NSW Legislative Council Hansard

ANTI-DISCRIMINATION AMENDMENT (MISCELLANEOUS PROVISIONS) BILL

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Second Reading

The Hon. IAN MACDONALD (Minister for Primary Industries) [3.12 p.m.]: I move:

That this bill be now read a second time.

I seek leave to have the second reading speech incorporated in *Hansard*.

Leave granted.

The NSW *Anti-Discrimination Act 1977* is a vital plank in this 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 NSW Law Reform Commission's Review of the Anti-Discrimination Act 1977, which is Report number 92.

It follows on from the steps the Government has already taken to enact recommendations from report 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 92, the development of this bill has considered around 60 of these recommendations, 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 NSW Ombudsman, and the current President of the Board, Mr Stepan Kerkyasharian, have resulted in the inclusion of other provisions in the bill which will improve the capacity of the Board to handle complaints fairly and expeditiously.

The Hon. Bob Debus, MP, Attorney-General in his second reading speech in the other place, emphasised that the other recommendations in the Law Reform Commission's report not yet addressed will be given full consideration by the Government and he expects 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 which 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.

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 which provide greater clarity and seek greater levels of fairness in relation to the lodgment of complaints.

Currently a person must lodge a complaint within 6 months of the alleged discrimination occurring. The president has a discretion to accept complaints after the 6 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 current Act, or may feel unable to confront the alleged perpetrator within such a short time of the alleged unlawful conduct. This approach has also produced concerns in relation to complaints which allege a series of unlawful, discriminatory acts over a period of time.

This bill provides that a complainant must lodge a complaint within 12 months of the alleged discriminatory conduct. Clause 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.

This 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 timeframe. 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 their behalf.

Clause 87A of the bill 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 also given powers to ensure that a complainant has consented where possible to the complaint being made on their behalf.

The bill also provides that where 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.

Clause 88A of the bill 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.

The Attorney-General 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.

Clause 89 of the bill 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 their signature to a complaint. To ensure the authenticity of the complaint, the president has the power to satisfy him or herself that the complaint is made by the complainant.

Clause 88B of the bill 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 NSW or elsewhere.

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 which 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.

Clause 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 ninety (90) days. This will ensure that all parties involved are given regular feedback about the progress of investigation and the issues in the complaint which 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, clause 91C of the bill 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 NSW 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.

Clause 90B of the bill 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, clause 90A of the bill 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. Clause 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 6 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.

Clause 92 of the bill 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 the complainant 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 which 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 NSW 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. Clause 94C of the bill 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 the Attorney-General's 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 the Attorney-General's 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.

Referral 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.

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 92, the NSW 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.

Clause 98 of the bill outlines the relevant factors that the tribunal is to consider 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.

Clause 105 of the bill 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.

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 only applied 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.

Currently, 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.

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.

Protection of information

The bill also contains a new secrecy provision which contains the duties and obligations of employees and agents in respect of information about a person's affairs which 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 which 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 NSW 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 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 proven 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 NSW Government agencies with similar complaint handling and reporting functions, such as the Independent Commission Against Corruption and the Ombudsman's Office.

Fees for services

The president of the board has brought to 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 which ought to be remedied. A clause 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.

As this matter was raised in the debate in the other place, I offer the following information about its importance.

The Anti-Discrimination Board has had a self-funding education program for a number of years. This program operates broadly on a cost-recovery basis. In the 2003-04 financial year, it raised $680,000 and effectively covered the cost of relevant salaries, on-costs, venue hire and some publications costs.

The board's reputation for interactive, relevant and up-to-date training is second to none. As to its fees, it charges:

• $800 for sessions up to 2.5 hours,
• $1060 for sessions between 2.5 hours and ½ a day in length and
• $1920 for sessions lasting for a day.

These are highly competitive rates for professional training seminars.

The board's workplace consultants conducted more than 530 sessions in 2003-04, mostly in NSW, but also further a field in New Zealand and the Asia Pacific region.

