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**LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

DISCRIMINATION AMENDMENT BILL 2016

EXPLANATORY STATEMENT

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DISCRIMINATION AMENDMENT BILL 2016

This explanatory statement relates to the *Discrimination Amendment Bill 2016* as presented to the Legislative Assembly. It has been prepared in order to assist the reader of the bill and to help inform debate on it. It does not form part of the bill and has not been endorsed by the Assembly.

The Statement must be read in conjunction with the bill. It is not, and is not meant to be, a comprehensive description of the bill. What is said about a provision is not to be taken as an authoritative guide to the meaning of a provision, this being a task for the courts.

Purpose of the Bill

The *Discrimination Amendment Bill 2016* (the Bill) implements a first stage of reforms to the *Discrimination Act 1991* (the Act), following recommendations made by the ACT Law Reform Advisory Council (LRAC).

This Bill makes reforms to the Act to:

- improve its objects;
- allow people to make complaints of both direct and indirect discrimination and on more than one ground;
- refine the range and scope of protected attributes in line with developments in discrimination law nationally and internationally and include new protected attributes;
- revise the application of vilification provisions in the Act to expand the list of attributes for which protections against vilification apply to include disability;
- strengthen protections against victimisation; and
- amend procedures for dealing with and redressing complaints to better support complainants.

Human Rights Considerations

Right to equality and non-discrimination

The Bill promotes the rights to equality and non-discrimination in section 8 of the *Human Rights Act 2005* (HRA) by linking these more explicitly with ACT discrimination law and processes and making it less onerous for a person to exercise their right to equality and non-discrimination through the complaints framework in the *Human Rights Commission Act 2005*.

Arguably the creation of new exceptions could be said to limit the full enjoyment of the right to non-discrimination, but these exceptions are reasonable and proportionate and therefore demonstrably justifiable.

Nature of the right affected

Section 8 of the Human Rights Act is a statement of the general principle of non-discrimination and equality of treatment that applies to everyone.

Human rights law recognises that formal equality can lead to unequal outcomes. Sometimes to achieve substantive equality differences in treatment may be necessary. For example, the targeted delivery of a service to a specific group may be necessary to ensure equal access to house or health care. It also recognises that not every difference of treatment amounts to discrimination. Provided the distinction is reasonable and objective and is designed to achieve a legitimate purpose, it will not infringe section 8.¹

¹ *Broeks v. the Netherlands*, (172/1984), Human Rights Committee, 9 April 1987, 2 Sel. Dec. 196; *Zwaan-de Vries v. the Netherlands*, (182/1984), Human Rights Committee, 9 April 1987, 2 Sel. Dec. 209; Human Rights Committee General Comment 18, para 13.

The importance of the purpose of the limitation

The new exceptions in the Bill accompany the inclusion of new protected attributes to provide that there are some circumstances in which there is a legitimate need to distinguish between people, because of genuine occupational concerns, or where it is necessary to allow the consideration of all the relevant aspects of a person's circumstances.

The exceptions are generally couched in terms of reasonableness and relevance. For example, the exception for employment status provides that it is not unlawful to discriminate if the discrimination is reasonable.

When determining what is reasonable, all relevant factors should be taken into account, including the effect on the person who is discriminated against. Exceptions recognise the balance between the right to non-discrimination and other rights, or requirements to distinguish between individuals where reasonable.

The nature and extent of the limitation

The limitations allowing reasonable discrimination have a specific scope that builds in an assessment of proportionality. They are clearly articulated in law. The onus in claiming an exception is placed on the respondent to a claim, as they are in the best position to identify their rationale for the discrimination and to demonstrate why the discrimination is reasonable. This still recognises that the right to non-discrimination may be limited where reasonable.

The relationship between the limitation and its purpose

The limitations will ensure that the public is not constrained from having regard to all the circumstances in doing actions or making decisions, as long as those actions or decisions are not made on the basis of reasons including that a person is for example, homeless, where that is unreasonable in all the circumstances.

Any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve

The limitations, framed in relation to reasonableness, build in elements of proportionality and least restrictive means as part of an assessment of what is reasonable, or what is necessary to protect health or safety or allow genuine occupational requirements to be met, for example. The revised objects for the Act and the beneficial interpretations clause, in the Bill require a holistic view of all the circumstances. These mean that the exceptions should be interpreted and applied in the way that is least restrictive of the right to equality and non-discrimination.

Right to freedom of expression

Clauses 9 and 1.1 of the Bill limit the right to freedom of expression under s 16 of the HRA. These clauses revise the drafting of the vilification provision in s 67A, and transfer the offence of serious vilification to the Criminal Code, applying both offences to the protected attribute of disability. For the reasons below this limitation is reasonable and justifiable in a free and democratic society in accordance with the test in section 28 of the HRA.

Nature of the right affected

The right to freedom of expression is fundamental but not absolute. The right to freedom of expression in the HRA is broader in scope than the freedom of political communication which is implied into the Constitution.

The right to freedom of expression under s 16(2) extends a general protection to all forms of expression for any purpose, whether political, commercial, artistic or otherwise. Expression is to be interpreted broadly and includes actions whereby an individual seeks, receives or imparts ideas or information in any form by any method. The guarantee of free expression covers any information or idea capable of being communicated.

Modes or means of expression include spoken, written and sign language and such non-verbal expression as images and objects of art.²

The protection of the rights exists regardless of the method by which they are stored, transmitted or presented such as all forms of audio-visual as well as electronic and internet-based modes of expression.³

The importance of the purpose of the limitation

The limit is demonstrably justifiable given the impact of disability vilification which can compound existing disabilities or other disadvantages through stereotyping, stigmatisation and harassment and can act as a barrier for people with disability accessing services available to them.

A submission by Advocacy for Inclusion in consultation on these reforms stated –

There has been a concerning lack of acknowledgement of disability harassment and vilification. Offensive language used to describe people with disabilities such as ‘retard’, ‘spastic’ and ‘psycho’ are consequently widely viewed as acceptable terminology and used widely in the public domain. This degrades and vilifies people with disabilities.

