

1996

**THE LEGISLATIVE ASSEMBLY FOR
THE AUSTRALIAN CAPITAL TERRITORY**

DISCRIMINATION (AMENDMENT) BILL 1996

Explanatory Memorandum

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Discrimination (Amendment) Bill 1996

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Outline

The Discrimination Act 1991

The *Discrimination Act 1991* ("the Act") makes discrimination, on certain grounds, unlawful and establishes a scheme whereby a person may seek investigation of, and redress for, unlawful discrimination.

Complaints of discriminatory behaviour are made to the Discrimination Commissioner ("the Commissioner"), appointed pursuant to the Act. The Commissioner is empowered to investigate, conciliate and decline complaints. The Commissioner's powers include the power to conduct public hearings and the power to give enforceable directions to parties in respect of conduct which is found to be unlawful.

The Discrimination (Amendment) Bill 1996

The *Discrimination (Amendment) Bill 1996* ("the Bill") amends the Act to:

- establish a Discrimination Tribunal;
- provide that the hearing function, presently exercised by the Discrimination Commissioner, will be exercised by the Tribunal;
- introduce new procedures to encourage speedy resolution of complaints, by imposing time limits at various stages of the complaints handling process (based on provisions of the *Victorian Equal Opportunity Act 1984*);

- make consequential amendments; and
- make the following minor amendments to assist in the administration of the Act
 - extend the prohibition on discrimination against a person accompanied by a guide or hearing dog, to a person accompanied by another assistance animal;
 - clarify the application of certain provisions of the Act to employment agencies, and
 - extend a provision of the Act, the effect of which is that discrimination by a voluntary body, in relation to the provision of benefits, facilities and services to members, is not unlawful, so that the provision also applies in respect of discrimination by such bodies towards non-members

Financial implications

There are no financial implications.

DETAILS OF THE BILL

PART I - PRELIMINARY

Clauses 1, 2 and 3 - Formal provisions

Clauses 1, 2 and 3 are formal provisions setting out the short title of the proposed Act, the commencement provisions and that references to the "principal Act" are references to the *Discrimination Act 1991*.

PART II - AMENDMENTS OF THE PRINCIPAL ACT

Clause 4 - Interpretation

Clause 4 is an interpretation clause which omits the definition of "public complaint", substitutes a new definition of "representative complaint" and inserts a definition of "Tribunal" in section 4 of the Act, consequentially on amendments effected by *clauses 10 and 11*.

Clause 5 - Impairment - guide dogs etc.

Clause 5 amends section 9 of the Act to the effect that a person discriminates against another person on the ground of impairment if the discriminator treats the other person unfavourably because the person possesses or is accompanied by any animal trained to assist the person to alleviate the effect of a disability. It is already unlawful to discriminate against a person who possesses, or is accompanied by, a guide dog or hearing dog. This amendment recognises that animals, including animals other than dogs, may be trained to assist a person in alleviating the effect of a disability, including, but not restricted to, sight or hearing impairment. It will bring the Act into line with anti-discrimination legislation in other jurisdictions and avoid inconsistency with the Commonwealth *Disability Discrimination Act 1992*.

Clause 6 - Insertion of new section 26A

Clause 6 inserts new section 26A for the purpose of making it clear that Part III and Part IV of the Act, which set out what constitutes unlawful discrimination and exceptions to unlawful discrimination, do not make it unlawful for an employment agency to discriminate in selecting persons as suitable for a job vacancy, where that discrimination would, if committed by an employer, not have been unlawful. There are, for example, exceptions under the Act to the general provisions rendering discrimination unlawful, such as section 34 which permits an employer to discriminate on the basis of genuine occupational qualifications.

Clause 7 - Acts done under statutory authority

Clause 7 is a consequential amendment to section 30 of the Act, dealing with acts done under statutory authority. The amendment reflects that under the new provisions of the Act the Tribunal, and not the Commissioner, will exercise determinative powers.