I wish to assure this House that the Government is not profiting out of discrimination. It takes its obligations seriously to ensure that employers understand the law in this area and work with their employees to reduce the possibility of unlawful discrimination occurring.

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 their disability. This would include an interpreter, a reader, an assistant or a carer. The clause 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 which 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 NSW into line with the definitions of "disability" contained in the federal *Disability Discrimination Act 1992*.

I commend the Anti-Discrimination Amendment (Miscellaneous Provisions) Bill to the House.

The Hon. GREG PEARCE [3.12 p.m.]: I lead for the Opposition on this bill, which, in essence, amends the Anti-Discrimination Act 1977 and makes a number of amendments to various other Acts. The Opposition does not oppose the bill, which, makes a number of essentially procedural changes to the administration of the anti-discrimination laws. These stem from recommendations by the Law Reform Commission to improve complaints handling and review process for discrimination matters in New South Wales. A number of recommendations are made by the New South Wales Law Reform Commission in its report No. 92 entitled, "Review of the Anti-Discrimination Act 1977" and some of those recommendations were incorporated in an Act last year.

This bill goes further and makes amendments which are included in a variety of those recommendations. Amongst them are amendments which allow a complaint to be made by an agent of a person or by the parent or guardian if the person lacks legal capacity. The president of the board is also given powers to ensure that a complainant has consented, where possible, to the complaint being made on their behalf, and to appoint another person to act on their behalf if the president believes a person's best interests are not being served.

The bill also enables a person who has consented to a complaint being made on his or her behalf to withdraw the consent. It allows the president to assist a person to make a complaint, and this will help those with special needs, such as dyslexia. Under the bill a person is not prevented from making a complaint if that person has prosecuted the subject matter of the complaint in another jurisdiction, whether in New South Wales or elsewhere. The bill provides for electronic lodgment of complaints, and clarifies the president's powers to accept, dismiss, refer and terminate complaints, both at the outset and during an investigation. It provides also that a decision by the president to decline a complaint is not reviewable by the Administrative Decisions Tribunal.

The bill also sets out the powers of the president to acquire the relevant information required to conduct an investigation

into a complaint, and enables the president to endeavour to resolve a complaint by conciliation at any stage. The bill broadens the power of the president to delegate the president's functions and 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. Further provisions also widen the circumstances in which the tribunal can make interim orders and make it an offence to refuse or neglect to comply with certain orders, or an interim order of the tribunal. The bill also sensibly empowers the tribunal to order apologies and retractions, and enables the president to enforce orders of the tribunal in the public interest.

The bill allows the Anti-Discrimination Board to charge fees for the services or materials it provides while exercising its education functions under the Act. It also contains a minor substantive reform which extends the protection from disability discrimination arising out of the use of disability assisting aids—human, mechanical or electronic. This bill brings the Anti-Discrimination Act into line with the Commonwealth Disability Discrimination Act 1992. As I mentioned at the outset, the Opposition considers it very important to continue to improve our anti-discrimination laws as part of our efforts to protect human rights. This bill incorporates a number of the recommendations of the Law Reform Commission and, accordingly, the Opposition does not oppose it.

Ms LEE RHIANNON [3.16 p.m.]: The Greens support the bill. The Anti-Discrimination Act has provided thousands of people in New South Wales with the opportunity to challenge injustice in employment, the workplace, education, the supply of goods and services and other areas of public life. In 1977 the passing of the Anti-Discrimination Act for the first time provided legal protection for those in our communities who suffer discrimination. In turn, this brought a heightened level of humanities to our whole society, which was most welcome. The Act has been amended from time to time over the past 27 years to reflect the development of our society, and we hope it will continue to be so amended. During that time we have become aware of the need to remove discrimination in all its manifestations. The Act has long been in need of some important amendments.

