

EXPLANATORY STATEMENT

Human Rights and Equal Opportunity Commission Regulations

Statutory Rules 1989 No. 407

Issued by the Authority of the
Attorney-General

Section 50 of the Human Rights and Equal Opportunity Commission Act 1986 ("the Act"), provides that the Governor-General may make regulations, not inconsistent with this Act, prescribing matters required or permitted by this Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The Human Rights and Equal Opportunity Commission Regulations ("the Regulations") declare additional grounds of discrimination for the purposes of the Act. The Human Rights and Equal Opportunity Commission ("the Commission") is therefore able to inquire into written complaints of discrimination made by persons who believe that they have been discriminated against on the basis of a declared ground in relation to employment or occupation.

Section 3 of the Act provides that "discrimination" means:

(a) any distinction exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin that has the effect of

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nullifying or impairing equality of opportunity or treatment in employment or occupation; and

(b) any other distinction exclusion or preference that

(i) has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation, and

(ii) has been declared by the regulations to constitute discrimination for the purposes of the Act.

The Act excludes from the definition of "discrimination" any distinction, exclusion or preference in respect of a particular job which is based on the inherent requirements of the job, or which is necessary to avoid, in regard to employment as a member of staff, injury to religious susceptibilities of adherents of a religion or creed in connection with employment in a religious institution.

Division 4 of Part II of the Act deals with the functions of the Commission relating to equal opportunity in employment. These functions further the objects of the International Labour Organisation Convention Concerning Discrimination in respect of Employment and Occupation which is Schedule 1 of the Act. Under Article 2 of the Convention, Australia has undertaken to promote equality of opportunity in respect of employment and occupation with a view to eliminating any discrimination in that respect.

Section 31 of the Act confers on the Commission a range of functions relating to equal opportunity in employment. One of the functions conferred on the Commission provides that the Commission may inquire into any act or practice that may constitute discrimination and may endeavour by conciliation to effect a settlement of the matter. Where the Commission is of the opinion that the act or practice constitutes discrimination, it may report to the Attorney-General on any matters in relation to which conciliation was unsuccessful or on matters considered by it to be inappropriate for

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conciliation. When requested by the Minister, when a complaint is made in writing or when it appears to the Commission desirable to do so, section 32 requires the Commission to investigate any act or practice that may constitute discrimination in employment.

The regulations declare any distinction, exclusion, or preference on the basis of the declared grounds to be discrimination for the purposes of the Act. As a consequence, the regulations increase the ambit of "discrimination" in relation to the functions of the Commission. The declaration of additional grounds of discrimination for the purposes of the Act does not make discrimination on the declared grounds unlawful.

The declaration of the additional grounds was foreshadowed by the Attorney-General in 1986 in his Second Reading Speech on the Human Rights and Equal Opportunity Commission Bill.

Regulation 1

Regulation 1 provides for the citation of the Regulations.

Regulation 2

Regulation 2 provides for the commencement of the Regulations on 1 January 1990.

Regulation 3

Regulation 3 defines certain terms used in the regulations.

"Impairment" is defined to ensure that certain conditions which may not amount to a disability will be covered by the declaration. The definition will apply to HIV/AIDS status as that condition relates to the presence in the body of organisms causing disease. The definition will also cover the condition of cancer sufferers as that condition relates to the

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malfunction of a part of the body. The definition will also apply to a malformation or disfigurement of a part of the body which may not amount to physical disability.

"Marital status" is defined to have the same meaning as in the Sex Discrimination Act 1984. In that Act, marital status includes the status or condition of being-

- (a) single;
- (b) married;
- (c) married but living separately and apart from one's spouse;
- (d) divorced;
- (e) widowed; or
- (f) the de facto spouse of another person.

Regulation 4 paragraph (a)

Paragraph (a) of regulation 4 declares as additional grounds of discrimination:

- (i) age;
- (ii) medical record;
- (iii) criminal record;
- (iv) impairment;
- (v) marital status;
- (vi) mental, intellectual or psychiatric disability;
- (vii) nationality;
- (viii) physical disability;
- (ix) sexual preference;
- (x) trade union activity; and
- (xi) one or more of the grounds specified in subparagraphs (iii) to (x) (inclusive) which existed but which has ceased to exist.

(i) Age

Subparagraph 4(a)(i) provides that any distinction, exclusion or preference on the basis of a person's age constitutes discrimination for the purposes of the Act where it has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation. It is envisaged that

this ground will most commonly relate to matters such as maximum and minimum hiring ages and mandatory retiring ages. However, where a particular age restriction is genuinely related to a person's capacity to perform a particular job, a distinction, exclusion or preference on that basis will not constitute discrimination due to the exception in section 3 of the Act for a distinction exclusion or preference based on the inherent requirements of a job.