Clause 8 - Voluntary bodies

Clause 8 amends section 31 of the Act to the effect that discrimination by a voluntary body in connection with the provision of benefits or services as between non-members is not unlawful. The underlying policy of section 31 is to allow for voluntary bodies to cater for groups of persons with particular attributes or interests and it would, therefore, be reasonable for some bodies to wish to provide benefits, facilities or services to non-members with those particular attributes or interests. Discrimination in that context is not contrary to the purpose of the Act and the amendment to section 31 makes this clear.

Clause 9 - Discrimination in the provision of goods and services

Clause 9 amends section 53 of the Act which deals with discrimination on the grounds of impairment and provides that discrimination on these grounds is not unlawful where because of the nature of a person's impairment goods, services or facilities would have to be provided in a special manner and their provision in that manner would impose an unjustifiable hardship on the provider. New subsection 53(2) makes

it clear that a reference to services includes a reference to services provided by an employment agency.

Clause 10 - Repeal of Part VIII and substitution of new provisions

Clause 10 repeals Part VIII of the Act, dealing with resolution of complaints and inserts a new Part VIII - Complaints, comprising new sections 70 to 108O. The new provisions in this part set out the new process for handling complaints under the Act.

New section 70 is an interpretation provision setting out the meaning of the term “party” for the purpose of new Part VIII.

New section 71 replaces section 87 of the Act, dealing with reliance on exceptions and exemptions, and extends the application of the provision to proceedings conducted before the Tribunal.

New section 72 sets out how complaints may be made under the Act and replaces section 70 of the Act. However, new paragraph 72(2)(b) differs from the equivalent provision in section 70 of the Act in that it sets out the basis on which the Commissioner may authorise a person to act as an agent for an aggrieved person.

New section 73 requires that where a complaint is made in accordance with the Act the Commissioner must investigate the complaint to determine -

- whether the complaint can be dealt with under the Act;
- whether the complaint may be declined; and
- if the complaint can be dealt with under the Act and the Commissioner does not decline it - whether there is a reasonable likelihood of resolving the complaint by conciliation.

New section 74 requires the Commissioner to notify each party to the complaint before commencing an investigation in relation to a matter.

New section 75 replaces section 79 of the Act, and provides for the conduct of investigations by the Commissioner in such manner as the Commissioner thinks fit.

The new provision differs from section 79 in that it no longer refers to a person being afforded an opportunity to appear prior to the making of an interim decision or a decision as these powers are vested in the Tribunal (**new sections 99, 100 and 102 refer**)

New section 76 is an entirely new provision and is intended to assist the Commissioner in closing complaints where a complainant has failed to adequately respond to a request from the Commissioner for information. While **new subsection 76(1)** requires the Commissioner to dismiss a complaint if no adequate response to a request has been provided within 3 months, **new subsection 76(2)** provides that the complainant must be notified that the complainant may apply to the Tribunal for a review of the decision

New section 77 replaces section 75 of the Act, dealing with single investigation of several complaints.

New section 78 reproduces section 77 dealing with representative complaints and **new section 79** carries over the provisions of section 78 which enables a person to lodge a complaint in respect of a grievance that is the subject of a representative complaint.

New section 80 replaces subsection 73(2) of the Act permitting the investigation, on the Commissioner's own motion, of conduct, that appears to be unlawful. **New subsection 80(3)** applies where an own motion investigation by the Commissioner discloses unlawful conduct towards a person, that cannot be resolved by conciliation. It enables the person who was the object of the unlawful conduct to require the Commissioner to refer the conduct to the Tribunal for hearing, as if the person were a complainant in respect of the conduct

New section 81 requires that where the Commissioner, having investigated a complaint, determines that a relevant ground exists, the Commissioner must decline the complaint. The relevant grounds are set out in **new subsection 81(2)**.

New subsection 81(3) is one of the new provisions intended to assist in expediting the handling of complaints under the Act. It requires that complainants be notified in writing, of a decline of a complaint by the Commissioner, within 60 days of lodgement of the complaint. **New subsection 81(4)** requires that the notice include information

about the complainant's right, within 60 days after the date of the notice, to require the matter to be referred to the Tribunal and that where the complainant does not, within that time period, require the matter to be referred to the Tribunal the Commissioner must dismiss the complaint. The notice must also advise the complainant that, where the complaint is dismissed, the complainant may apply to the Tribunal for the complaint to be heard, if there were exceptional circumstances preventing the complainant from requiring the complaint to be referred within the 60 day period

New section 82 replaces section 81 enabling the Commissioner to conduct a compulsory conference.