Many of our consumers are the victims of harassment on the basis of their disability. They experience harassment in public by strangers as they go about their day to day routines, as well as by people they know such as neighbours. There are currently no avenues for redress in these cases. Our consumers are also the victims of disability hate crimes, including assault and property damage combined with disability targeted verbal harassment.

The nature and extent of the limitation

The right to freedom of expression is not absolute and can be limited. The right to freedom of expression should not amount to abuse resulting in discrimination or vilification of a person just as the right to protection from discrimination should not stifle freedom of expression.⁴

International law provides that a law which restricts freedom of expression may be enacted to protect and promote respect for the rights and reputations of others. Such laws must be formulated with sufficient precision to allow an individual to regulate his or her conduct accordingly and it must be made accessible to the public. A law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution.⁵

The threshold for an offence of vilification is high with a court having to find there was incitement to hatred toward, severe revulsion or ridicule of, or serious contempt for people with a disability, in an act done other than in private.

An element of intention and threatened harm is required for the criminal offence of serious vilification.

The Bill does not alter or weaken existing protections for free speech that are found in the exceptions for fair reporting, and reasonable and honest acts done for academic, artistic, scientific or research purposes or other purposes in the public interest including discussion and debate.

These exceptions uphold the public interest in maintaining right to freedom of expression necessary to facilitate public discussion and debate, in good faith, but also recognise that vilifying conduct

² UNHRC General Comment No. 34: Article 19 (2011) *One hundred and second session*, 11-29 July 2011, CCPR/C/GC/34, [12].

³ UNHRC General Comment No. 34: Article 19 (2011) *One hundred and second session*, 11-29 July 2011, CCPR/C/GC/34, [12].

⁴ *Daniel Emlyn-Jones v Federal Capital Press [Intervener: Human Rights Commissioner]* [2005] DT 577/2005 (31 July 2009) [114].

⁵ UNHRC General Comment No. 34: Article 19 (2011) *One hundred and second session*, 11-29 July 2011, CCPR/C/GC/34, [25].

diminishes the dignity and sense of community inclusion of a person by denying the right of the person to equality and non - discrimination. Vilification acts as a barrier to individuals engaging in and contributing to ACT society, driving divisions in the community, rather than promoting respect and inclusion.

The relationship between the limitation and its purpose

A research paper presented at the Australian Human Rights Commission's 40 Years of the Racial Discrimination Act Conference by Luke McNamara and Katharine Gelber concluded that -

Anti-vilification laws like s 18C of the *Racial Discrimination Act 1975* (Cth) do provide targeted communities with the opportunity to lodge complaints with a human rights authority, in a process that reassures them that the law can assist them, and reminds them that the polity has enacted provisions that enable them to seek redress for hate speech. Further, the laws have educative functions – both direct and indirect – and symbolic importance.⁶

It is considered that clarifying the vilification provision and extending its application to disability will serve an important educative function that it is not acceptable in the ACT to seriously denigrate or abuse people with disability. For unlawful vilification, there are clear processes of conciliation that will allow complaints to be resolved informally and confidentially, also providing an opportunity for perpetrators to understand the effects of their actions on the complainant, without limiting the complainant's ability to enforce their right to non-discrimination in the ACAT.

Any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve

There are a range of policy responses and educative campaigns across the ACT public service, and in the community sector, about the impact of vilification, harassment, and offensive conduct and the need to promote substantive equality through creating workplace and other public conditions that promote respect, diversity and inclusion.

For example the ACTPS Respect, Equity and Diversity framework provides awareness training about issues of diversity and sensitivity, and establishes a network of peer contact officers for guiding people who may have complaints about discriminatory treatment through their options. There are Employment Action Plans and positions for people from identified culturally and linguistically diverse groups.

The Human Rights Commission drives educative campaigns such as the 'Racism. It stops with me' campaign and the 'Diversity it goes with the Territory' campaign which promote a constructive dialogue about the impact of stereotyping, stigmatisation and vilification of vulnerable groups on the basis of protected attributes.

These methods are part of an overall response to vilification but without a clear statement of the types and scope of conduct which society considers to be unlawful, it is hard for people to understand how and why behaviours and attitudes should change. The vilification provision also provide assurance to the victims of vilification that the law does recognise the impact of this abusive and unwarranted discriminatory practice and that there is a scope for disputes to be settled in accordance with lawful process and for remedies to be found.

For these reasons there are no less restrictive means to achieve the intent of the vilification provisions.

⁶ L. J. McNamara and K. Gelber, 'The impact of section 18C and other civil anti-vilification laws in Australia' (Paper presented at the Perspectives on Racial Discrimination Act: Papers from the 40 years of the Racial Discrimination Act 1975 (CTH) Conference, Sydney, 19-20 February, Australian Human Rights Commission, Sydney, 19-20 February) available at <http://ro.uow.edu.au/lhapapers/2095/> p 167.

Right to fair trial

Amendment 1.9 of the Bill, which inserts a new section 53CA into the Human Rights Commission Act, arguably limits the right to fair trial under s 21(1) of the HRA. It amends the onus of proof in a discrimination complaint in the ACAT. This limitation is reasonable and justifiable in a free and democratic society in accordance with the test in section 28 of the HRA.

Nature of the right affected

The right to a fair trial or fair hearing is regarded as a fundamental human right that protects individuals from arbitrary or unlawful deprivation of their rights and freedom. The purpose of the right is to ensure access to the proper administration of justice under the rule of law. The right to fair trial as included in the HRA applies to both criminal and civil proceedings.

The right to fair trial is about procedural fairness. Many of the elements of a fair trial parallel the elements of administrative procedural fairness. The ACT Civil and Administrative Tribunal (ACAT) has observed that “the term ‘obligations’ in s 21 of the HRA may encompass good administration”.⁷ The right also requires that a person is given the opportunity to respond to any allegations made against them in a court that is independent and impartial. Typically, consistent with the right to presumption of innocence in s 22(1), the right to fair trial would encompass a standard process where the complainant proves all elements of the unlawful action, with the respondent only having to establish a defence after the unlawful conduct is proved.