Indeed, attention by this Government to report No. 92 on the Law Reform Commission's review of the Anti-Discrimination Act, which was released in 1999, is long overdue. In its report the commission made 161 recommendations. Clearly, the commission believed that the law dealing with anti-discrimination requires considerable attention to bring it up to date with the contemporary needs and understanding of our society. This bill deals only with those recommendations relating to the procedural reforms and falls very short of adequately addressing the problems with the legislation highlighted by the commission's report. The Greens acknowledge that in improving the mechanisms for the lodgment and determination of discrimination complaints, the bill will go some way to address some of the issues confronted by complainants. But the majority of the recommendations of the Law Reform Commission are substantive in nature. If it has taken the Government five years to address those procedural recommendations, will it take another five years to address the important substantive recommendations of the commission?

After 9½ years in office the Carr Government has failed to amend the legislation to reflect the development of our society. We welcome this bill, but it has many shortcomings which highlight a problem with this Government. The recommendations of the Law Reform Commission seek to reflect changes in our society. The Government has been remiss in not acting on those recommendations. Unlike most discrimination legislation, the Anti-Discrimination Act does not include a preamble, and that omission was addressed by recommendation 7 of the commission's report, which stated that the Anti-Discrimination Act should include a preamble that refers to a right to substantive, as distinct from formal, equality. The Carr Government's failure to bring New South Wales legislation into line with other similar legislation clearly underlines its inadequacy in addressing the ugly phenomenon of discrimination in our society.

As the years role by one starts to feel that the Carr Government is unwilling to do this. This is why the Greens have been forced to launch a private member's bill, the Anti-Discrimination Amendment (Equality in Education and Employment) Bill, which addresses one of the major anomalies that has lingered with the New South Wales Anti-Discrimination Act [ADA]. Since 1977 private and religious schools and small businesses that employ fewer than six people have not been required to comply with the Anti-Discrimination Act. Side by side with the advances achieved by the Anti-Discrimination Act we have allowed and, if anything, codified discrimination against people in private schools and small businesses. Recommendation 14 of the report of the New South Wales Law Reform Commission urges the repeal of the small business exception. Recommendation 20 deals specifically with the anomaly with regard to private schools, and recommends the repeal of exception on all grounds.

The Government addressed just one of the recommendations of the report of the commission with the passage of the Anti-Discrimination Amendment (Carers' Responsibility) Act 2000, which was assented to in June 2000 and commenced in March 2001. The amendment adopted recommendation 40 of the report of the commission and extended the Act to include carers' responsibility as a new ground of discrimination in employment. However, it did not follow recommendation 38, extending the Act to religious belief, or recommendation 39, extending it to political opinion. In the current bill the Government was willing in one instance only to address one of the substantive recommendations of the report of the commission and to bring the ADA into line with its Commonwealth counterpart. This was in an area of disability discrimination, where the bill extends protection from disability discrimination arising out of the use of disability assisting aids. The Greens welcome this amendment, but call on the Government to address the need for substantive reform of the ADA in keeping with the recommendations of the report of the commission.

The extent of the need for serious reform is evidenced by the fact that the commission called for redefinition of both direct and indirect discrimination. These recommendations go to the heart of our discrimination legislation. The Government must move to address them. As I mentioned earlier, the New South Wales Anti-Discrimination Act has provided thousands of people in New South Wales with the opportunity to challenge discrimination, harassment and vilification in employment, education, the supply of goods and services, and other areas of public life. However, significant loopholes still exist. Experience in operating under the legislation has highlighted the need for some clarification and amendment to

reflect the development of our society. Clearly, as our society develops and changes, the Government of the day, if it has a commitment to anti-discrimination, must respond to this greater knowledge about the manifestations of discrimination. Again the Premier is failing in an area he says he is deeply committed to.

