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LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

HUMAN RIGHTS COMMISSION LEGISLATION AMENDMENT BILL 2009

EXPLANATORY STATEMENT

Presented by
Mr Simon Corbell MLA
Attorney General

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Overview of Bill

The Human Rights Commission Legislation Amendment Bill (the Bill) would amend the following legislation:

- *Discrimination Act 1991*;
- *Health Professionals Act 2004*;
- *Human Rights Commission Act 2005*; and
- *Mental Health (Treatment and Care) Act 1994*

The amendments are detailed below.

Discrimination Act 1991

These amendments substitute new terms to better describe the objectives of those parts of the Act that formerly aimed to cover transsexuality and discrimination on the basis of membership or non-membership in an association or organisation of employers or employees. The new terms, “gender identity” and “industrial activity”, are intended to provide clearer and easier to understand definitions in the Act, and also to recognise the affected groups by their most appropriate descriptions.

The amendments will also include a new section that gives protection against victimisation for people who make a complaint or give information related to a matter under the Discrimination Act. This protection from victimisation is intended to operate in addition to any other protections available, including those contained in the *Human Rights Commission Act 2005*.

Health Professionals Act 2004

These amendments are consequential to the *Human Rights Commission Act 2005* amendments in this Bill concerning information sharing between the Health Profession Board and the Human Rights Commission. This amendment would exempt a Health Profession Board from the requirement to notify a health professional about complaints that are referred by the Human Rights Commission. The purpose is to ensure that a Health Profession Board and the Human Rights Commission have the flexibility necessary to decide on a course forward in those circumstances.

Human Rights Commission Act 2005

These amendments give the Human Rights Commission more flexibility in informing complainants of the progress of a consideration, and allow the Commission to close a complaint if withdrawn by the complainant before notice is given to the person complained about. Additionally, protection from liability would be extended to people who, honestly and without recklessness, give information to the Human Rights Commission or file a complaint.

The amendments would also obligate the Human Rights Commission to refer complaints about registered health professionals to the Health Profession Board.

Mental Health (Treatment and Care) Act 1994

The one amendment to this Act omits the Discrimination Commissioner from the list of people that must be notified of an ACT Civil and Administrative Tribunal hearing under the *Mental Health (Treatment and Care) Act 1994*.

Clause Notes

PART 1 – Preliminary

Clause 1 – Name of Act – states the title of the Act as the Human Rights Commission Legislation Amendment Act 2009.

Clause 2 – Commencement – sets out the commencement date for the Act as the seventh day after notification.

PART 2 – Discrimination Act 1991

Clause 3 – Legislation amended—pt 2 – provides that part 2 of this Act amends the *Discrimination Act 1991*.

Clause 4 – Grounds, Section 7(1)(c) – substitutes “gender identity” in place of “transsexuality.” This is a more appropriate description of the concept, and is intended to ensure that those of one sex, or of an indeterminate sex, who identify as another sex are protected from discrimination.

Clause 5 – Section 7(1)(k) – substitutes “industrial activity” for “membership or nonmembership of an association or organisation of employers or employees.” This brings the ACT *Discrimination Act 1991* in line with the Commonwealth’s *Fair Work Act 2009* and the approach to this issue in anti-discrimination legislation in other jurisdictions which include this ground.

Clause 6 – Unlawful vilification—race, sexuality etc, Section 66(1)(c) – substitutes “gender identity” in place of “transsexuality.”

Clause 7 – Serious vilification offence—race, sexuality etc, Section 67(1)(d)(iii) – substitutes “gender identity” in place of “transsexuality.”

Clause 8 – Victimisation, New section 68(1)(a)(ia) to (ic) – inserts new sub-sections (1)(a)(ia) to (ic) in section 68 of the Discrimination Act. This restores the protection previously provided in section 68 of the Act. Section 98 of the *Human Rights Commission Act 2005* currently makes it a criminal offence to victimise someone for making a complaint, giving information, or producing a document or other thing to a person exercising a function under that Act. New section 68 of the Discrimination Act will provide protection for

conduct that amounts to victimisation in relation to a discrimination complaint that may be enforced as a civil matter. It is intended that people who are victimised under new section 68 will be able to complain to the Human Rights Commission about the victimisation, and that the complaint will be evaluated under a civil burden of proof. The remedies available for complaints of victimisation under new section 68 will be those civil remedies that are normally available for complaints to the Human Rights Commission.

