (3) is designed to ensure that, although the President retains a discretion as to whether or not to hold a conference, if the President does hold one, at least each complainant and each respondent is present at it. If the President decides to hold a conference, he or she must give a written notice to each complainant and each respondent directing them to attend the conference. This subsection does not preclude the President from requiring (under subsection (4)) the attendance of other persons, for example any affected persons.

174. Subsection (4) gives the President a general discretion to require the attendance at a conference of persons other than the complainants and the respondents. The President may, by notice in writing, direct any of the following persons to attend the conference:

- (a) any person who, in the President's opinion, is likely to be able to provide information relevant to the inquiry. This could include any or all of the affected persons;
- (b) any person whose presence at the conference is, in the President's opinion, likely to be conducive to the settlement of the matter to which the alleged unlawful discrimination relates.

175. Subsection (5) provides that any person directed to attend a conference is entitled to be paid by the Commonwealth a reasonable sum for that person's attendance at the conference.

176. Subsection (6) provides that the President may, in a notice under this section, also require a person to produce at the conference any documents that are specified in the notice.

New section 46PK - Proceedings at compulsory conference

177. This section deals with the conduct of a compulsory conference held under section 46PJ. Section 46PM provides that it is an offence to refuse or fail, without reasonable excuse, to give information, or to produce a document, when required to do so under this section.

178. Subsection (1) provides that the person presiding at a conference may require a person attending the conference to produce a document.

179. Subsection (2) provides that a conference must be held in private and is to be conducted in such manner as the person presiding thinks fit. This provision is intended to ensure that, aside from the minimum formal requirements, the person presiding retains the maximum degree of flexibility possible in relation to the conduct of a conference.

180. Subsection (3) deals with attendance by a body of persons at a conference. It provides that, subject to subsection (4), such a body (whether corporate or unincorporated) that is directed under section 46PJ to attend a conference is taken to attend the conference (for example, for the purposes of

the offence provision in section 46PL) if an officer or employee of the body attends on behalf of the body.

181. Subsection (4) deals with the representation of persons and bodies at a conference. Unless the person presiding at the conference consents:

- (a) an individual is not entitled to be represented at the conference by another person; and
- (b) a body of persons (whether corporate or unincorporated) is not entitled to be represented at the conference by a person other than an officer or employee of that body.

182. Subsection (5) makes special provision for individuals with disabilities. It provides that, notwithstanding subsection (4), an individual who is unable to attend a conference because of a disability is entitled to nominate another person to attend instead on his or her behalf.

183. Subsection (6) is modelled on subsection 123(6) of the DDA. It provides that any conduct by a person who attends a conference on behalf of a body of persons (whether incorporated or unincorporated) is to be treated, for the purposes of the new HREOCA, as conduct of the body.

184. Subsection (7) makes it clear that the term 'disability' in this section has the same meaning as in the DDA.

New section 46PL - Failure to attend compulsory conference

185. This section creates an offence of failing to attend a conference under section 46PJ. The offence carries a penalty of 10 penalty units. Penalty units are dealt with in section 4AA of the *Crimes Act 1914*.

186. The section provides that a person who has been directed to attend a conference must not, without reasonable excuse:

- (a) fail to attend as required by the direction; or
- (b) fail to attend and report from day to day unless excused, or released from further attendance, by the person presiding at the conference.

New section 46PM - Failure to give information or produce documents

187. This section creates an offence of failing to give information or produce documents when required to do so under section 46PI, 46PJ or 46PK. The offence carries a penalty of 10 penalty units. Penalty units are dealt with in section 4AA of the *Crimes Act 1914*.

188. Subsection (1) provides that a person must not, without reasonable excuse, refuse or fail to give information, or to produce a document, when so required under section 46PI, 46PJ or 46PK.

189. Subsection (2) provides that subsection 4K(2) of the *Crimes Act 1914* does not apply to this section. Section 4K of the *Crimes Act 1914* deals with continuing and multiple offences. Subsection 4K(1) provides that where a law of the Commonwealth requires that an act or thing be done within a particular

period or before a particular time, then, generally speaking, the obligation to do that act or thing continues, even after the period has expired or the time has passed, until the act or thing is done. Subsection 4K(2) provides as follows:

Where a refusal or failure to comply with a requirement referred to in subsection (1) is an offence against a law of the Commonwealth, a person is guilty of an offence in respect of each day during which the person refuses or fails to comply with that requirement, including the day of a conviction for any such offence or any later day.

190. Subsection (3) is similar in substance to existing subsection 23(3) of the HRA. It provides that one possible 'reasonable excuse' for the purposes of subsection (1) is that, in answering a question or producing a document, a person might tend to incriminate themselves, or to expose themselves to a penalty. The subsection makes it clear that it is not intended to limit what might amount to a 'reasonable excuse' for the purposes of subsection (1).

New section 46PN - False or misleading information

191. This section creates an offence of giving false or misleading information. It carries a penalty of imprisonment for six months.

192. The section provides that a person must not give information or make a statement to HREOC, to the President or to any other person exercising powers or performing functions under the new HREOCA, knowing that the information is false or misleading in a material particular.

New Division 2 - Proceedings in the Federal Court

New section 46PO - Application to Court if complaint is terminated

193. This section sets out the pre-conditions to the making of an application to the Federal Court in respect of a terminated complaint.

194. Subsection (1) provides that the two 'triggering' events for a Federal Court application are the termination of a complaint by the President under section 46PE or 46PH, and the giving of a notice to any person under subsection 46PH(2). If both of these events occur, an affected person may make an application to the Federal Court alleging unlawful discrimination by one or more of the respondents to the terminated complaint.

195. It should be noted that although a complaint may have been through the inquiry and conciliation processes as a 'representative complaint' under section 46P, if the complainants and other class members wish to continue with representative proceedings when an application is made to the Federal Court in respect of that complaint, they must comply with the requirements set out in Part IVA of the *Federal Court of Australia Act 1976*, which differ from those applying to 'representative complaints' under section 46P of the new HREOCA.