The Greens call on the Government to close the loopholes and address the need for substantive reform. Not doing so reflects badly on the Government. But, sadly, it comes as no surprise when one considers that during the Government's time in office there has been a gradual, but determined, running down of the Anti-Discrimination Board's funding, staffing and status. It is a tragedy. What a legacy Labor has given itself. The Greens call on the Government to fulfil its promise to provide a further package of substantive amendments. We should have these amendments now, not later. However, as I said, the Greens will support the bill.

The Hon. ROBYN PARKER [3.23 p.m.]: I support the Anti-Discrimination Amendment (Miscellaneous Provisions) Bill. As other speakers have noted, the anti-discrimination legislation has been in place for the past seven years. Discrimination law, which has existed in this country for less than 30 years, has served our community well. It is all about giving people a fair go. We in this country value dearly the proposition that everyone should have the opportunity to have a fair go. The fundamental rights in the Anti-Discrimination Act receive the support of all governments. But it is a welcome opportunity to update legislation and make it relevant to our changing times, albeit rather late when one considers that the report was produced in 1999. But these are good alterations and it is pleasing, therefore, that the amendments have bipartisan support. When one considers the recent cuts to disability services, the provisions outlined in the bill are welcomed and give me some heart.

As other speakers have mentioned, the legislation is the result of deliberations by the New South Wales Law Reform Commission and its findings in report No. 92. The response to recommendations in the report has led to a renovation of procedures for complaints handling and review under the New South Wales Anti-Discrimination Act 1977. These renovations aim to improve the way the Act operates with a view to improving the capacity of the board and the tribunal to make effective interventions on behalf of those who have been discriminated against. I acknowledge Mr Jim Bond of Killarney Vale, who has been a champion in bringing special needs issues to the forefront and, in regard to the bill, the need for people with dyslexia in particular to receive assistance where necessary in compiling a written complaint to the Anti-Discrimination Board.

I met with Mr Bond last year during a discussion about dyslexia, and I met with him again recently to discuss the amending bill. I acknowledge his commitment and determination over a substantial period. Mr Bond has a learning difficulty that we term dyslexia. Mr Bond informed me that in attempting to lodge a complaint with the Anti-Discrimination Board about the honourable member for The Entrance, Mr Grant McBride, in about 1999, he was made aware of restrictions that existed with the board. The tragic irony of anti-discrimination law today it is that those with a disability or learning difficulty who have been subject to discrimination can find it hard to lodge a complaint with the board because of restrictions in the procedure. Under section 88 of the Anti-Discrimination Act a complaint of discrimination must be in writing. This provision clearly raises issues for people with a disability or a learning difficulty that affects their ability to write.

The Government's web site contains a link to a site that is used as a resource by staff who serve people with disabilities. That site notes certain medical conditions that may require adjustments in terms of client services. Those medical conditions include dyslexia. The Government has acknowledged that adjustments need to be made for people with such disabilities. However, it has taken some time for the anti-discrimination law to catch up with that. The bill amends the Act to allow the president of the board to assist people with special needs, such as those with dyslexia, to make a complaint. It further provides the president with powers to ensure that a complainant has consented, where possible, to a complaint being made on his or her behalf.

New section 88A therefore gives the president the power to assist a person to make a complaint. Complainants are further protected as the bill provides that when the president is not satisfied that a complaint is being made on someone's behalf with his or her best interests in mind the president can appoint another person to act on his or her behalf, or may decline the complaint. New section 89 maintains that a complaint must still be in writing, but it does not have to take any particular form or to demonstrate evidence that is sufficient to raise a presumption of fact. Provided it is in writing, no view is taken. This means that no forms have to be filled out by a person who wishes to lodge a complaint with the board. The lodging of the complaint in its original form is enough to initiate a further investigation.