The Bill shifts this balance marginally, by allowing the ACAT to presume that discrimination has occurred if the complainant can demonstrate a plausible set of facts to suggest discrimination.

The importance of the purpose of the limitation

New section 53CA arguably imposes a limitation on the rights of a respondent by requiring, in circumstances where the complainant establishes a plausible allegation of discrimination, the respondent to demonstrate that discrimination has not occurred as alleged, rather than requiring the applicant to establish the reasons for the discrimination.

New section 53CA addresses imbalances between a respondent and complainant in proceedings for a discrimination complaint by placing a greater onus on the respondent to demonstrate the rationale for unfavourable treatment or a disadvantageous condition imposed on a person, as they are in a better position to identify and explain the reasons for adverse decisions or actions taken in relation to a complainant.

LRAC notes that it can be difficult for the complainant to establish the reasons for the respondent’s conduct, because they cannot know what was in the mind of the respondent.⁸

As noted by Dominique Allen, a discrimination lawyer from the Australian National University, “complainants face an arduous task in attempting to establish that they were subject to unlawful discrimination. In most instances, the complainant bears the entire onus of proof and they are unlikely to have access to the evidence needed to discharge their burden. The difficulties that complainants confront have been acknowledged for the duration of Australian anti-discrimination law and yet they

⁷ *Thompson v ACT Planning and Land Authority (Administrative Review)* [2009] ACAT 38 at para 76.

⁸ ACT Law Reform Advisory Council, *Inquiry into the Discrimination Act 1991 (ACT)*, Final Report, p 142.

have not been addressed, even though there are useful mechanisms operating in other countries that Australia could adopt”.⁹

Reversing the onus of proof can assist the ACAT to expeditiously and fairly resolve complaints, by requiring both parties to establish the facts relevant to their complaint or the defence to a complaint.

The nature and extent of the limitation

The intention of this reform is to make the process for establishing that discrimination has occurred less onerous on the complainant.

Rather than requiring the complainant to establish that discrimination was because of a protected attribute, the complainant will be required to establish the imposition of unfavourable treatment or a disadvantageous condition (to a civil standard of ‘on the balance of probabilities’) and present evidence that would allow the ACAT to draw a conclusion that the treatment or condition was imposed because of a protected attribute. This means that circumstantial or indirect evidence or evidence arising from multiple occasions may be presented to ACAT to build up a plausible case that discrimination has occurred, noting that the complainant must prove on the balance of probabilities that they were subject to unfavourable treatment or disadvantageous operation of a condition imposed on them.

If the complainant meets these requirements, the legislation will provide that there is a rebuttable presumption that discrimination has occurred on the grounds identified.

The respondent can rebut that presumption by presenting evidence to establish (to a civil standard of ‘on the balance of probabilities’) that the treatment or conditions imposed were not only for that reason or alternatively, that an exception or exemption applies (as is required under existing s 70 of the Discrimination Act).

The reversal of the onus is appropriate given the complainant will not be in a position to know the rationale for the unfavourable treatment or imposition of a disadvantageous condition.

The Human Rights Commission retains powers to not deal with vexatious complaints and the ACAT retains a wide ambit as to the level of proof and evidence that it requires and is focused on quick, just and informal resolution of disputes. It is not anticipated that the shift in the burden of proof will impose additional substantive burden on the respondent, who should be able to give an account of reasons for a decision or action taken to rebut the presumption.

The relationship between the limitation and its purpose

The revised process for establishing discrimination will remove a barrier to complainants enforcing their rights to non-discrimination that currently exists where they are required to prove the reasons for the actions or decisions of the respondent.

Dominique Allen’s paper on reducing the burden on discrimination complainants concluded that shifting the burden of proof would, at least in part, “bring anti-discrimination law closer to achieving its statutory objectives — addressing discrimination and promoting equality”.¹⁰

⁹ Dominique Allen, Reducing the Burden of Proving Discrimination in Australia (2009) 31 Sydney Law Review 579, available at https://sydney.edu.au/law/slr/slr31/slr31_4/Allen.pdf, p 579.

¹⁰ Ibid, p 605.

Any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve

Discrimination laws in the UK, Canada, the US and EU variously adopt the model proposed. Regard was also had to similar reverse onus provisions in s 361 of the *Fair Work Act 2009* (Cth) and s 124 of the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012 (Cth) in formulating a revised set of requirements of proof. A review of the broader reverse onus provision in the Fair Work Act found that there wasn't "any evidence that the reverse onus of proof requirement for general protections claims is generating unanticipated results".¹¹ It is not anticipated that the shift of the burden will have unintended consequences for organisations.

The Bill adopts a middle ground approach to that recommended by LRAC (which more closely mirrors the Fair Work Act) by still requiring the complainant to show evidence to support an assertion that the discrimination occurred because of a protected attribute of the complainant.

¹¹ Australian Government, Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation, 2012, available at [https://docs.employment.gov.au/system/files/doc/other/towards more productive and equitable workplaces a n evaluation of the fair work legislation.pdf](https://docs.employment.gov.au/system/files/doc/other/towards_more_productive_and_equitable_workplaces_a_n_evaluation_of_the_fair_work_legislation.pdf), p 238.

Discrimination Amendment Bill 2016

Detail

Part 1 – Preliminary

Clause 1 — Name of Act

This is a technical clause that names the short title of the Act. The name of the Act will be the *Discrimination Amendment Act 2016*.

Clause 2 — Commencement

This clause provides that provides for a staggered commencement for the provisions in the Act by providing for parts 1 and 2 and schedule 1 of the Act (other than amendments noted in the clause) commence on the day after notification. The remaining amendments will commence on 3 April 2017.

This means that changes to the objects of the Act, vilifications and complaints processes commencing on the day after notification. The new protected attributes be included in the Act, from 3 April 2017, meaning that people will not be able to make a complaint about discrimination on the new grounds (for example, discrimination on the basis of a person’s immigration or employment status) under the *Human Rights Commission Act 2005* until 3 April 2017. This will allow time for promotion and education about the changes to be communicated to the ACT community.