196. It should also be noted that the effect of subsection (1) is that a complainant who was not himself or herself an 'affected person' (ie. one who brought a complaint only on behalf of persons aggrieved, without any personal

interest in the subject matter) will not be entitled to commence Federal Court proceedings in respect of a terminated complaint - only 'affected persons' may do so.

197. Subsection (2) provides that an application to the Federal Court under subsection (1) must be made within 28 days of the date of the notice under subsection 46PH(2), or within such further time as the Court allows.

198. Subsection (3) deals with the unlawful discrimination which may be alleged in an application to the Federal Court under subsection (1). It provides that the unlawful discrimination alleged in the application:

- (a) must be the same, or the same in substance, as the unlawful discrimination that was the subject of the terminated complaint; or
- (b) must arise out of the same, or substantially the same, acts, omissions or practices that were the subject of the terminated complaint. This second limb is intended to cover situations in which different instances of unlawful discrimination arise out of essentially the same factual circumstances. For example, an Asian woman may make a complaint to HREOC alleging that her dismissal from employment amounted to discrimination on the ground of her sex. On the basis of things said or done during the inquiry and conciliation process, the woman may form the view that her dismissal also amounted to discrimination on the ground of her race. If the complaint cannot be conciliated and is terminated, and the woman makes an application to the Federal Court in respect of the terminated complaint, this paragraph may permit her to allege racial discrimination in that application.

199. Subsection (4) sets out a non-exhaustive list of orders which the Federal Court may make if it is satisfied that there has been unlawful discrimination by any respondent. The list of orders is modelled on the list of determinations, in paragraph 103(1)(a) of the DDA, that HREOC may currently make, and it is not intended to limit the Court's discretion to make any orders that it considers appropriate in the circumstances of the individual case before it.

200. The Court may make such orders (including a declaration of right) as it thinks fit, including any of the following orders or orders to similar effect:

- (a) an order declaring that the respondent has committed unlawful discrimination and directing the respondent not to repeat or continue such unlawful discrimination;
- (b) an order requiring a respondent to perform any reasonable act or course of conduct to redress any loss or damage suffered by an applicant. It is envisaged that this paragraph would permit the Court to order, for example, that a respondent make an apology to an applicant;
- (c) an order requiring a respondent to employ or re-employ an applicant;
- (d) an order requiring a respondent to pay to an applicant damages by way of compensation for any loss or damage suffered because of the conduct of the respondent;
- (e) an order requiring a respondent to vary the termination of a contract or agreement to redress any loss or damage suffered by an applicant;
- (f) an order declaring that it would be inappropriate for any further action to be taken in the matter.

201. Subsection (5) provides that “applicant” in section 46PO(4) includes a reference to a group member in a representative proceeding commenced under Part IVA of the Federal Court of Australia Act 1976.

202. Subsection (6) gives the Court a power to grant interim injunctions pending the determination of proceedings. This subsection only applies where an application has already been made to the Federal Court under subsection (1). Section 46PP provides for the granting of injunctions in relation to complaints before HREOC.

203. Subsection (7) makes it clear that the Court has the power to discharge or vary any order that it has made under this section, including an order under subsection (6) granting an injunction, while subsection (8) provides that the Court cannot, as a condition of granting an interim injunction under subsection (6), require a person to give an undertaking as to damages.

New section 46PP - Interim injunction to maintain status quo etc.

204. This section provides for the granting by the Federal Court of interim injunctions in relation to complaints which are before HREOC, but which have not yet been terminated. By virtue of subsection 46PO(6), the Court is also vested with a power to grant injunctions in relation to proceedings that are already before it.

205. Subsection (1) sets out the bases on which the Federal Court may grant an interim injunction after a complaint has been lodged with HREOC. Such an injunction may be granted to maintain:

- (a) the status quo, as it existed immediately before the complaint was lodged; or
- (b) the rights of any complainant, respondent or affected person.

206. The bases on which an injunction may be granted under this subsection are narrower than the broad discretion which the Court retains under subsection 46PM(6) in relation to proceedings which are already before it.

207. Subsection (2) sets out who may make an application for an interim injunction. It provides that such an application may be made by HREOC, a complainant, a respondent or an affected person.

208. While the decision whether or not to apply for an interim injunction is intentionally left to the discretion of HREOC, it is envisaged that the discretion will only be exercised in limited circumstances, for example where a complaint raises issues of such public importance that HREOC is justified in taking action to protect the relative positions of the parties pending the determination of those issues.

209. Subsection (3) provides that an injunction under this section cannot be granted after the complaint has been withdrawn (s. 46PG) or terminated (s. 46PE or 46PH). If there were a need to seek an injunction after that time, it would be necessary first to commence proceedings in the Federal Court under section 46PO.

210. Subsection (4) makes it clear that the Court retains the power to discharge or vary an injunction granted under this section.

211. Subsection (5) provides that the Court cannot, as a condition of granting an interim injunction under subsection (1), require a person to give an undertaking as to damages.

New section 46PQ - Right of representation

212. Subsection (1) provides that a party in proceedings under this Division:

- (a) may appear in person,;
- (b) may be represented by a barrister or a solicitor;
- (c) may be represented by another person, unless the Court is of the opinion that it is inappropriate in the circumstances for the other person to appear. It is envisaged that a person other than a barrister or solicitor who wishes to represent a party will have some relevant expertise. However, he or she may not necessarily be legally qualified.

213. Subsection (2) will prohibit a person, other than a barrister or solicitor, from demanding or receiving a fee, reward, or payment for expenses incurred in representing a party in proceedings under Division 2 of Part IIB. The provision is similar to others which exist in Commonwealth anti-discrimination legislation and is considered necessary in order to prevent representatives, who are not officers of the Court (and therefore not bound by the rules of court), from acting unconscionably and charging inappropriate fees.