New section 83 replaces section 80 dealing with conciliation of complaints. **New subsection 83(1)** requires that where the Commissioner decides it is reasonably likely that a complaint can be resolved by conciliation, the Commissioner must notify the parties accordingly and endeavour to resolve the complaint by conciliation. **New subsection 83(2)** is to the effect that the Commissioner is not required to comply with **new subsection 83(1)** where an application for the complaint to be struck out is pending determination. **New subsection 83(3)** replaces subsection 80(2) precluding the admissibility, in subsequent proceedings, of things said and done during conciliation.

New section 84 provides for conciliations to be conducted in such manner as the Commissioner thinks fit.

New section 85 is an entirely new provision which requires that, where a complaint has been resolved by conciliation, the Commissioner must assist the parties to reduce to writing the agreement they have reached. The provisions of **new subsection 85(2)** enable the Commissioner to take no further action in relation to a resolved complaint where the written record has been signed by the parties and they each have a copy. The exception to this is where a party breaches the terms of the agreement. If this occurs, **new subsection 85(3)** enables a party to require referral of the complaint to the Tribunal

New section 86 deals with circumstances where the Commissioner decides that it does not appear reasonably likely that a complaint will be able to be resolved by conciliation or where conciliation has been attempted, but has been unsuccessful. In either

situation, **new subsection 86(3)** requires that the Commissioner notify the complainant of the Commissioner's decision and include in the notice information about the complainant's right, within 60 days after the date of the notice, to require the matter to be referred to the Tribunal and that where the complainant does not, within that time period, require the matter to be referred to the Tribunal the Commissioner must dismiss the complaint. The notice must also advise the complainant that, where the complaint is dismissed, the complainant may apply to the Tribunal for the complaint to be heard, if there were exceptional circumstances preventing the complainant from requiring the complaint to be referred within the 60 day period.

New section 87 requires the Commissioner to refer a complaint to the Tribunal where a complainant has notified the Commissioner within the 60 day period referred to in **new sections 81 or 86** that the complainant requires the complaint to be referred to the Tribunal. Any other parties to the investigation conducted by the Commissioner are required to be notified of the referral of the complaint to the Tribunal.

New section 88 requires the Commissioner to dismiss a complaint where the complainant has been notified in accordance with **new section 81 or 86** and has not, within the 60 day period, required referral of the complaint to the Tribunal.

New section 89 is another of the new provisions intended to expedite the handling of complaints under the Act. It enables a respondent to apply to the Tribunal for a complaint to be struck out on the grounds that it is frivolous, vexatious, misconceived or lacking in substance or not made in good faith. However, the application may not be made once conciliation in relation to the complaint is underway or the Tribunal has commenced to hear the complaint.

New section 90 permits a complainant to withdraw his or her complaint at any time before it is referred to the Tribunal.

New section 91 deals with hearings before the Discrimination Tribunal and **new subsection 91(1)** sets out the matters which the Tribunal may hear. **New subsection 91(2)** specifies that parties must be given at least 14 days notice of a hearing by the Tribunal, except in the case of a hearing of an application for the strike out of a complaint, in which case the notice required is at least 7 days. **New subsection 91(3)**

requires the Tribunal to commence to hear an application for the strike out of a complaint within 14 days after the date of the application, consistent with the policy intention that such applications should be dealt with as expeditiously as possible.

New section 92 provides that, other than as prescribed by the Act, other enactments or regulations, the Tribunal may determine its own procedure. The section also enables the Tribunal, either of its own motion or on the application of a party, to direct that a hearing, or any part of it, be held in private.

New section 93 deals with sittings by the Tribunal. **New subsection 93(2)** is intended to minimise the use of court rooms for Tribunal hearings and so avoid Tribunal proceedings being conducted in a formal court environment. It is anticipated that hearing rooms and conference rooms will be used for Tribunal hearings.

New section 94 gives parties to a hearing the right to appear at the hearing.

