NSW Legislative Assembly Hansard

Anti-Discrimination Amendment (Miscellaneous Provisions) Bill

Extract from NSW Legislative Assembly Hansard and Papers Thursday 16 September 2004.

Second Reading

Mr BOB DEBUS (Blue Mountains—Attorney General, and Minister for the Environment) [12.01 p.m.]: I move:

That this bill be now read a second time.

The New South Wales Anti-Discrimination Act 1977 is a vital plank in the Government's commitment to the protection of the human rights of members of our community. It was introduced in 1977 by the Wran Labor Government and has continued to evolve over the past 27 years into an increasingly important regime for protecting members of our community from prejudice and discrimination in key areas of public life, such as employment, education, the provision of goods and services and the provision of accommodation. There is growing evidence of its effectiveness in bringing about positive change and reducing discriminatory attitudes and practices in the broader community. The Government's resolve to support these fundamental rights remains strong, but one of the key tasks of Government is to take the opportunity to update and make laws relevant to changing times. The current bill does this in a number of important ways.

The bill represents a major step in the Government's response to the New South Wales Law Reform Commission's Review of the Anti-Discrimination Act 1977, which is Report No. 92. It follows on from the steps the Government has already taken to enact recommendations from Report No. 92 which prohibit discrimination in employment on the basis of a person's responsibilities as a carer. The Government introduced and this Parliament passed the Anti-Discrimination Amendment (Carers Responsibilities) Bill in 2000. These provisions provide protection for the many carers in our community who are unfairly treated in the workplace when they try to balance work and family commitments. The Anti-Discrimination Board reported in 2002-03 that it received 765 enquiries in relation to the ground of carers' responsibilities, and 88 complaints were lodged in the same period. The Government's reforms are making it possible for workers who are also carers to insist that employers take reasonable steps to accommodate these other important responsibilities.

Many of the reforms in the current bill also reflect or are consistent with the Law Reform Commission's recommendations for improving the operation of the Act. Of the 161 recommendations contained in Report No. 92, the bill addresses around 60 of them, most of which relate to the Anti-Discrimination Board's complaint handling procedures and the review of the president's decisions by the Administrative Decisions Tribunal. More recent consultations with the New South Wales Ombudsman and the current president of the board, Mr Stepan Kerkyasharian, have resulted in the inclusion of other provisions in the bill that will improve the capacity of the board to handle complaints fairly and expeditiously. I wish to emphasise that the other recommendations in the Law Reform Commission's report not yet addressed will be given full consideration by the Government and I expect that a further package of amendments will be put before this Parliament in due course. I turn now to the main purpose of the current bill.

The bill rewrites divisions 1, 2 and 3 of part 9 of the Act to provide a clear process for the lodgment, investigation and, where necessary, review of complaints. While it retains aspects of the current law that are working well, it also includes provisions which will bring about significant improvements to the processes governing the making and investigation of complaints of unlawful discrimination by the President of the Anti-Discrimination Board. It also streamlines and improves the processes of review of the president's decisions by the Administrative Decisions Tribunal.

I turn now to the lodgment of complaints. The capacity of an individual, or a group of individuals, to lodge a complaint of unlawful discrimination is crucial to the protection of their human rights. There are a number of new provisions that provide greater clarity and seek greater levels of fairness in relation to the lodgment of complaints. Currently a person must lodge a complaint within six months of the alleged discrimination occurring. The president has discretion to accept complaints after the six-month period, on good cause being shown. Experience has shown that the six-month statutory limitation period has proven to be inadequate, as some victims of discrimination may not be aware of their rights under the present Act, or may feel unable to confront the alleged perpetrator within such a short time of the alleged unlawful conduct. That approach has also produced concerns in relation to complaints that allege a series of unlawful, discriminatory acts over a period of time.