New section 46PR - Court not bound by technicalities

214. This section provides that the Federal Court, within the limits set by the Constitutional requirements relating to the exercise of judicial power, is not bound by technicalities and legal forms in relation to proceedings under this Division.

215. This section is intended, amongst other things, to provide a legislative framework for the Court to develop appropriate practices and procedures to facilitate the determination of human rights proceedings. It aims to ensure that the Court processes are accessible, efficient and as sensitive as possible to the needs of the parties, while not compromising the Court's overriding objective of deciding matters according to law as a court exercising the judicial power of the Commonwealth.

New section 46PS - Report by President to Court

216. This section provides for the making of a report by the President to the Federal Court in relation to terminated complaints.

217. Subsection (1) gives the President a discretion to make a written report in relation to a complaint that has been terminated under section 46PH. It is envisaged that the President would generally make such a report when requested to do so either by an applicant under section 46PO, or by a respondent to such an application. The President may also choose to make such a report in the absence of a request, for example where he or she becomes aware

that an application has been made to the Federal Court in respect of a terminated complaint which raises issues of public importance.

218. Subsection (2) provides that the report must not set out or describe anything said or done in the course of a conciliation process under this Part, including anything said or done at a conference held under section 46PJ. This is to protect the confidentiality of proceedings relating to the conciliation of a complaint.

219. Subsection (3) provides that the President may give a copy of any report prepared under this section to the applicant and the respondent, and to any relevant member of HREOC. It will be open to the applicant and the respondent, subject to any limitations imposed by the rules of evidence and procedure, to make such use of the contents of the report as they see fit. It is also envisaged that the report will assist a relevant member of HREOC to determine whether or not to seek leave, pursuant to section 46PV, to appear as *amicus curiae* in proceedings before the Federal Court.

New section 46PT - Assistance by Commission

220. This section provides that HREOC may help a person to prepare the forms required for the person to make an application under this Division.

221. This section is intended to give HREOC a discretion to help those applicants with special needs by assisting them to complete the initial forms required to make an application to the Federal Court in respect of a terminated complaint. It is not intended that HREOC will provide general legal advice to applicants, or that it will assist with the substantive pleadings or other documentation required for a Court proceeding.

New section 46PU - Assistance in proceedings before the Federal Court

222. This section provides for applications to the Attorney-General for legal or financial assistance in proceedings before the Federal Court under this Division.

223. Subsection (1) provides that a person who has either commenced or proposes to commence proceedings under this Division, or a person who is a respondent to proceedings under this Division, may apply to the Attorney-General for legal or financial assistance in relation to those proceedings.

224. Subsection (2) provides that if there is such an application to the Attorney-General for legal or financial assistance and the Attorney-General is satisfied that it will involve hardship to the person seeking such assistance to refuse the application, and it is reasonable in all the circumstances to grant the application, the Attorney-General may authorise the provision of such assistance. The Attorney-General may impose conditions on the provision of that legal or financial assistance.

New section 46PV - Amicus curiae function of Commission members

225. This section deals with the *amicus curiae* role of the members of HREOC (other than the President and the Privacy Commissioner) in proceedings before the Federal Court.

226. Subsection (1) provides that a 'special-purpose Commissioner' (defined in subsection (3)) has the function of assisting the Court, as *amicus curiae*, in the following proceedings under Division 2 of Part IIB:

- (a) proceedings in which the Commissioner thinks that the orders sought, or likely to be sought, may significantly affect the human rights of persons who are not involved in the proceedings;
- (b) proceedings which the Commissioner thinks have significant implications for the administration of the relevant Act or Acts;
- (c) proceedings that involve special circumstances that satisfy the Commissioner that it would be in the public interest for him or her to perform their function under this section.

227. Subsection (2) makes it clear that the Commissioners' function under this section may only be performed with the leave of the Court.

228. Subsection (3) defines the term 'special-purpose Commissioner' to mean:

- (a) the Aboriginal and Torres Strait Islander Social Justice Commissioner;
- (b) the Disability Discrimination Commissioner;
- (c) the Human Rights Commissioner;
- (d) the Race Discrimination Commissioner; and
- (e) the Sex Discrimination Commissioner.

New Part IIC - Referral of discriminatory awards and determinations to other bodies

New section 46PW - Referral of discriminatory awards to the Australian Industrial Relations Commission

229. This section deals with the handling of complaints relating to discriminatory acts done under an award, a Certified Agreement or an Enterprise Flexibility Agreement, and the referral of such an award or agreement to the Australian Industrial Relations Commission ('AIRC'). It is the same in all material respects as section 50A of the SDA (subject to some consequential changes as a result of the move to Presidential complaint handling, including the removal of the right to Presidential review of a decision not to refer an award or agreement, and taking into account amendments made by the *Workplace Relations and Other Legislation Amendment Act 1996*).

230. Subsection (1) provides that a complaint alleging that a person has done a discriminatory act under an award or agreement may be lodged with HREOC and specifies the persons who may lodge a complaint.

231. Subsection (2) provides that, if a complaint is received under subsection (1), HREOC must notify the President accordingly.

232. Subsection (3) provides that the President must refer the award or agreement to the AIRC if it appears to him or her that the act which is the subject of the complaint is discriminatory. However, the President is not

required to refer the award or agreement if he or she thinks that the complaint is frivolous, vexatious, misconceived or lacking in substance.

233. Subsection (4) provides that the President must give written notice to each of the complainants if he or she decides not to refer the award or agreement. The notice must include the reasons for the President's decision. The requirement to provide reasons for the decision not to refer an award or agreement must be read in the light of section 25D of the *Acts Interpretation Act 1901*. That section provides as follows:

Where an Act requires a tribunal, body or person making a decision to give written reasons for the decision, whether the expression "reasons", "grounds" or any other expression is used, the instrument giving the reasons shall also set out the findings on material questions of fact and refer to the evidence or other material on which those findings were based.