New section 95 provides that a person who may appear at a Tribunal hearing may only be represented with the consent of the Tribunal. However, the effect of **new subsection 95(2)** is that a party that is a body of persons is entitled to be represented by a member, officer or employee of the party.

New section 96 gives the Tribunal power to require a person to appear as a witness at a hearing for the purpose of giving evidence and/or producing any specified document or thing, in the possession, custody or control of the person.

New section 97 permits the Tribunal to take evidence on oath or affirmation, and authorises the Tribunal to require a person appearing before it to take an oath or make an affirmation and to administer an oath or affirmation to such a person. A penalty is provided under **new section 98** where a person, without reasonable excuse, refuses to take an oath or make an affirmation, when so required.

New section 99 gives the Tribunal the power to make an interim order to safeguard the position of a party, where a complaint is before the Commissioner.

New section 100 gives the Tribunal the power to make an interim order to safeguard the position of a party, where a complaint is before the Tribunal

New section 101 provides that where the Tribunal hears an application from a person whose complaint has been dismissed under the new State Complaints provision (**new section 76**), and is satisfied that exceptional circumstances are made out, the Tribunal must remit the complaint to which the application relates to the Commissioner

New section 102 replaces section 90 of the Act, dealing with decisions which may be made, by the Tribunal, following a hearing. The actions which the Tribunal may take, pursuant to **new subsection 102(2)** are:

- dismissal of the complaint,
- order the respondent not to repeat or continue unlawful conduct;
- order the respondent to perform a reasonable act or acts to redress loss or damage;
and
- order the respondent to pay compensation for loss or damage.

New subsection 102(4) enables the Tribunal to require a complainant whose complaint has been dismissed as being frivolous, vexatious or not made in good faith, to pay a specified amount to the respondent. Parties to the hearing must be notified, within 28 days, after the dismissal of a complaint or giving of a direction, pursuant to **new subsection 102(5)**.

New sections 103 and 104 enable decisions of the Tribunal to be enforced and provide for a penalty of 50 penalty units or imprisonment for 6 months, or both, to be imposed upon a party who unreasonably fails to comply with a decision of the Tribunal

New section 105 makes clear that the Commissioner may not join a party to a hearing before the Tribunal or give a direction or make a requirement in relation to such a hearing. Conversely, the Tribunal may not join a party to an investigation by the Commissioner or give a direction or make a requirement in relation to a complaint being so investigated. This provision is included to avoid any misinterpretation of the subsequent provisions, many of which refer to powers of "the Commissioner or the Tribunal".

New section 106 enables the Commissioner to join a person as a party to an investigation and the Tribunal to join a person as a party to a hearing.

New section 107 empowers the Commissioner and the Tribunal to require a person appearing before the Commissioner in an investigation or Tribunal in a hearing, as the case may be, to answer a question relevant to that proceeding or to produce a document or record relevant to the proceeding. Failure to do so without reasonable excuse, attracts a penalty of 50 penalty units or imprisonment for 6 months or both.

New section 108 replaces section 88, and extends the powers of the Commissioner, to prohibit publication of evidence, to the Tribunal, permitting the Tribunal to direct that evidence given before it shall not be published or may only be published in a manner specified.

New section 108A provides that application may be made to the Tribunal, in relation to a direction given by the Commissioner under **new section 108**. A penalty of 50 penalty units is provided pursuant to **new section 108B** where a person, without reasonable excuse, contravenes a direction under **new section 108**.

New section 108C replaces section 85 of the Act, dealing with the power of the Commissioner to obtain information and documents. **New section 108C** extends those powers to the Tribunal, for the purpose of obtaining information or documents for the purpose of a hearing. **New paragraph 108C(1)(a)** includes a specific reference to a "body politic" to make it clear, on the face of the legislation, that the Act applies in respect of a body politic.

New section 108D allows a party to a Tribunal hearing to appeal to the ACT Supreme Court on a question of law arising from a decision of the Tribunal, in the hearing, and requires the Supreme Court to hear and determine the appeal. **New subsection 108D(3)** enables the Supreme Court to make an order or orders, including an order remitting the case to be heard and decided again by the Tribunal.