Clause 3 — Legislation amended

This clause identifies the legislation amended by the Act, which is the *Discrimination Act 1991* and also other legislation including the *Human Rights Commission Act 2005* and the *Criminal Code 2002* as identified in schedule 1.

Part 1 – Discrimination Act 1991 – general amendments

Clause 4 – Section 4

This clause substitutes a new object provision into the Discrimination Act. The new objects provision ties the Discrimination Act in with the other main element of the ACT’s rights protection framework - the Human Rights Act. The objects are refocused on a general and high level statement of aims about promoting equality and preventing discrimination, rather than referring to specific types of discrimination such as sexual harassment.

In particular the new objects of the Discrimination Act are, in summary, to:

- a) eliminate discrimination to the greatest extent possible;
- b) promote human rights including the right to non discrimination and right to equality and equal recognition before the law;
- c) encourage the identification and elimination of systemic causes of discrimination;
- d) promote and facilitate the progressive realisation of equality by recognising that the aim of discrimination law is not just the application of the same laws or conditions to everyone, but that substantive equality may require the making of reasonable adjustments, reasonable accommodations and taking special measures to overcome social and economic disadvantage.

This clause also includes a new explicit provision – s 4AA - that the Act is to be interpreted in a way that is beneficial to people who have protected attributes (who may be complainants), to the degree that that interpretation is consistent with the objects of the Act, the HRA and other rules of legislative interpretation.

Clause 5 – Section 5AA

This clause substitutes a refined definition of disability for the Discrimination Act. This definition is substantially equivalent to and based on the definition of disability in the *Disability Discrimination Act 1992*. The key change is recognition that disability can include a disorder or malfunction that results in a person learning differently from a person without the disorder or malfunction (new section 5AA(1)(f)), a broader category than ‘intellectual disability or developmental delay’ in the Act. The definition also will expand to encompass loss of mental function, presence of organisms capable of causing illness, and malfunction of a part of the body.

For the Discrimination Act disability means—

- a) total or partial loss of a bodily or mental function; or
- b) total or partial loss of a part of the body; or
- c) the presence in the body of organisms that cause disease or illness; or
- d) the presence in the body of organisms that are capable of causing disease or illness; or
- e) the malfunction, malformation or disfigurement of a part of the body; or
- f) a disorder or malfunction that results in a person learning differently from a person without the disorder or malfunction; or
- g) a disorder, illness or disease that affects a person’s thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour; or
- h) any other condition prescribed by regulation.

New section 5AA(2) provides that the definition of disability will also extend to cover behaviour that is a symptom or manifestation of the disability; a disability that a person may have in the future based on an actual or presumed genetic predisposition to a disability, regardless of any genetic indication of predisposition. This provision clarifies that the protection from disability discrimination extends to situations where a person is discriminated against on the basis of genetic tests or other indications that a person is predisposed to disability.

New section 5AA(2)(d) extends the definition of disability to reliance on a support person such as interpreter, carer or assistant who provides assistance to the person because of their disability; as well as reliance on an assistance animal or disability aid.

Recognition of guide dogs as an aspect of disability was previously contained in section 9 of the Discrimination Act (repealed by clause 7 of the Bill, below), but has been built into the definition to clarify that discrimination on the basis of someone using a guide dog or other assistance aid or relying on a support person is actually discrimination on the basis of the underlying disability.

Section 5AA(3) provides a regulation making power for establishing requirements for the training of assistance animals and the recognition of the assistance animal accreditations of other states and territories. It also provides for recognition of disability aids in the regulation and provides a definition of support person as a person who provides assistance or services to another person because of a disability the person has.

New section 5AB provides that a person who relies on an assistance animal or disability aid may be liable for damage caused by the animal or aid. This is adopted from existing section 9(3) of the Act.

Clause 6 – Section 8

This clause substitutes in a new section 8 setting out the meaning of discrimination. The definition is substantially the same as the existing definition, dealing with both direct and indirect discrimination. The new definition makes clear that discrimination can be based on the imposition of unfavourable treatment or a disadvantageous condition on the basis of one or more protected attributes of a person.

This change highlights a shift in the discrimination framework, including the complaints process, away from requiring a complainant to be able to identify, plead and prove discrimination for each separate attribute where the person has multiple protected attributes which may have been the basis for the discrimination.

This clause highlights that discrimination can occur in circumstances where it is not immediately apparent what the reasons for the discrimination are and that it can occur on multiple grounds which are linked. For example a person's age may give rise to a disability, and discrimination might be established on both grounds from a single set of circumstances.

Clause 7 – Section 9

This clause omits section 9 relating to guide dogs, as this has been adopted in section 5AA as part of the broader definition of disability.

Clause 8 – Part 6

This clause omits part 6 of the Discrimination Act which is necessary as a result of a change in the structure to the part 6 provisions dealing with vilification, following from the transfer of the offence of serious vilification in s 67 into the Criminal Code.

Clause 9 – New section 67A

This clause inserts a revised unlawful vilification provision.

The definition of vilification has been expanded to include conduct that 'incites revulsion of' a person on the basis of the grounds of gender identity, HIV/AIDS status, race or sexuality. Disability is included as a ground on which vilification is made unlawful. Intersex status is also included, as this was previously covered by the ground of gender identity (the definition of which has been simplified).

The concept of 'inciting revulsion' is adopted from the Victorian *Racial and Religious Tolerance Act 2001* and is in line with the intent of the other aspects of inciting conduct which are about preventing the most seriously ridiculing, contemptuous and hate inciting acts by making unlawful conduct which promotes or urges the strongest feelings of revulsion, hatred or dislike.

The intent of this provision and the threshold required to establish vilification is summarised in the Victorian Civil and Administrative Tribunal case *National Italian Australian Foundation v Herald and Weekly Times and Andrew Bolt (Anti Discrimination)* [2005] VCAT 2704 (16 December 2005). In that case Deputy President C. McKenzie surveyed various cases involving claims of unlawful vilification and held that –

the test is an objective one. The test is how the phrase to which the complaint relates, read in the context of the whole article, would be understood by an ordinary reasonable reader, not one who comes with particular beliefs or with the beliefs or sensitivities of the complainant - not one who is overly open to being inflamed to serious contempt; nor one who is invulnerable to prejudice of this kind. It does not matter whether the particular words are words of opinion, fact or both (at para 17).