234. In line with the new scheme for complaint handling, there is no provision in the new HREOCA for review of the President's decision not to refer an award or agreement. However, the decision not to refer an award or agreement will be subject to judicial review by the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977*.

235. If the President does refer an award or agreement to the AIRC, subsection (5) requires the President to give written notice to each of the complainants of the outcome of the referral. This provision is required because the complainant may not necessarily be a party to review proceedings in the AIRC.

236. Subsection (6) enables the President to obtain documents or information for the purposes of this section by using his or her power under section 46PI.

237. Subsection (7) defines the terms 'award' and 'discriminatory act under an award'.

238. Subsection (8) makes it clear that, for the purposes of the definition of 'discriminatory act under an award' in subsection (7), the fact that an act is done in direct compliance with the award or agreement does not of itself mean that the act is reasonable.

New section 46PX - Referral of discriminatory determinations to the Remuneration Tribunal

239. This section deals with the handling of complaints relating to discriminatory acts done under a determination of the Remuneration Tribunal ('the Tribunal') made under the *Remuneration Tribunal Act 1973*, and the referral of such a determination to the Tribunal. It is the same in all material respects as section 50C of the SDA (subject to some consequential changes as a result of the move to Presidential complaint handling, including the removal of the right to Presidential review of a decision not to refer a determination).

240. Subsection (1) provides that a complaint alleging that a person has done a discriminatory act under a determination may be lodged with HREOC and specifies the persons who may lodge a complaint.

241. Subsection (2) provides that, if a complaint is received under subsection (1), HREOC must notify the President accordingly.

242. Subsection (3) provides that the President must refer the determination to the Tribunal if it appears to him or her that the act which is the subject of the complaint is discriminatory. However, the President is not required to refer the determination if he or she thinks that the complaint is frivolous, vexatious, misconceived or lacking in substance.

243. Subsection (4) provides that the President must give written notice to each of the complainants if he or she decides not to refer the determination. The notice must include the reasons for the President's decision. The requirement to provide reasons for the decision not to refer a determination must be read in the light of section 25D of the *Acts Interpretation Act 1901*. That section provides as follows:

Where an Act requires a tribunal, body or person making a decision to give written reasons for the decision, whether the expression "reasons", "grounds" or any other expression is used, the instrument giving the reasons shall also set out the findings on material questions of fact and refer to the evidence or other material on which those findings were based.

244. In line with the new scheme for complaint handling, there is no provision in the new HREOCA for review of the President's decision not to refer a determination. However, the decision not to refer a determination will be subject to judicial review by the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977*.

245. If the President does refer a determination to the Tribunal, subsection (5) requires the President to give written notice to each of the complainants of the outcome of the referral. This provision is required because the complainant may not necessarily be a party to the proceedings before the Tribunal.

246. Subsection (6) enables the President to obtain documents or information for the purposes of this section by using his or her power under section 46PI.

247. Subsection (7) defines the terms 'determination and 'discriminatory act under a determination'.

248. Subsection (8) makes it clear that, for the purposes of the definition of 'discriminatory act under an determination' in subsection (7), the fact that an act is done in direct compliance with the determination does not of itself mean that the act is reasonable.

New section 46PY - Referral of discriminatory determinations to the Defence Force Remuneration Tribunal

249. This section deals with the handling of complaints relating to discriminatory acts done under a determination of the Defence Force Remuneration Tribunal ('DFRT') made under the *Defence Act 1903*, and the referral of such a determination to the DFRT. It is the same in all material respects as section 50E of the SDA (subject to some consequential changes as a

result of the move to Presidential complaint handling, including the removal of the right to Presidential review of a decision not to refer a determination).

250. Subsection (1) provides that a complaint alleging that a person has done a discriminatory act under a determination may be lodged with HREOC and specifies the persons who may lodge a complaint.

251. Subsection (2) provides that, if a complaint is received under subsection (1), HREOC must notify the President accordingly.

252. Subsection (3) provides that the President must refer the determination to the DFRT if it appears to him or her that the act which is the subject of the complaint is discriminatory. However, the President is not required to refer the determination if he or she thinks that the complaint is frivolous, vexatious, misconceived or lacking in substance.

253. Subsection (4) provides that the President must give written notice to each of the complainants if he or she decides not to refer the determination. The notice must include the reasons for the President's decision. The requirement to provide reasons for the decision not to refer a determination must be read in the light of section 25D of the *Acts Interpretation Act 1901*. That section provides as follows:

Where an Act requires a tribunal, body or person making a decision to give written reasons for the decision, whether the expression "reasons", "grounds" or any other expression is used, the instrument giving the reasons shall also set out the findings on material questions of fact and refer to the evidence or other material on which those findings were based.

254. In line with the new scheme for complaint handling, there is no provision in the new HREOCA for review of the President's decision not to refer a determination. However, the decision not to refer a determination will be subject to judicial review by the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977*.

255. If the President does refer a determination to the DFRT, subsection (5) requires the President to give written notice to each of the complainants of the outcome of the referral. This provision is required because the complainant may not necessarily be a party to the proceedings before the DFRT.

256. Subsection (6) enables the President to obtain documents or information for the purposes of this section by using his or her power under section 46PI.

257. Subsection (7) defines the terms 'determination' and 'discriminatory act under a determination'.

258. Subsection (8) makes it clear that, for the purposes of the definition of 'discriminatory act under an determination' in subsection (7), the fact that an act is done in direct compliance with the determination does not of itself mean that the act is reasonable.

Item 59 - After Section 49

259. This item of the Schedule will insert in the new HREOCA three new sections after existing section 49.

New section 49A - Information stored otherwise than in written form

260. This section provides that if information is recorded or stored by means of a mechanical, electronic or other device, a duty imposed by the new HREOCA to produce the document recording that information is to be treated as a duty to provide a document containing a clear reproduction in writing of the information. This section is based on section 128 of the DDA.