New section 108E replaces section 96 of the Act which prevents a person from relying on the argument of self-incrimination or potential self-incrimination to avoid

providing information, answering a question of, or producing a document to the Commissioner. **New section 108E** extends the provision so that a person may not rely on the self-incrimination excuse to avoid providing such material to the Tribunal

New section 108F replaces section 97 of the Act, to provide that an act that is unlawful under Part III, V or VII or section 66 of the Act does not constitute an offence

New section 108G replaces section 98 of the Act to provide that other than as provided for by the Act, nothing in the Act confers a right of action on a person in respect of the doing of an act that is unlawful under Part III, V or VII or section 66 of the Act

New section 108H replaces section 99 of the Act relating to aiding in the commission of an unlawful act under Part III, V or VII or section 66 of the Act

New section 108I replaces section 100 of the Act, dealing with the conduct of directors, servants and agents. **New subsection 108I(1)** sets out the requirements for establishing the state of mind of a body politic, or corporate, or a natural person in relation to conduct.

New section 108J replaces section 101 of the Act, which protects persons from civil proceedings in respect of loss, damage or injury suffered by another person arising from the making of a complaint or giving of a statement or information, in good faith, to the Commissioner. **New section 108J** extends the application of the provision to the making of a statement, giving of a document, or information, to the Tribunal or a member of the Tribunal's staff, for the purposes of the Act

New section 108K replaces section 102 of the Act, which entitles persons appearing before the Commissioner to be reimbursed in respect of expenses, to extend its application to witnesses attending before the Tribunal

New section 108L replaces section 103 of the Act, which establishes a penalty of 20 penalty units for failure of a person to comply with a requirement to appear or attend before the Commissioner, to extend the application of the provision to a failure of a person to comply with a requirement to appear or attend before the Tribunal.

New section 108M replaces section 104 of the Act, which establishes a penalty of 20 penalty units for failure of a person to comply with a requirement to furnish information, produce a document or answer a question before the Commissioner, to extend the application of the provision to a failure of a person to furnish information, produce a document or answer a question before the Tribunal.

New section 108N replaces section 106 of the Act, which imposes a penalty of 20 penalty units where a person disrupts proceedings before the Commissioner or obstructs the Commissioner or a member of his or her staff in the exercise of a power or the performance of a duty or function under, or in relation to, the Act. **New section 108N** extends this provision to the disruption of proceedings, or obstruction, of the Tribunal.

New section 108O replaces section 108 of the Act, which imposes a penalty of 50 penalty units, 6 months imprisonment, or both, for a person knowingly giving the Commissioner or his or her staff false or misleading information, or a document containing false or misleading information. **New section 108O** extends the application of the provision to the Tribunal and its staff.

Clause 11 - Insertion of new Part IXA - Discrimination Tribunal

Clause 11 inserts new Part IXA, comprising new sections 110A to 110F, dealing with the establishment of a Discrimination Tribunal.

New section 110A establishes the Discrimination Tribunal which, in accordance with **new section 110B**, will consist of a President appointed under **new section 110C**.

New subsection 110C(1) provides that the President of the Tribunal shall be a Magistrate appointed by the Executive, by instrument. Pursuant to **new subsection 110C(2)** the President shall be appointed to the office for a maximum term of 5 years but is eligible for reappointment.

New section 110D provides for the appointment of an Acting President of the Tribunal.

New section 110E gives the Tribunal power to do all things necessary and convenient to be done for or in connection with the performance of its functions, subject only to the provisions of the Act

New section 110F provides that there shall be a Registrar of the Tribunal whose functions are those conferred by the Act and any other law of the Territory Pursuant to **new subsections 110F(3) and (4)** the Registrar's position will be filled by an ACT public servant.

Clause 12 - Insertion of new provision

Clause 12 inserts **new section 119** enabling the Commissioner to authorise a member of his or her staff to perform the investigatory functions of the Commissioner

Clause 13 - Delegation by Commissioner

Clause 13 makes consequential amendments to section 120 of the Act, dealing with the powers of the Commissioner to delegate his or her functions under the Act.