The bill provides that a complainant must lodge a complaint within 12 months of the alleged discriminatory conduct. New section 89B (2) (b) will give the president a discretion to decline a complaint if the whole or any part of the conduct complained of occurred more than 12 months before the making of the complaint. That approach will double the period of time which complainants have to seek advice about their rights and to lodge a complaint, while at the same time encouraging them to bring complaints within a reasonable time frame. The majority of submissions received by the Law Reform Commission supported extending the limitation period to 12 months. This approach will also promote uniformity with the majority of other Australian jurisdictions in relation to time limitation provisions. There are times when, due to a person's vulnerability, it is appropriate for someone else to lodge a complaint on his or her behalf. New section 87A allows a complaint to be made by an agent, or by a parent or a legal guardian, if the person lacks legal capacity.

The president is given powers also to ensure that a complainant has consented where possible to the complaint being made on their behalf. The bill also provides that when the president is not satisfied that a person is acting in the best interests of the person on whose behalf a complaint is made, the president may appoint another person to act on their behalf, or may decline the complaint. The overall concern of this regime of provisions is to ensure that the best interests of complainants and potential complainants are protected. They are often the most vulnerable in our community and this bill seeks to uphold and protect their interests. New section 88A also gives the president the capacity to assist a person to make a complaint. It is envisaged that this might occur in circumstances where a person's disability, illiteracy, lack of English language skills or cultural background, including their Aboriginality, may make it difficult or impossible to lodge a complaint without such assistance.

I have received a number of representations from interested parties, including in particular Mr Jim Bond of Killarney Vale, a visiting lecturer at the Australian Catholic University in the area of special needs, about the need for people with dyslexia to receive assistance, where necessary, in compiling a written complaint. Without such help they are often not in a position to lodge a complaint under the Act. The bill allows the president to assist such people in the future. New section 89 proposes that a complaint must be in writing, but it does not have to take any particular form or to demonstrate a prima facie case. This ensures that there is no prescriptive form required for a person to lodge a complaint and that the lodgment of the complaint in its original form is a sufficient trigger for further investigation and refinement of the issues raised by the complaint.

Complaint lodgment will soon enter the electronic age. The bill allows for the establishment of an electronic system for lodging complaints and thus removes the requirement for a person to put his or her signature to a complaint. To ensure the authenticity of the complaint, the president has the power to satisfy himself or herself that the complaint is made by the complainant. New section 88B also makes clear that a person is not prevented from lodging a complaint with the board only because they have made a complaint or taken proceedings in another jurisdiction, whether in New South Wales or elsewhere.

I refer next to complaints handling by the Anti-Discrimination Board. Once the Anti-Discrimination Board has received a complaint, the bill proposes a number of changes to the way in which that complaint is considered and investigated, if accepted. Firstly, the president must determine whether the complaint is to be accepted in whole or in part. The capacity of the president to decline a complaint in part is a new

feature and will address the situation that arose in the case of *MacDonald v Home Care Services of NSW* in which it was concluded that the president cannot decline part of a complaint. This has caused practical difficulties where some part of a complaint may be capable of investigation for a contravention of the Act, even if some other parts are not.

New section 89B sets out the circumstances in which the president may decline a complaint. Generally, the president is required to give notice of a decision to accept or decline a complaint, or part of a complaint, within 28 days of the decision. The president must provide regular reports to the parties about the progress of the investigation—at least every 90 days. This will ensure that all parties involved are given regular feedback about the progress of investigation and the issues in the complaint that still need to be resolved. Once an investigation into a complaint has begun, different or additional issues are often identified to those originally raised in the complaint. In such circumstances, flexibility is required to ensure that all aspects of a complaint that come to light are dealt with fairly and in a timely way.

Therefore, to give greater flexibility to the complaint-handling process, new section 91C gives the complainant the capacity to amend the complaint, provided the president has not already declined or resolved it. The president will be required to inform the respondent and any new respondents about the substance of the amended complaint. The same time limits will apply as apply to the making of the original complaint. Currently when the president is investigating a complaint, he or she may request the production of documents and information relevant to an investigation, but has no power to compel their production. Other Australian jurisdictions have empowered the equivalent of their president to require the production of documents and have adopted sanctions for failure to comply.