New section 49B - Jurisdiction of the Federal Court

261. This section confers on the Federal Court jurisdiction with respect to civil matters arising under Parts IIB and IIC. It is based on sections 130 of the DDA and 115 of the SDA.

New section 49C - Compensation for acquisition of property

262. This section provides an entitlement to just terms compensation in respect of an acquisition of property. It is based on section 131 of the DDA.

263. Subsection (1) provides that if the application of any provision of the new HREOCA would result in an acquisition of property from any person otherwise than on just terms, that person is entitled to just terms compensation from the Commonwealth.

264. Subsection (2) provides that the Federal Court has exclusive jurisdiction with respect to matters arising under subsection (1), subject to the High Court's original jurisdiction under section 75 of the Constitution.

Racial Discrimination Act 1975

265. This part of the Schedule makes a number of consequential amendments to the RDA which arise from the transfer of the legislative structure for complaint handling to the HRA.

Item 60 - Subsection 3(1) (definition of *class member*)

266. This item will repeal the definition of 'class member'. The provision is no longer necessary in the RDA as uniform complaint provisions are to be inserted in the HRA. A similar definition will be inserted in the HRA.

Item 61 - Subsection 3(1) (definition of *Federal Court*)

267. This item will repeal the definition of 'Federal Court'. The provision is no longer necessary in the RDA as uniform complaint provisions are to be inserted in the HRA. A similar definition will be inserted in the HRA.

Item 62 - Subsection 3(1) (definition of *registered organisation*)

268. This item will repeal the definition of 'registered organisation'. The provision is no longer necessary in the RDA as uniform complaint provisions are to be inserted in the HRA. A definition of 'trade union' will be inserted in the HRA.

Item 63 - Subsection 3(1) (definition of *representative complaint*)

269. This item will repeal the definition of 'representative complaint'. The provision is no longer necessary in the RDA as uniform complaint provisions are to be inserted in the HRA. A definition of this term will be inserted in the HRA.

Items 64 and 65 - Subsection 6A(2)

270. These items are consequential amendments made necessary by the transfer of the legislative structure for complaint handling to the HRA.

271. Under the old law, subsection 6A(2) restricted a complainant from making similar complaints of racial discrimination in respect of the same act or omission under both the State and Commonwealth law. With the consolidation of the complaint handling process in the one Act, this amendment preserves that limited restriction. It does not restrict a person from making a subsequent complaint alleging, for example, sex or disability discrimination arising out of the same act or omission. A similar amendment has been made to related provisions in the SDA and DDA.

Item 66 - Subsection 18C(1) (note)

272. This item will replace the reference in the note to subsection 18C(1) to section 22 of the RDA with a reference to section 46P of the new HREOCA. It is consequential on the transfer of the legislative structure for complaint handling to the HRA.

Item 67 - Part III (heading)

273. This item is a consequential amendment made necessary by the transfer of the legislative structure for complaint handling to the HRA. It will change the heading of Part III from 'Inquiries and Civil Proceedings' to 'Race Discrimination Commissioner and functions of Commission'.

Item 68 - Section 19A

274. This item will repeal section 19A of the RDA, which currently specifies what is meant by a reference to an unlawful act under Part II of that Act. With the transfer of the legislative structure for complaint handling to the HRA, the same result will be achieved by inserting in subsection 3(1) of the HRA a definition of 'unlawful discrimination' which includes those acts which are currently included by virtue of section 19A of the RDA.

Item 69 - Paragraph 20(1)(a)

275. This item will repeal the provision which confers on HREOC the functions of inquiring into, and attempting to conciliate, complaints received under the RDA. Under the new scheme, the President will undertake the functions of inquiring into, and attempting to conciliate, complaints lodged under Part IIB of the new HREOCA.

Item 70 - At the end of subsection 20(1)

276. This is a consequential amendment and inserts a note into the RDA to inform the reader that the provisions dealing with the inquiry and conciliation of complaints of racial discrimination have been placed in Part IIB of the new HREOCA.

Item 71 - Subsection 20(2)

277. Subsection 20(2) currently places a restriction on the involvement of the Race Discrimination Commissioner in an inquiry held by HREOC under Division 3 of Part III of the RDA. Under the new scheme, HREOC will not undertake such inquiries. This item will repeal the provision as it is no longer necessary.

Item 72 - Sections 21, 22 and 23

278. Section 21 currently provides for the Race Discrimination Commissioner to undertake inquiry and conciliation functions on behalf of HREOC. These functions will now be undertaken by the President. Section 21 will therefore be repealed.

279. Section 22 currently provides for the making of complaints under the RDA. Under the new uniform scheme, complaint handling provisions will be included in the HRA. Section 22 will therefore be repealed.

280. Section 23 currently provides for the Race Discrimination Commissioner, in certain circumstances, to be deemed to be a complainant for the purposes of an inquiry by HREOC. Under the new scheme HREOC will no longer undertake such inquiries and the provision will therefore be repealed.

Item 73 - Divisions 2, 3, 3A and 4 of Part III

281. Divisions 2, 3, 3A and 4 of Part III of the RDA currently deal (respectively) with inquiry and conciliation by the Race Discrimination Commissioner, inquiries by HREOC, enforcement of determinations involving respondents other than Commonwealth agencies and review and enforcement of determinations involving Commonwealth agencies.

282. Under the new scheme, only the inquiry and conciliation functions will remain with HREOC. These are to be undertaken by the President under Part IIB of the new HREOCA. This item will repeal the provisions which form the basis of the scheme for complaints under the RDA.

Item 74 - Paragraph 27(2)(e)

283. This item is a consequential amendment made necessary by the transfer of the legislative structure for complaint handling to the HRA.