The clause changes the qualifier that the vilifying act is a 'public act' to provide that a vilifying act can be constituted by any act done 'other than in private', in order to remove uncertainty about the legal meaning of 'public'. The intention is to make clear that acts which are communicated openly, or which are observable publicly, will be covered, even if they are done in a private capacity or in a place that is not generally open to the public, such as a workplace.

The clause includes examples of when conduct might be 'otherwise than in private' - such as writing a publically viewable post on social media, actions or gestures or wearing or displaying of clothes, sign or flags observable by the public.

Existing exceptions for fair reporting, and reasonable and honest acts done for academic, artistic, scientific or research purposes or other purposes in the public interest including discussion and debate are maintained in s 67A(2).

These exceptions, as in the existing vilification provision, are intended to provide a mechanism for a

balance to be struck between maintaining and upholding the right to freedom of expression necessary to facilitate public discussion and debate, in good faith, and the recognition that vilifying conduct diminishes the dignity and sense of community inclusion of a person by denying the right of the person to equality and non - discrimination. Vilification acts as a barrier to individuals engaging in and contributing to ACT society.

Clause 10 – Section 68

This clause substitutes a revised victimisation provision. Section 68 is redrafted for clarity, and to better protect complainants of discrimination and their associates from being subject to detriment, and also threat of detriment, for exercising their rights under the Discrimination Act (eg by making a complaint, asserting rights, making claims of unlawful behaviour that are not false or made dishonestly).

The victimisation protection is also extended in new s 68 to cover not only detriment but also the threat of detriment.

In summary s 68 makes it unlawful to subject or threaten to subject a person to any detriment because that person or an associated of that person takes or proposes to take discrimination action or because the perpetrator believes that the person has or will take discrimination action.

Clause 11 – Sections 70 to 73

This clause makes minor and technical amendment to reflect the concept of an ‘unlawful act’ which is introduced in the dictionary and which covers unlawful discrimination, sexual harassment, vilification and victimisation under parts 3, part 5, section 66 or part 7 of the Act. This simplifies the drafting of the Act.

Clause 12 - Acts and omissions of representatives Section 121A(1)

This clause substitutes a revised s 121A(1) for consistency with the new language of ‘unlawful act’ which is used throughout the Discrimination Act and the Human Rights Commission Act.

Clause 13 – New section 124

This clause provides for the Discrimination Regulation 2016 set out in clause 14 (schedule 1 to the Act) to be made, automatically, on commencement of the Bill. The Regulation will have force and effect as if it had been made by the executive under the regulation making power in section 133 of the Discrimination Act.

Section 124 expires on the day the Bill commences.

Clause 14 - New schedule 1

This clause inserts a new schedule containing the *Discrimination Regulation 2016* which is enacted under the provision in clause 13, above.

The regulation provides for the requirements for the recognition of an assistance animal for section 5AA (3).

The regulation provides that an assistance animal must be trained to meet standards of hygiene and behaviour that are appropriate for an animal in a public place and accredited under any relevant state or territory law or trained as an assistance animal by a relevant training organisation.

This will provide for automatic recognition of assistance animals recognised in other jurisdictions, avoiding uncertainty about whether an assistance animal assisting a person with a disability from interstate is offered the same protection against discrimination.

Clause 15 – Dictionary, definition of *discriminate*

This clause makes a minor and technical change to omit the definition of discriminate from the dictionary to the Act, as it will be replaced by discrimination, under clause 16 which defines discrimination by reference to the meaning of discrimination set out in s 8.

Clause 16 - Dictionary, new definition of *discrimination*

This clause inserts a new definition of discrimination by pointing the reader to s 8 which provides the meaning of discrimination.

Clause 17 – Dictionary, definitions of *HIV/AIDS status* and *public act*

This clause makes a minor and technical change to omit the definitions of HIV/AIDS status (as this is now contained in s 67A) and public act as this is no longer an element of the offence of vilification.

Clause 18 – Dictionary, new definition of *unlawful act*

This clause makes minor and technical amendment to define the concept of an ‘unlawful act’ which covers unlawful discrimination, sexual harassment, vilification and victimisation under parts 3, part 5, or part 7 of the Act. This simplifies the drafting of the Act.

Part 3 – Discrimination Act – amendments about protected attributes and exceptions

Clause 19 – Interpretation beneficial to people with protected attributes - Section 4AA

This clause makes a technical change to s 4AA to refer to a protected attribute instead of an attribute, reflecting consistent terminology introduced in part 3 of the Act.

Clause 20 – Section 7

This clause substitutes a revised and expanded list of grounds on which discrimination may occur under the Discrimination Act.

From 3 April 2017 these grounds will be referred to as protected attributes throughout the Act.

There are 15 grounds in the Discrimination Act. This clause expands the number to 24, as a result of the addition of new grounds and the separation of particular grounds in to distinct attributes.

New attributes include accommodation status, employment status, genetic information, immigration status, intersex status, physical features, record of sex being altered, and subsection to domestic and family violence.

Revisions to attributes include separating religious and political conviction into separate attributes and expanding the attribute of spent conviction to encompass irrelevant criminal record. Status as a parent or carer is expanded to cover parent, family, carer or kinship responsibilities.

The Bill makes it generally unlawful to subject a person to discrimination on the basis that the person has one or more of these protected attributes.

Exceptions set out in parts 3, 4 and 5 of the Act may allow discrimination in specific circumstances.

Each attribute is extended by s 7(2) to cover characteristics that are associated with the attribute, or attributes that the person has, had in the past, or was presumed to have.

Clause 21 - Meaning of *discrimination* - Section 8

This clause makes a minor amendment to the drafting of section 8 for consistency with the new language of ‘protected attribute’.

Clause 22 – Domestic accommodation etc – New section 26(1A)

This clause introduces a general exception relating to discrimination on the basis of accommodation status in the provision of accommodation.