(ii) Medical record

Subparagraph 4(a)(ii) provides that any distinction, exclusion or preference on the basis of a person's medical record constitutes discrimination for the purposes of the Act where it has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.

(iii) Criminal record

Subparagraph 4(a)(iii) provides that any distinction, exclusion or preference on the basis of a person's criminal record constitutes discrimination for the purposes of the Act where it has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation. It is envisaged that this ground will most commonly relate to matters such as dismissal of or refusal to employ or promote a person on the basis of the person having a criminal record. However, where a person's criminal record makes it inherently inappropriate for him or her to perform a particular job, a distinction exclusion or preference on that basis will not constitute discrimination due to the exception in section 3 of the Act for a distinction exclusion or preference based on the inherent requirements of a job. The Australian Law Reform Commission's report on Spent Convictions recommended the declaration of "criminal record".

(iv) Impairment

Subparagraph 4(a)(iv) provides that any distinction, exclusion or preference on the basis of a person's impairment constitutes discrimination for the purposes of the Act where it has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation. The term "impairment" is defined in regulation 3.

(v) Marital status

Subparagraph 4(a)(v) provides that any distinction, exclusion or preference on the basis of a person's marital status constitutes discrimination for the purposes of the Act where it has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation. It is envisaged that this ground will most commonly relate to matters such as restriction of jobs to married applicants only or to single applicants only. The term "marital status" is defined in regulation 3.

(vi) Mental, intellectual or psychiatric disability

Subparagraph 4(a)(vi) provides that any distinction, exclusion or preference on the basis of a person's mental, intellectual or psychiatric disability constitutes discrimination for the purposes of the Act where it has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation. State legislation in a number of jurisdictions is already in force to prohibit discrimination on the ground of physical or intellectual impairment. However, where a particular level of mental capacity is genuinely required for a person to perform a particular job, a distinction, exclusion or preference on that basis will not constitute discrimination due to the exception in section 3 of the Act for a distinction exclusion or preference based on the inherent requirements of a job.

(vii) Nationality

Subparagraph 4(a)(vii) provides that any distinction, exclusion or preference on the basis of a person's nationality constitutes discrimination for the purposes of the Act where it has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation. This ground may partially overlap with the existing grounds of "national extraction" and "race", already included in the grounds of discrimination in section 3 of the Act.

(viii) Physical disability

Subparagraph 4(a)(viii) provides that any distinction, exclusion or preference on the basis of a person's physical disability constitutes discrimination for the purposes of the Act where it has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.

(ix) Sexual preference

Subparagraph 4(a)(ix) provides that any distinction, exclusion or preference on the basis of a person's sexual preference constitutes discrimination for the purposes of the Act where it has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation. It is envisaged that this ground will most commonly relate to matters such as dismissal of or refusal to employ or promote a person on the basis of that person's being heterosexual, homosexual or bisexual.

(x) Trade union activities

Subparagraph 4(a)(x) provides that any distinction, exclusion

or preference on the basis of a person's trade union activities constitutes discrimination for the purposes of the Act where it has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation. It is envisaged that this ground will most commonly relate to matters such as the dismissal of or refusal to employ or promote a person because that person is a member of a trade union, has participated in trade union actions or has refused to join a particular union.

(xi) A ground which has ceased to exist

Subparagraph 4(a)(xi) provides that any distinction, exclusion or preference on the basis of any of the grounds specified in subparagraphs (iii) to (x), which existed but which has ceased to exist, will be discrimination for the purposes of the Act where it has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation. This makes it clear that where a person does an act by reason that a particular ground applied to another person in the past, that act constitutes discrimination for the purposes of the Act. For example, where a person is discriminated against on the ground that he or she once had a particular marital status, that will constitute discrimination for the purposes of the Act even though the person is no longer of that particular marital status.

Regulation 4 paragraph (b)

Paragraph (b) of regulation 4 declares that a distinction, exclusion or preference made on the basis of the imputation to a person of any ground specified in paragraph (a) of regulation 4 constitutes discrimination for the purposes of the Act. The effect of this paragraph is to make it clear that a distinction, exclusion or preference on a relevant ground, even if the reason for the distinction, exclusion or preference has no basis in fact, constitutes discrimination for the purposes of the Act.