284. Currently, paragraph 27(2)(e) makes it an offence to subject a person to specified detrimental acts by reason that the person has made, or proposes to make, a complaint under the RDA. Since action will now be taken under the new HREOCA, the reference to the RDA will be amended to refer to a complaint under either the RDA or the new HREOCA.

Item 75 - At the end of paragraph 27(2)(f)

285. This item is a consequential amendment made necessary by the transfer of the legislative structure for complaint handling to the HRA.

286. Currently, paragraph 27(2)(f) makes it an offence to subject a person to specified detrimental acts by reason that the person has given, or proposes to give, information to a person exercising or performing any power or function under the RDA. Since action arising from complaints will now be taken under the new HREOCA, the provision will be amended to refer to the giving of information under either the RDA or the new HREOCA.

Item 76 - Paragraph 27(2)(g)

287. This item is a consequential amendment made necessary by the transfer of the legislative structure for complaint handling to the HRA.

288. Currently, paragraph 27(2)(g) makes it an offence to subject a person to specified detrimental acts by reason that the person has attended, or proposes to attend, a conference under section 24C of the RDA. Since action will now be taken under the new HREOCA, the provision will be amended to refer to a conference under either the RDA or new HREOCA.

Item 77 - Sections 27A, 27B, 27C and 27D

289. Sections 27A, 27B, 27C and 27D create offences for certain acts in relation to the inquiry and conciliation functions. As the new complaint handling scheme will be set out in Part IIB of the new HREOCA, these provisions will be repealed from the RDA. To the extent that there is a need for similar offences in the new complaint handling scheme, provision will be made in sections 46PL, 46PM and 46PN of the new HREOCA.

Item 78 - Section 27E

290. This item is a consequential amendment made necessary by the transfer of all complaint handling functions to the President of HREOC. It will amend section 27E to include within the scope of the offence the giving of false or misleading information, or the making of a false or misleading statement, to the President, in addition to the Race Discrimination Commissioner and HREOC. This will reflect the President's role in complaint handling.

Item 79 - Subsection 45(2) - Protection from civil action

291. Subsection 45(2) of the RDA currently provides that a person is not liable to an action, suit or other proceedings in respect of loss, damage or injury simply because they:

- (a) have made a complaint under the RDA; or
- (b) have provided, amongst other things, a submission, document or evidence to the Race Discrimination Commissioner or to HREOC.

292. As complaints will no longer be lodged under the RDA the provision will be amended to remove references to complaints. For complaints lodged under the uniform scheme in the new HREOCA, a similar protection already exists in the HRA at section 48.

Item 80 - Subsection 45(2)

293. This item will remove a reference to “the complaint or” which was not removed by the previous amendment at item 79.

Remuneration Tribunal Act 1973

294. This part of the Schedule makes two consequential amendments to the *Remuneration Tribunal Act 1973* which arise from the transfer of the legislative structure for complaint handling to the HRA.

Item 81 - Subsection 8B(1)

295. This item is a consequential amendment made necessary by the transfer of the legislative structure for complaint handling to the HRA. The item will remove the reference to the SDA and substitute a reference to section 46PX of the new HREOCA.

Item 82 - Section 8C

296. This item is a consequential amendment made necessary by the transfer of the legislative structure for complaint handling to the HRA. The item will remove the reference to the SDA and substitute a reference to section 46PX of the new HREOCA.

Sex Discrimination Act 1984

297. This part of the Schedule makes a number of consequential amendments to the SDA which arise from the transfer of the legislative structure for complaint handling to the HRA.

Item 83 - Subsection 4(1) (definition of *class member*)

298. This item will repeal the definition of ‘class member’. The provision is no longer necessary in the SDA as uniform complaint provisions are to be inserted in the HRA. A similar definition will be inserted in the HRA.

Item 84 - Subsection 4(1) (definition of *Federal Court*)

299. This item will repeal the definition of 'Federal Court'. The provision is no longer necessary in the SDA as uniform complaint provisions are to be inserted in the HRA. A similar definition will be inserted in the HRA.

Item 85 - Subsection 4(1) (definition of *representative complaint*)

300. This item will repeal the definition of 'representative complaint'. The provision is no longer necessary in the SDA as uniform complaint provisions are to be inserted in the HRA. A definition of this term will be inserted in the HRA.

Item 86 - Subsection 4(1) (definition of *respondent*)

301. This item will repeal the definition of 'respondent'. The provision is no longer necessary in the SDA as uniform complaint provisions are to be inserted in the HRA. A similar definition will be inserted in the HRA.

Items 87 and 88 - Subsection 10(4)

302. These items are consequential amendments made necessary by the transfer of the legislative structure for complaint handling to the HRA.

303. Under the old law, subsection 10(4) restricted a complainant from making similar complaints on grounds covered by the SDA, in respect of the same act or omission, under both the State and Commonwealth law. With the consolidation of the complaint handling process in the one Act, this amendment preserves that limited restriction. It does not restrict a person from making a subsequent complaint alleging, for example, disability or racial discrimination arising out of the same act or omission. A similar amendment has been made to related provisions in the DDA and RDA.

Items 89 and 90 - Subsection 11 (4)

304. These items are consequential amendments made necessary by the transfer of the legislative structure for complaint handling to the HRA.

305. Under the old law, subsection 11(4) performed a similar function to subsection. 10(4) of the SDA by restricting similar complaints under both State and Commonwealth law. However subsection. 11(4) refers to complaints made under a law of a State or Territory that furthers the object of the Convention on the Elimination of All Forms of Discrimination Against Women, (see s.11(2) SDA). With the consolidation of the complaint handling process in the one Act, this amendment preserves that limited restriction. It does not restrict a person from making a subsequent complaint alleging, for example, disability or racial discrimination arising out of the same act or omission.