Substitution of new Immunity from suit provision

Clause 14 - repeals section 121 of the Act, which provides immunity from civil suit to the Commissioner, his or her staff, and persons acting under the direction or authority of the Commissioner, in relation to acts or omissions, done in good faith. It is replaced with a **new section 121** which extends this immunity to the President of the Tribunal, its staff, persons acting under the President's or the Tribunal's direction or authority and the Registrar.

Clause 15 - Amendment of Secrecy provision

Clause 15 amends section 122 of the Act which prohibits the making of a record of protected information or the communication or divulging of such information to other persons, by the Commissioner, his or her staff or anyone authorised to exercise a power or perform a duty or function under the Act, otherwise than in accordance with

the Act. The amendment extends the application of this provision to the President of the Tribunal, staff of the President or Tribunal, and the Registrar.

PART III - TRANSITIONAL

Part III of the Bill contains provisions to make transitional arrangements in respect of complaints which have already been made, under the Act, at the time when the provisions enacting the new procedures for complaints handling come into force.

Clause 16 - Interpretation

Clause 16 is an interpretation provision establishing the meaning in Part III of the amending Act of the term “commencement date”, as the day on which section 10 commences.

Clause 17 - Complaints not heard or conciliated

The effect of **clause 17** is that any complaint which had been made to the Commissioner, before the commencement date, which had not commenced to be heard or conciliated, will be treated as if it was a complaint made, under the new provisions. **Subclause 17(2)** is to the effect that where a complaint is to be dealt with in accordance with this clause, the complaint won't be treated as being lodged until the information required pursuant to the form approved, by the Commissioner, for lodgement of complaints, is provided to the Commissioner.

Clause 18 - Complaints where conciliation commenced

Clause 18 sets out the arrangements to apply where a complaint lodged, prior to the commencement date, had commenced to be conciliated. In this situation, the conciliation process will continue until such time as a conciliated resolution is reached or the Commissioner decides that resolution by conciliation is not reasonably likely. At this point the relevant new provision (**new section 85 or new section 86**) of the Act will apply.

Clause 19 - Complaints where notice of hearing sent

The effect of *clause 19* is that where, prior to the commencement date, the Commissioner had not commenced to hear a complaint, but had sent the parties a notice, under the present section 83 of the Act, advising them that a hearing would be held concerning the complaint, the hearing will be conducted by the Tribunal. The right of appeal in respect of the hearing will be as for any other matter heard by the Tribunal under the new provisions, that is, to the Supreme Court and on questions of law only.

Clause 20 - Complaints where hearing commenced

However, where the Commissioner had commenced to hear a complaint, prior to the commencement date, the effect of *clause 20* is that the person who was the Commissioner, as at 30 December 1996, shall continue to hear the complaint and has determinative power, in respect of the complaint. The appeal right in relation to a decision by Commissioner is the right of appeal, under the present provisions of the Act, that is, to the Administrative Appeals Tribunal. This provision is intended to enable the incumbent Commissioner to hear any matters which may be part-heard as at the expiry of the Commissioner's term of appointment, the last day of which is 30 December 1996, irrespective of whether the incumbent Commissioner or another person is subsequently appointed as the Commissioner.

Clause 21 - Appeals to Administrative Appeals Tribunal

Clause 21 is included to make it clear that a right of appeal to the AAT continues in respect of decisions or directions of the Commissioner made before the commencement of the new provisions.

Clause 22 - Remittal of complaints

Clause 22 enables a decision of the Commissioner, whether made before or after the commencement date, which has been the subject of an appeal to the Administrative Appeals Tribunal, to be remitted by that Tribunal to the Commissioner to be dealt with under the new complaints handling provisions of the Act.

Clause 23 - Interim directions by the Commissioner

Clause 23 is a saving provision which ensures that any direction given by the Commissioner, pursuant to his or her power to give an interim direction, remains in force and enforceable by the Tribunal.

Clause 24 - Final directions by the Commissioner

Clause 24 is a savings provision which ensures that a direction given, pursuant to the Commissioner's determinative powers, whether made before or after the commencement of the new provisions, remains in force and enforceable by the Tribunal.