Arguably, it is difficult to conciliate a case effectively if not all the relevant information about the alleged discriminatory conduct is made available. On the other hand, some have argued that the informal and generally co-operative nature of the conciliation process is undermined by giving the president a coercive power to produce material. The New South Wales Law Reform Commission ultimately recommended that the president should be given a power to require the provision of documents and information, backed by a penalty for failure to comply. New section 90B empowers the president to require a party to the complaint, or a person who has material relevant to the complaint, to provide information or documents to the president, generally within 28 days of the request. A person who fails to comply is guilty of an offence. Where there is non-compliance, the president may also refer the complaint to the tribunal.

In addition, new section 90A enables the president to require the production of a transcript of a broadcast that has given rise to a vilification complaint or an allegation that a serious vilification has been committed. Failure to comply also brings a criminal sanction in the form of a monetary penalty. The bill enables the president to endeavour to resolve a complaint by conciliation at any stage after it has been accepted. It also provides for registration and enforcement of an agreement reached after a successful conciliation. This is a new aspect of the conciliation process. New section 91A provides that where a party believes that the other party has not complied with the terms of a recorded agreement he, she or they will need to apply to the tribunal to have it registered, within six months of the date of the agreement. If the tribunal registers the agreement, it is taken to be an order of the tribunal and can be enforced accordingly.

New section 92 also sets out clearly, although not exhaustively, the president's powers to decline a complaint once the investigation has commenced. The factors included in the bill are designed to guide the president's discretion in deciding whether to decline the complaint. Where a complaint is declined, the president must advise complainants of the reasons for the decision and their rights of referral to the tribunal in certain circumstances. The bill also provides a clear basis for formally terminating complaints that have been withdrawn, abandoned, settled or resolved by agreement between the parties. These provisions will assist the president to bring closure to complaints for all parties, especially in the case of respondents, who may otherwise remain uncertain about the status of a complaint against them that has been withdrawn or not actively pursued.

The bill also addresses a significant issue raised as a result of the New South Wales Ombudsman's investigation into the handling of certain specific complaints by the former president of the board, Mr

Chris Puplick. The Ombudsman's final report recommended that the current Act be amended to permit the president to delegate all complaint-handling functions to appropriate officers, other than the power of delegation. The Government has acted on the Ombudsman's recommendation. New section 94C broadens the power of the president to delegate his or her functions under the Act and will allow him or her to delegate any of the president's functions—other than the power of delegation—to a specified person or to the holder of a specified office.

As the president's complaint-handling functions extend to handling of complaints within my portfolio, it is appropriate that the bill provides for the president or his or her delegate to perform the president's functions without the concurrence of the relevant Minister. It is also important that the Minister plays no role in revoking the delegations made to designated officers. This will ensure that there is no actual or perceived bias in favour of persons within my portfolio who may be the subject of a complaint. There is one final matter in relation to complaints handling by the board. The bill also proposes an amendment to the general regulation-making power under the Act to allow for the making of regulations in relation to all aspects of the complaint-handling process.

I deal now with referrals to the Administrative Decisions Tribunal. The bill sets out the circumstances in which a complaint may be referred to the Administrative Decisions Tribunal, either by the Minister, the president or a party to the complaint. A new feature is that either party can request the president by notice in writing to refer the complaint to the tribunal if it has not been declined, terminated or otherwise resolved within 18 months after the complaint was lodged. This approach is designed to encourage resolution or conciliation of the complaint within an 18-month time frame, but recognises that there are some variables, often beyond the board's control, which will leave a complaint unresolved after this time.

In such circumstances, and in the interests of fairness to parties, referral to the tribunal for resolution will be possible. However, if the complainant objects to the referral of the complaint, the president must not refer the complaint but may terminate it if there are no reasonable prospects of a conciliated agreement. If the respondent objects to the referral of the complaint, the president will be required to refer the complaint, unless he or she is satisfied that there are reasonable prospects of a conciliated agreement.