Item 91 - Part III (heading)

306. This item is a consequential amendment made necessary by the transfer of the legislative structure for complaint handling to the HRA. This item will change the heading of Part III from 'Inquiries and Civil Proceedings' to 'Functions of Human Rights and Equal Opportunity Commission'.

Item 92 - Section 47A

307. This item will repeal section 47A of the SDA, which currently specifies what is meant by a reference to an unlawful act under Part II of that Act. With the transfer of the legislative structure for complaint handling to the HRA, the same result will be achieved by inserting in subsection 3(1) of the HRA a definition of 'unlawful discrimination' which includes those acts which were currently included by virtue of section 47A of the SDA.

Item 93 - Paragraphs 48(1)(a), (b) and (ca)

308. This item will repeal the provisions which confer on HREOC the functions of inquiring into, attempting to conciliate and making determinations in relation to, complaints received under the SDA. Under the new scheme, the President will perform the functions of inquiring into, and attempting to conciliate, complaints lodged under new Part IIB, and handling complaints relating to discriminatory awards and agreements and determinations under Part IIC of the new HREOCA.

Item 94 -At the end of subsection 48(1)

309. This is a consequential amendment which inserts a note into the SDA to inform the reader that the provisions dealing with the inquiry and conciliation of complaints of alleged unlawful discrimination on grounds covered by the SDA have been placed in Part IIB of the new HREOCA.

Item 95 - Subsection 48(3)

310. Subsection 48(3) places a restriction on the involvement of the Sex Discrimination Commissioner in an inquiry held by HREOC under existing Division 3 of Part III of the SDA. Under the new scheme, HREOC will not undertake such inquiries. This item will therefore repeal the provision as it is no longer necessary. (See also item 97, which will repeal, amongst other things, Division 3 of Part III of the SDA.)

Item 96 - Sections 49, 50, 50A, 50B, 50C, 50D, 50E, 50F and 51

311. Section 49 currently provides for the Sex Discrimination Commissioner to undertake inquiry and conciliation functions on behalf of HREOC. These functions will now be undertaken by the President. Section 49 will therefore be repealed.

312. Section 50 currently provides for the making of complaints under the SDA. Under the new uniform scheme, complaint handling provisions will be included in the HRA. Section 50 will therefore be repealed.

313. Sections 50A - 50F currently deal with the referral of discriminatory awards and agreements to the Australian Industrial Relations Commission, and the referral of discriminatory determinations to the Remuneration Tribunal and the Defence Force Remuneration Tribunal. These functions will now be undertaken by the President. These sections will therefore be repealed.

314. Section 51 currently provides for the Sex Discrimination Commissioner, in certain circumstances, to be deemed to be a complainant for the purposes of an inquiry by HREOC. Under the new scheme HREOC will no longer undertake such inquiries and the provision will therefore be repealed.

Item 97 - Divisions 2, 3, 3A and 4 of Part III

315. Divisions 2, 3, 3A and 4 of Part III of the SDA currently deal (respectively) with inquiry and conciliation by the Sex Discrimination Commissioner of complaints of unlawful discrimination, inquiries by HREOC, enforcement of determinations involving respondents other than Commonwealth agencies and review and enforcement of determinations involving Commonwealth agencies.

316. Under the new scheme, only the inquiry and conciliation functions will remain with HREOC. These are to be undertaken by the President under new Part IIB of the new HREOCA. This item will repeal the provisions which form the basis of the scheme for complaints under the SDA.

Item 98 - Section 87

317. This item is a consequential amendment made necessary by the transfer of all complaint handling functions to the President of HREOC. This item will change the reference to the Sex Discrimination Commissioner to a reference to the President.

Item 99 - Sections 88, 89, 90 and 91

318. Sections 88, 89, 90 and 91 create offences for certain acts in relation to the inquiry and conciliation functions. As the provisions dealing with the new uniform complaint handling scheme are set out in Part IIB of the new HREOCA, these provisions will be repealed from the SDA. To the extent that there is a need for similar offences in the new complaint handling scheme, provision will be made in sections 46PI, 46PJ and 46PK of the new HREOCA.

Item 100 - Subsection 92(1)

319. This item is a consequential amendment made necessary by the transfer of all complaint handling functions to the President of HREOC and the transfer of the legislative scheme to the HRA. This item will therefore change the reference to subsection 50(1) of the SDA to a reference to section 46P.

Item 101 - Paragraph 92(1)(a)

320. This item, and items 102 and 104, effect consequential amendments made necessary by the transfer of all complaint handling functions to the President of HREOC. This item will change the current reference in paragraph 92(1)(a) to the Sex Discrimination Commissioner to a reference to the President.

Item 102 - Paragraph 92(1)(ab)

321. This a consequential amendments to the SDA made necessary by the inclusion of separate provisions dealing with the withdrawal and termination of complaints in the HRA.

322. This item will substitute a new paragraph, the effect of which is to set the withdrawal of a complaint under section 46PG as one of the limiting factors on the obligation of confidentiality imposed by section 92 of the SDA.

Item 103 - Paragraph 92(1)(b)

323. This a consequential amendments to the SDA made necessary by the inclusion of separate provisions dealing with the withdrawal and termination of complaints in the HRA. The amendment insert a reference to the withdrawal of complaints and the relevant section.

324. This item will substitute a new paragraph, the effect of which is to set the President's termination of a complaint under section 46PE or 46PH as one of the limiting factors on the obligation of confidentiality imposed by section 92 of the SDA.

Item 104 - Paragraph 92(2)(a)

325. This item will change the current references in paragraph 92(2)(a) to the Sex Discrimination Commissioner to references to the President.

Item 105 - Section 93

326. This item is a consequential amendment made necessary by the transfer of all complaint handling functions to the President of HREOC. It will amend section 93 to include within the scope of the offence the giving of false or misleading information, or the making of a false or misleading statement, to the President, in addition to the Sex Discrimination Commissioner and HREOC. This will reflect the President's role in complaint handling.