The clause provide that section 2, which deals with offering access to accommodation, does not make it unlawful to discriminate on the grounds of accommodations status in providing accommodation, if the discrimination is reasonable, having regard to relevant factors.

The aim of this exception is to recognise that there may be situations where a person's accommodation status is a relevant consideration in offering a person accommodation under a lease. For example an agent might look to a person's rental history as part of an assessment about the suitability of a prospective tenant for a particular offer of accommodation in a rental house.

The exception will allow people to take into account this kind of distinction between individuals on the basis of circumstances where it is reasonable. For instance, it is unlikely to be reasonable to refused accommodation to a person only because they became homeless for a period, or because their previous accommodation was in public housing premises.

Clause 23 – Measures intended to achieve equality – Section 27, example for s (1)(a)

This clause makes a minor amendment to the drafting of the example for s 27(1)(a) for consistency with the new language of 'protected attribute'.

Clause 24 - New section 33A

This clause inserts a new exception in division 4.1 relating to the provisions of accommodation, goods and services etc.

This exception provides that it is not unlawful to discriminate against a person in relation to accommodation, providing goods or services or making facilities available, to provide that it is not discrimination only because a person charges for the accommodation, goods, services or facilities.

This is necessary in light of the inclusion of broad protected attributes of accommodation status and employment status, which might otherwise be understood as enabling a discrimination complaint to be made on the basis of accommodation status, or employment status, for example, if a person is homeless, or is unemployed and cannot afford a fee for a particular service.

If a homeless person is able to pay the fee charged but is refused service it is likely that would constitute discrimination. In addition, depending on circumstances, the way that the fee is charged or whether entitlements which differ between people who have and do not have a protected attribute but who otherwise pay the same fee and under the same terms may give rise to discrimination.

Clause 25 – Work related discrimination –section 49(3)

This clause substitutes a new section 49(3) dealing with the meaning of disability for the section providing an exception for work related discrimination on the grounds of disability. Under existing section 49(3) disability does not include a disability that a person had in the past but no longer has. This meant that an employer could refuse a prospective candidate for a position an offer of employment on the basis that the employee had a previous history of mental illness or a back injury which was no longer present.

This clause removes that exception, meaning that disability is only a relevant for this exception if it is a disability that a person actually has.

Clause 26– Discrimination by qualifying bodies – section 50(2)

As for clause 26 above, this clause removes an exception previously available to qualifying bodies that allowed discrimination on the basis of a disability that a person had in the past but no longer has.

This clause removes that exception, meaning that disability is only a relevant for this exception if it is a disability that a person actually has.

Clause 27 – New divisions 4.8 to 4.10

This clause inserts new divisions 4.8 through 4.10 that set out new specific exceptions.

Division 4.8 – Exceptions relating to employment status

Section 57O – Discrimination relating to employment status

This section inserts a specific exception which provides that it is not unlawful to discriminate on the basis of a person's employment status in arrangements for employment, where the discrimination is reasonable, having regard to relevant factors in deciding for example, whether to hire or promote a person.

The aim of this exception is to recognise that there may be situations where a person's employment status is a relevant consideration in offering a person employment. For example an agent might look to a person's work history as part of an assessment about the suitability of a prospective applicant for a particular offer of employment.

Division 4.9 – Exceptions relating to immigration status

Section 57P – Discrimination relating to immigration status

This section provides a general exception relating to immigration status which means that it is not unlawful to discriminate against a person, where the discrimination is reasonable, having regard to relevant factors.

This exception would allow for a person's visa status to be taken into account when offering employment opportunities, or access to facilities, for example, if reasonable in the circumstances. However, policies which exclude individuals from accessing a service on the sole basis that they are a refugee, for example, would not be reasonable and therefore, not lawful.

Other general exceptions including the statutory acts exception will also apply to immigration status allowing Territory agencies to comply with Commonwealth restrictions which might apply to various classes of visa holders.

Division 4.10 – Exceptions relating to physical features

Section 57Q – General occupational requirements – physical features

This section provides a specific exception allowing discrimination on the basis of physical features in relation to employment or work if the employment is for a dramatic or artistic performance, photographic or modelling work or similar employment or work, where physical features may be an occupational or aesthetic requirement.

Section 57R – Health and safety – physical features

This section provides a general exception allowing discrimination on the basis of physical features where it is reasonably necessary to discriminate on the grounds of physical features to protect the health or safety of any person or to protect the property of any person.

These exceptions will allow, for example, discrimination in elite sporting competition or in admission to emergency services where a person may be placed at risk injury if they are not excluded.

Clause 28 – New section 67A(1)(ca)

This inserts the ground of intersex status into the new unlawful vilification section.

Clause 29 – Dictionary, note 2

This clause inserts a new note to the dictionary to make clear that intersex person is defined in s 169B of the *Legislation Act 2001*.

Clause 30 – Dictionary, new definitions

This clause inserts new definitions of accommodation status, and employment status in the dictionary to the Act.

The dictionary defines accommodation status as including being a tenant, an occupant (within the meaning of the *Residential Tenancies Act 1997*), being in receipt of, or waiting to receive housing assistance (within the meaning of the *Housing Assistance Act 2007*) or being homeless. This definition is non-exhaustive.

The dictionary defines employment status as including being unemployed, receiving a pension or social security benefit, receiving compensation, being employed on a part-time, casual or temporary basis and undertaking shift or contract work. This definition is non-exhaustive.

Clause 31 – Dictionary, definition of gender identity

This clause inserts a new definition of gender identity that is updated and consistent with the *Births, Deaths and Marriages Registration Act 1997*.

This clause also inserts a new note for the definition of gender identity which indicates that gender identity includes the gender identity that the person has or has had in the past, or is thought to have or have had in the past (see s 7(2)). This highlights that discrimination on the grounds of gender identity can occur if a person is subjected to unfavourable treatment by someone who believed that they used to be a person of the opposite sex.

Clause 32 – Dictionary, new definitions

This clause inserts new definitions of intersex status, immigration status, irrelevant criminal record, physical features, political conviction and protected attribute.