Clause 9 – New section 68(3) – inserts new subsection 68(3) which defines a discrimination complaint, discrimination function and HRC Act (*Human Rights Commission Act 2005*) for the purposes of unlawful victimisation as described in subsections 68(1)(a)(ia) to (ic).

Clause 10 – Dictionary, new definitions – adds definitions for “gender identity,” “industrial activity,” “industrial association,” and “industrial organisation.”

Clause 11 – Dictionary, definition of *transsexual* – omits this definition from the dictionary, to reflect the change to “gender identity.”

PART 3 – Health Professionals Act 2004

Clause 12 – Legislation amended—pt 3 – provides that part 3 of this Act amends the *Health Professionals Act 2004*.

Clause 13 – Notice to health professional reported, Section 84(1), new note 2 – inserts new note 2, explaining that under part 9.2 of the *Health Professionals Act 2004*, a report does not include a complaint referred to the Health Professions Board by the Human Rights Commission.

Clause 14 – Dictionary, definition of *report* – substitutes a new definition to provide that for the purposes of division 9.2 only, a report does not include a complaint made under the *Human Rights Commission Act 2005* that is referred to a Health Profession Board by the Human Rights Commission. This change is consequential to the *Human Rights Commission Act 2005* amendments introduced by clause 20 of this Act. The effect of this change is that there will not be a requirement to notify health professionals of a complaint that is made under the *Human Rights Commission Act 2005* or referred by the Human Rights Commission.

PART 4 – Human Rights Commission Act 2005

Clause 15 – Legislation amended—pt 4 – provides that part 3 of this Act amends the *Human Rights Commission Act 2005*.

Clause 16 – Commission’s obligation to be prompt and efficient, Section 45(2)(e) – substitutes a new subsection 45(2)(e) to give the Commission greater flexibility in updating complainants on the status of complainants. This amendment allows the Commission to update the complainant every six weeks, as is the case now, or to provide information at

a longer interval if the Commission had previously indicated to the complainant when the next information update would be given.

Clause 17 – Section 45(2), examples – provides examples to clarify the operation of the re-drafted section 45(2)(e).

Clause 18 – New section 45(3)(d) – inserts a new subsection 45(3)(d), confirming that the Commission may close a complaint under section 45(3) if the complainant has withdrawn it before notice has been given to the person complained about.

Clause 19 – New section 71A – inserts a new section 71A to enable the Commission to join new persons complained about that may not have been originally identified by the complainant. The Discrimination Commissioner exercised this power prior to the passage of the *Human Rights Commission Act 2005*. This power allows the Commission to promptly and efficiently resolve complaints, rather than take the additional administrative step of seeking the formal approval of the complainant when it becomes clear that another party must be joined to the complaint.

Clause 20 – Referral of complaints to health profession board, Section 92(1) – amends section 92 to require the Commission to give a copy of a complaint and related documents to the relevant health profession board when the Commission receives a complaint about a health service professional. This amendment ensures that where a complaint is lodged with the Commission which raises concerns regarding professional standards, the relevant health profession board can have input at an early stage.

Clause 21 – New section 92(4) to (6) – inserts a transitional provision applying section 92(1) to complaints that have been received and not yet closed.

Clause 22 – New section 100A – inserts a new section 100A providing civil protection for persons who honestly and without recklessness makes a complaint or makes a statement, or provides a document under the HRC Act. This protection was previously included in both the *Discrimination Act 1991* and *Community and Health Services Complaints Act 1993* (repealed) and offered protection for those that honestly and without recklessness assist the Commission in its consideration of complaints.

PART 5 – Mental Health (Treatment and Care) Act 1994

Clause 23 – Legislation amended—pt 5 – provides that part 4 of this Act amends the *Mental Health (Treatment and Care) Act 1994*.

Clause 24 – Notice of hearing, Section 85(j) – omits the Discrimination Commissioner for the list of recipients of notices of mental health hearings before the ACT Civil and Administrative Tribunal (ACAT) under the *Mental Health (Treatment and Care) Act 1994*. This amendment ends mandatory notification of the Discrimination Commissioner by the ACAT for the matters to

which section 85 applies. The ACAT may still, on a case by case basis, provide the Discrimination Commissioner with notice of hearings, but this amendment ensures this is no longer a mandatory requirement.