Item 106 - Paragraph 94(2)(a)

327. This is a consequential amendment made necessary by the transfer of the legislative structure for complaint handling to the HRA.

328. Under the old law, paragraph 94(2)(a) made it an offence to subject a person to specified detrimental acts by reason that the person has made, or proposes to make, a complaint under the SDA. Since action will now be taken under the new HREOCA, the provision will be amended to refer to action taken under either the SDA or the new HREOCA.

Item 107 - Paragraph 94(2)(b)

329. This item is a consequential amendment made necessary by the transfer of the legislative structure for complaint handling to the HRA.

330. Currently, paragraph 94(2)(b) provides that an act of victimisation includes, amongst other things, subjecting a person to any detriment because that person has brought, or proposes to bring, proceedings under the SDA. Since complaint based action will now be taken under the new HREOCA the provision will be amended to refer to action taken under either the SDA or the new HREOCA.

Item 108 - At the end of paragraph 94(2)(c)

331. This item is a consequential amendment made necessary by the transfer of the legislative structure for complaint handling to the HRA.

332. Currently, paragraph 94(2)(c) provides that an act of victimisation includes, amongst other things, subjecting a person to any detriment because that person has given, or proposes to give, information to a person exercising or performing any power or function under the SDA. Since complaint based action will now be taken under the new HREOCA, the provision will be amended to refer to action taken under either the SDA or the new HREOCA.

Item 109 - Paragraph 94(2)(d)

333. This item is a consequential amendment made necessary by the transfer of the legislative structure for complaint handling to the HRA.

334. Under the old law, paragraph 94(2)(d) provided that an act of victimisation includes, amongst other things, subjecting a person to any detriment because that person has attended, or proposes to attend, a conference under the SDA. Since complaint based action will now be taken under the new HREOCA, the provision will be amended to refer to a conference under either the SDA or the new HREOCA.

Item 110 - Paragraph 94(2)(e)

335. This item is a consequential amendment made necessary by the transfer of the legislative structure for complaint handling to the HRA.

336. Under the old law, paragraph 94(2)(e) provided that an act of victimisation includes, amongst other things, subjecting a person to any detriment because that person has appeared, or proposes to appear, as a witness before HREOC in proceedings under the SDA. Since complaint based action will now be taken under the new HREOCA, the provision will be amended to refer to action taken under either the SDA or the new HREOCA.

Item 111 - At the end of paragraph 94(2)(f)

337. This item is a consequential amendment made necessary by the transfer of the legislative structure for complaint handling to the HRA.

338. Currently, paragraph 94(2)(f) provides that an act of victimisation includes, amongst other things, subjecting a person to any detriment because that person has reasonably asserted, or proposes to assert, any rights under the SDA. Since complaint based action will now be taken under the new HREOCA,

the provision will be amended to refer to action taken under either the SDA or the new HREOCA.

Item 112 - Subsection 104(1)

339. This item is a consequential amendment made necessary by the transfer of all complaint handling functions to the President. It will remove a reference to section 49 of the SDA, which will be repealed as a result of the transfer (see item 96).

Item 113 - Subsection 107(2)

340. This provision will be repealed as it currently deals with conduct by directors, servants or agents at conferences or inquiries held under Part III of the SDA. Under the new scheme, the inquiry and conciliation functions will be undertaken by the President, and the provisions dealing with the uniform complaint handling scheme will be set out in Part IIB of the new HREOCA. Subsection 46PK(6) will achieve the same result in relation to compulsory conferences held under new Part IIB.

Item 114 - Subsection 111(2)

341. Subsection 111(2) of the SDA currently provides that a person is not liable to an action, suit or other proceedings in respect of loss, damage or injury simply because they:

- (a) have made a complaint to HREOC; or
- (b) have provided, amongst other things, a submission, document or evidence to the Sex Discrimination Commissioner or to HREOC.

342. As complaints will no longer be lodged under the SDA, the provision will be amended to remove references to complaints. The provision will remain in the SDA to apply in the limited circumstances in which it is proposed that documentation will be provided. For complaints lodged under the uniform scheme in the new HREOCA, a similar protection already exists in the HRA at section 48.

Item 115 - Subsection 111(2)

343. This item will remove a remaining reference to complaints not addressed by the amendment at item 114.

Item 116 - Section 115

344. This item will repeal the provision which confers jurisdiction on the Federal Court with respect to matters arising under Part III of the SDA. Jurisdiction will be conferred on the Federal Court in relation to matters arising under Parts IIB and IIC by section 49B of the new HREOCA (see item 59).

Workplace Relations Act 1996

345. This part of the Schedule makes a number of consequential amendments to the *Workplace Relations Act 1996* which arise from the transfer of the legislative structure for complaint handling to the HRA.

Item 117 - Paragraph 45(1)(ed)

346. This and the next two items effect consequential amendments made necessary by the implementation of a uniform complaint handling scheme in the HRA. As a consequence of this change a number of provisions in the SDA are to be repealed. This item will remove the current reference to repealed section 50A of the SDA and substitute a reference to section 46PW of the new HREOCA.

Item 118 - Subsection 111A(1)

347. This item will remove the current reference to repealed section 50A of the SDA and substitute a reference to section 46PW of the new HREOCA.

Item 119 - Section 113

348. This item will remove the current reference to repealed section 50A of the SDA and substitute a reference to section 46PW of the new HREOCA.

Workplace Relations and Other Legislation Amendment Act 1996

349. This part of the Schedule makes a consequential amendment to the *Workplace Relations and Other Legislation Amendment Act 1996* which arises from the transfer of the legislative structure for complaint handling to the HRA.

Item 120 - Sub Item 2(9) of Schedule 9

350. This item is a consequential amendment made necessary by the implementation of a uniform complaint handling scheme in the HRA. As a consequence of this change a number of provisions in the SDA are to be removed. This item will remove references in Schedule 9 to repealed provisions in the SDA.