Intersex status means status as an intersex person. Intersex person is defined in s 169B of the *Legislation Act 2001*.

Immigration status is defined as including being an immigrant, a refugee or an asylum seeker, or holding any kind of visa under the *Migration Act 1958* (Cwlth).

A note is included for the definition of immigration status which indicates that immigration status includes the immigration status that the person has or has had in the past, or is thought to have or have had in the past (see s 7(2)). Discrimination could therefore occur, for example, if a person is discriminated against because they came to Australia as an asylum seeker even if they now have Australian citizenship or permanent residency.

Irrelevant criminal record, in relation to a person, is defined in the dictionary as meaning a record relating to an offence, or an alleged offence, if a person has been charged with an offence where proceedings are not finalised or are withdrawn, where a person has been acquitted of an offence, or had the conviction quashed or set aside, or has been served an infringement notice. A spent conviction, within the meaning of the *Spent Convictions Act 2000* or a conviction which is not directly relevant to the situation in which the discrimination is taking place are also included in the definition of irrelevant criminal record. This definition is exhaustive.

The statutory acts exception in s 30 of the Discrimination Act, will allow agencies to continue to access criminal record information where that is authorised or required by a Territory law – for example under the *Working with Vulnerable People (Background Checking) Act 2011*.

Physical features are defined to mean a person's height, weight, size or other bodily features. This definition is exhaustive.

Political conviction is defined as including having or not having a political conviction, belief, opinion or affiliation, and engaging or not engaging in political activity. This might cover, for example, discrimination on the basis that a person refuses to support a particular political party.

Protected attribute is defined in the dictionary by reference to the list of protected attributes in s 7 of the Act.

Clause 33 – Dictionary, definition of *relevant class of people*

This clause makes a technical amendment to the drafting of the definition of relevant class of people for consistency with the new language of 'protected attribute'.

Clause 34 – Dictionary, new definition of *religious conviction*

This clause provides for a revised and expanded definition of religious convictions under the Act. The definition of religious conviction includes having or not having a religious conviction, belief, opinion or affiliation, and engaging or not engaging in religious activity. This might cover, for example, discrimination on the basis that a person refuses to support a particular political party.

The definition of religious conviction also encompasses the cultural heritage and distinctive spiritual practices, observances, beliefs and teachings of Aboriginal and Torres Strait Islander peoples and engaging in that heritage.

Schedule 1 – Consequential amendments

Part 1.1 – Criminal Code 2002

Clause 1.1 – New chapter 7A

This clause inserts new section 750 into the *Criminal Code 2002* providing for a criminal offence of serious vilification, with a maximum penalty of 50 penalty units.

This is the same offence as was in the Discrimination Act, with amendments discussed above under clause 9 above to apply it to disability, cover acts done other than in private and to cover conduct that incites severe revulsion of a person with one of the attributes listed.

The offence is transferred into the Criminal Code to make it more visible to police and prosecutors.

The defences and mental elements of this offence are not changed.

Clause 1.2 – New section 750(1)(c)(iiia)

This clause inserts intersex status as a ground of serious vilification under new s750 of the Criminal Code, as this was previously covered in the definition of gender identity.

Clause 1.3 – Section 750(2), new definition of *intersex status*

This clause provides a new definition of intersex status for the offence of serious vilification in the Criminal Code, which links to the definition in the dictionary of the Discrimination Act.

Part 1.2 – Human Rights Commission Act 2005

Clause 1.4 – Section 42(1)(c)

This clause makes a minor and technical amendment to reflect the concept of an ‘unlawful act’ which is introduced in the dictionary of the Discrimination Act and which covers unlawful discrimination, sexual harassment, vilification and victimisation under parts 3, part 5 or part 7 of the Act. The clause provides that a complaint of an unlawful act is a discrimination complaint for the purposes of the Human Rights Commission Act.

Clause 1.5– New section 42 (1A)

This clause provides that a discrimination complaint may be made in relation to unfavourable treatment on 2 or more separate grounds, and occurring on 2 or more separate occasions. The intention is to simplify the process for making a complaint by allowing multiple claims of discrimination arising from either a single set of circumstances or an ongoing series of behaviour to be expeditiously dealt with in a single complaint process.

Clause 1.6- Section 42(1A)

This clause, which has a delayed commencement (3 April 2017), will make a technical amendment to refer to ‘protected attributes’ rather than ‘attributes’ consistent with the changes in part 3 which also have a delayed commencement.

Clause 1.7 – Section 43(1)(ea),

This clause provides that a person who has a sufficient interest in the complaint may make a discrimination complaint.

Clause 1.8 – New section 43(1A)

This clause provides that a person has sufficient interest in a discrimination complaint if the conduct complained about is a genuine concern to the person, because the conduct would adversely affect (or has the potential to adversely affect) the interests of the person or interests or welfare of anyone the person represents. This provision will allow support services, legal representatives or advocacy groups to assist a person to exercise their rights under the Act. It acknowledges that due to the nature of discrimination, the vulnerabilities of people with protected attributes and the potential power imbalance between a complainant and respondent, complainants should be supported to make complaints.

This provision is not intended to remove or alter the authority of the Commission to conduct a complaint as a representative complaint in accordance with s 71 of the Human Rights Commission Act.

Clause 1.9 – New section 43(4A)

This clause provides that a person can only make a complaint if the person has the consent of the aggrieved person to make a complaint.

Clause 1.10 – New section 44(1)(ba)

This clause provides that a discrimination complaint must name the aggrieved person, as part of making the complaint. This means that a discrimination complaint cannot be made about conduct that

might be an unlawful act under the Discrimination Act, if there is no identified person to consent to the complaint and be named as the complainant.

This provision is not intended to remove or alter the authority of the Commission to conduct a complaint on its own initiative about an act or services which it appears that a person could make a complaint about, but has not made, in accordance with section 48 of the Human Rights Commission Act.

Clause 1.11 - New section 44(1A)

This clause inserts a new section 44(1A) which provides that a complaint, does not need state whether the discrimination is direct or indirect discrimination.