I deal next with proceedings before the tribunal. The current Act requires a grant of leave by the tribunal for a party to be represented by a legal practitioner or agent. In report No. 92 the New South Wales Law Reform Commission recommended that this situation be maintained, notwithstanding that the Administrative Decisions Tribunal Act generally allows for representation before the tribunal as a matter of right. The current bill maintains the position that there is no automatic right to representation in proceedings before the tribunal. Leave by the tribunal will be required. This is to ensure that an unrepresented litigant is not disadvantaged if he or she cannot find or afford representation. This is a significant issue, particularly for complainants in anti-discrimination matters, many of whom come from disadvantaged groups who may not be able to afford legal services and may otherwise be deterred from proceeding to the tribunal to have their complaints determined.

New section 98 outlines the relevant factors that the tribunal is to determine when considering an application for leave to be represented. These include: the complexity and importance of the proceedings to each party and their importance in the public interest, the likely length of the proceedings, and the likely cost of representation as compared to the financial benefit of the relief sought. New section 105 also makes clear the powers of the tribunal to make interim orders which preserve the status quo between the parties to the complaint, preserve the rights of the parties to the complaint or return the parties to the circumstances they were in before the alleged discrimination occurred, pending the determination of the complaint.

I turn now to orders of the tribunal. The bill also sets out clearly the powers of the tribunal to make orders and other decisions. It extends the current law to provide that where the tribunal finds a complaint substantiated, it may order the respondent to publish an apology or a retraction in a suitable publication. Previously this kind of order applied only to complaints of vilification. In addition, an order may extend to conduct of the respondent that affects persons other than the person who lodged the complaint. This will allow the tribunal to address identified situations of systemic discrimination. The tribunal will also be

able to order a respondent to pay damages not exceeding $40,000 if they do not comply with an earlier order of the tribunal. If the tribunal makes an order that affects an 'industrial agreement', it must give notice in writing to the president as soon as practicable. This will ensure that steps are taken to inform the Industrial Relations Commission of the relevant parts of the order.

In relation to enforcement of orders there are two new features to be added to the current enforcement regime. The Law Reform Commission proposed that the president be given a role in the enforcement of some orders. As a general rule, enforcement of tribunal orders will be a matter for the parties. However, there are some circumstances where the public interest might demand that the president take some action to enforce an order. It is envisaged that this might occur in situations where a complaint demonstrates systemic discrimination by a particular respondent and the complainant lacks the necessary resources to initiate enforcement proceedings. In addition, the bill provides for the enforcement of non-monetary orders of the tribunal as a judgment of the Supreme Court once the registrar of the tribunal has filed a certificate outlining the terms of the order.

Presently, the penalty for non-compliance with a non-monetary order of the tribunal is a small monetary fine. This is a serious limitation on the effectiveness of the kinds of relief granted by the tribunal, which are specifically designed to change or eliminate discriminatory attitudes and conduct. These new powers of civil enforcement seek to ensure that justice is actually brought about for complainants whose complaints have been proven and where non-monetary orders are an appropriate form of relief. Interest will also accrue on damages ordered to be paid by the tribunal from the date on which the order takes effect until payment. It will accrue at the same rate as that applicable to a judgment of the District Court.

I turn now to the issue of codes of practice. Another new feature contained in the bill relates to the development and promotion of codes of practice by the Anti-Discrimination Board. The board already develops guidelines to assist others, such as employers, to comply with the Anti-Discrimination Act. Proposed section 120A formalises this role in legislation. A code of practice is designed to provide guidance in relation to the conduct that constitutes discrimination under the Act and ways in which it can be avoided. The codes will not be legally binding, but evidence of compliance with, or contravention of, a code may be taken into account by the president or the tribunal during the investigation or review process. The development and promotion of codes of conduct, which will be done in consultation with relevant representative bodies and industry groups, is consistent with the board's educational role on human rights and discrimination matters. In the past such assistance has been well received by industry groups and has helped employers to eliminate many discriminatory practices from their workplaces.

I turn to the protection of information. The bill also contains a new secrecy provision that contains the duties and obligations of employees and agents in respect of information about a person's affairs that they acquire in the course of their duty as employees or agents of the board. Currently, information acquired or held by the board about a complaint, other than information that is protected from disclosure under section 94, may be subpoenaed by a court or may be subject to a request for production pursuant to the Freedom of Information Act 1989. The board has reported that its documents are regularly subpoenaed in relation to proceedings in other jurisdictions. It has limited grounds on which to oppose production under existing laws.