This amendment recognises that it may not be apparent to the complainant the rationale for a decision to cause unfavourable treatment or impose a disadvantageous requirement. Rather it may become clearer in conciliation or when additional information is requested by the Commission.

Ultimately a finding will have to be made about whether the act is direct or indirect discrimination, for the purpose of satisfying the test in section 8 of the Discrimination Act, however, the complainant will not be expected to be able to make that complex legal assessment as a pre-requisite to lodging a complaint.

Clause 1.12 – Section 53

This clause makes a minor and technical amendment to reflect the concept of an ‘unlawful act’ which is introduced in the dictionary of the Discrimination Act.

Clause 1.13 – New section 53CA

This clause inserts a new provision that provides for a revised process for establishing a complaint of discrimination in the ACAT.

The clause provides that for both direct and indirect discrimination, the legislation will make a rebuttable presumption that discrimination has occurred if the complainant:

1. establishes (to a civil standard) that unfavourable treatment or an (unreasonably) disadvantageous condition was imposed; and
2. presents evidence that would enable the ACAT to decide, in the absence of any other explanation that the unfavourable treatment or disadvantageous condition was imposed because of a protected attribute of the complainant.

If these threshold requirements for a prima facie case of discrimination are satisfied, the onus shifts to the respondent to rebut the presumption by establishing (to a civil standard) that the treatment or disadvantageous condition was not imposed because of the protected attribute of the complainant.

The intention of this legislation is to make the process for establishing that discrimination has occurred less onerous on the complainant by requiring the respondent to establish that an exception or exemption applied or that the complainant’s protected attribute was not the reason for the treatment. This reversal of the onus is appropriate given the complainant will not be in a position to know the rationale for the unfavourable treatment or imposition of a disadvantageous condition.

Clause 1.14 – Section 53CA (4)

This clause makes a technical amendment to the drafting of the definition of relevant class of people for consistency with the new language of ‘protected attribute’.

Clause 1.15 – New section 53DA

This clause provides a clearer authority for the Human Rights Commission to pass information about a complaint to the ACAT when the ACAT requests. This provision will assist the ACAT by allowing it to look to material provided by parties to the Human Rights Commission.

There are exceptions which provide that information obtained during conciliation, or which has been obtained as a result of compelling information or compelling a person to appear to give evidence, cannot be provided to ACAT.

ACAT has separate powers to compel the production of information or bring people before it to give evidence.

The exceptions are in line with ACT Government policy which generally provides immunity from evidence obtained from a person under threat of penalty being used in other legal proceedings. This is in recognition of the need for protection of the right against self-incrimination.

Clause 1.16 - New section 53E (2A) and (2B)

This clause inserts a new section that provides factors that the ACAT must consider when making an order about whether a complainant should be awarded compensation as a remedy for unlawful discrimination, vilification or victimisation.

The factors that the ACAT must consider are:

- a) the person’s right to equality before the law and the impact of the discrimination on the enjoyment of that right;
- b) the inherent dignity of all people and the impact of the discrimination on the person’s dignity;
- c) the public interest in ensuring an appropriate balance is struck between the right to protection from discrimination and equality before the law and other human rights;
- d) the nature of the discrimination; and
- e) any other mitigating factors.

The intention of this provision is to provide guidance to the ACAT about relevant factors in assessing a claim for compensation. These factors are not exhaustive and are not given particular weight or precedence under the legislation. By specifying these factors, it is anticipated that there will be more consistent assessment of awards of compensation by various members of the ACAT that may sit in discrimination complaint proceedings. To this end this clause also contains a range of examples of the scope of each factor.

New section 53E(2B) inserts an authority for the Commission to intervene in proceedings with ACAT’s consent to make submissions about an order for damages. This will allow the ACAT to draw on the Commission’s expertise and experience and insights gained during the complaint handling and conciliation process to better inform an award of compensation.

Clause 1.17 – Section 53E(2A), examples – par (d)

This clause clarifies that protected attributes, rather than attributes are referred to.

Clause 1.18 – Section 78(2)(c)(iv), example

This clause makes a minor and technical amendment to reflect the concept of an ‘unlawful act’ which is introduced in the dictionary of the Discrimination Act.

Clause 1.19 - New section 99(6)

This clause amends the secrecy provision in the Human Rights Commission Act to provide that a person does not commit an offence if disclosing information obtained in the course of handling a discrimination complain if the person discloses the information in exercising a function under the Act in relation to education or research and all relevant parties consent to the information being disclosed. This will allow for better community understanding of discrimination issues, including systemic issues through education or research by allowing for discussion of real life examples and case studies.

Part 1.3 – Legal Aid Act 1977

Clause 1.20 – Section 68A(9), definition of *unjustified discrimination*

This clause makes a technical consequential amendment to the Legal Aid Act to reflect the concept of an ‘unlawful act’ which is introduced in the dictionary of the Discrimination Act.

Part 1.4 – Protection of Public Participation Act 2008

Clause 1.21 – Section 7(2)(b)

This clause makes a technical consequential amendment to the Public Participation Act to reflect the restructuring of the part dealing with unlawful vilification and renumbering of the relevant sections. The Public Participation Act will continue to provide that vilification is not considered public participation conduct.

Clause 1.22 – Section 7(2)(b)

This clause makes a technical consequential amendment to the Public Participation Act to provide that serious vilification is not considered public participation conduct.

Part 1.5 – Road Transport (Public Passenger Services) Regulation 2002

Clause 1.23 – Section 62(2), note

This clause makes a technical consequential amendment to the Road Transport (Public Passenger Services) Regulation to reflect that provisions in the Discrimination Act for guide dogs have been relocated within section 5AA which deals with assistance animals as an aspect of the definition of disability.

Part 1.6 – Spent Convictions Act 2000

Clause 1.24– Section 3(2), note

This clause makes a technical consequential amendment to omit a note which will no longer be accurate due to the amendments to the existing ‘spent conviction’ attribute to expand it to cover ‘irrelevant criminal record’.

Clause 1.25 – section 3(3), new note

This clause inserts a new note referring the reader to the protected attribute of ‘irrelevant criminal record’ which protects against discrimination on the ground of spent conviction or extinguished conviction.