The result is that the current law fails to recognise the importance of ensuring confidentiality for persons lodging complaints. There is a risk, albeit a small one, that details of a complaint could be disclosed by officers of the board to the media, a relative or a prospective employer without sanction. Most other equal opportunity jurisdictions in Australia have provisions in place to govern the actions of public officers in relation to personal information contained in the complaint and acquired during its investigation. It is appropriate that New South Wales does also. Therefore, to protect the integrity of the complaint resolution process and to encourage persons to bring complaints, this bill will make it an offence for a member or officer of the board to make a record, disclose or communicate to any person information concerning the affairs of any person obtained while exercising the functions under the Act, unless it is already publicly available or where the disclosure is required under the Anti-Discrimination Act or authorised by any other relevant law. Information concerning the affairs of a person will also be inadmissible in a court and cannot lawfully be the subject of a subpoena.

One exception to these strict non-disclosure requirements is included in the bill. Where the president of the board certifies in writing that it is necessary to provide information to the Minister, and it is in the public interest to do so, the relevant material may be disclosed. This provision will ensure that the president has a discretion to convey relevant information about the affairs of a person to the Minister where the public interest demands it. Relying on the exception under the Freedom of Information Act 1989 for documents containing confidential information has also proved to be inadequate in relation to information provided to the board to assist in investigating the complaint. The bill contains an amendment to exempt the president of the board from the operation of the Freedom of Information Act in relation to the president's complaint handling, investigative and reporting functions while the complaint is in the course of being dealt with by the president. This puts the president of the board on a par with other New South Wales government agencies with similar complaint handling and reporting functions, such as the Independent Commission Against Corruption and the Ombudsman's office.

The president of the board has drawn to my attention that it is presently unclear whether the board can lawfully charge fees for the education services it provides to the public. These services include the holding of workplace training seminars for employers about their obligations under the Act, and how they can best meet these obligations. This is a situation that ought to be remedied. A provision has been included in this bill to make it abundantly clear that the board is able to enter agreements and to receive payments for the services or materials it provides while exercising its education functions under the Act.

I turn finally to the question of disability discrimination. The bill also extends the operation of the disability discrimination provisions of the Act to prohibit discrimination arising on the basis that a person with a disability is accompanied by another person whose role it is to assist them with his or her disability. This would include an interpreter, a reader, an assistant or a carer. The new section also prohibits discrimination on the basis that a person uses or possesses a palliative or therapeutic device or other mechanical or electronic equipment to alleviate the effect of their disability. These are sensible amendments that seek to protect a person with a disability from discrimination in public life on the basis of a characteristic that appertains generally to people who have that disability. This amendment is designed to bring New South Wales into line with the definitions of "disability" contained in the Federal Disability Discrimination Act 1992.

I mention in passing one other matter relating to the definition of "race" within the Act. In 1994 the then Attorney, Mr John Hannaford, MLC, in moving the second reading of an earlier bill to amend the Act, noted that the term "ethno-religious origin" was being added to the definition of "race", and I quote:

to clarify that groups such as Jews, Muslims and Sikhs have access to the racial vilification and discrimination provisions of the Act.

Since that time the term "ethno-religious origin" has been given a narrower judicial interpretation. However, it is important to reiterate the Government's clear position that the original intention of these provisions should continue to apply—that is, that members of specific groups who share a common religious and cultural identity, such as Jews, Muslims and Sikhs, should continue to be protected by the racial discrimination provisions of the Act. Recent international events have highlighted the importance of ensuring that the flames of irrational prejudice are not directed towards the vast majority of law-abiding citizens in New South Wales, regardless of their ethno-religious origin. The Anti-Discrimination Act is designed to protect all such citizens from prejudice and bigotry. It is my pleasure to commend the Anti-Discrimination Amendment (Miscellaneous Provisions) Bill to the House.