The ability to lodge a complaint with the Anti-Discrimination Board concerning unlawful discrimination is crucial to the protection of human rights. Indeed, this bill seeks to bring the 1977 Act into line with human rights legislation and will create similar provisions to those contained in the Federal Disability Discrimination Act 1992. It makes sense to me that just as the Anti-Discrimination Board currently provides translators for both on-the-spot meetings and for the board's inquiry line to assist complainants for whom English is a second language, it should make similar provision for people with disabilities and learning difficulties. We have certainly come a long way toward assisting people for whom English is a second language and this bill represents a catch-up or modernisation of legislation. The bill has sensible amendments that will provide people who have a disability or learning difficulty with the opportunity to seek protection from discrimination. The bill brings the definition in the New South Wales legislation into line with the definition of disability in the Federal Disability Discrimination Act 1992. It is long overdue. I heartily support the bill.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS [3.30 p.m.]: The Australian Democrats support the Anti-Discrimination Amendment (Miscellaneous Provisions) Bill, which implements many of the recommendations of the Law Reform Commission's report into the 1977 Anti-Discrimination Act which was introduced by a former Premier, Mr Wran. The Law Reform Commission's report was published in 1999 and contains 161 recommendations. This bill addresses 60 of those recommendations. The Government previously implemented the report's recommendations through the Anti-

Discrimination Amendment (Carers' Responsibilities) Act 2000. I understand that many of the other recommendations will be incorporated in subsequent bills. This bill addresses recommendations related to the mechanism of lodging complaints, the handling of complaints by the President of the Anti-Discrimination Board, hearings and appeals procedures, additions to the list of powers of the tribunal to make orders, allowing the board to develop codes of practice, new secrecy provisions, and additions to the Freedom of Information Act to exempt the president from its operations as is the case in relation to the Independent Commission Against Corruption and the Ombudsman.

The Legislation Review Committee expressed two concerns in relation to the bill associated with the retrospective application of some provisions and commencement of the legislation by proclamation. The committee concluded that the retrospective operation of the bill does not adversely affect the rights of individuals who may be parties to a complaint or trespass on personal rights. Regarding commencement of provisions by proclamation, the committee expressed the view that generally the practice is not good but added that the committee had been advised by the Minister that in this instance it has been necessary to undertake an education campaign regarding the changes prior to implementation. The Minister has indicated that material is already being prepared and that the bill, if passed, should commence within a few weeks of assent. Naturally I am concerned about the committee's reservations relating to proclamation. On numerous occasions in this House I have expressed fears regarding unproclaimed legislation. Indeed, my predecessor listed similar concerns quarterly. The Australian Democrats are disgusted that provisions passed by the Parliament but not favoured by the Government are rendered nugatory by non-proclamation—a totally undemocratic process.

An advocate for people who suffer from dyslexia, Jim Bond, was referred to in the Minister's second reading speech and by the Opposition during debate. Mr Bond thinks this legislation has merit because it provides people with rights to better access to facilities when lodging a complaint. By virtue of this legislation, complainants will be able to obtain assistance from Anti-Discrimination Board officers when lodging their complaints whereas currently that is not the case. A complaint barrier that is used by a lot of people is a request to "put it in writing" and that represents a severe barrier for people who have dyslexia. As many people who have problems with literacy or dyslexia tend to hide their discomfort from almost everybody in their world, naturally they will be pleased to have the assistance of an officer of the board in lodging a valid complaint. The Australian Democrats give praise when praise is due, and it is pleasing to note the Minister has taken steps to assist complainants who are affected by disability. Let us hope that similar action is taken to protect whistleblowers who, despite legislation that is intended to assist them in making disclosures, receive a very bad deal.

In one of today's newspapers there is a suggestion by a police whistleblower that in the event of the whistleblower's death in the next few days, it should not be regarded as suicide. Even if it turned out to be suicide, that is a very worrying situation. It demonstrates that whistleblowers have a very hard time and the events surrounding the Campbelltown inquiry are proof of that. This legislation has merit. The Australian Democrats hope the Government will proclaim the legislation in its entirety very soon, and will take similar action to strengthen whistleblower legislation.

The Hon. HENRY TSANG [Parliamentary Secretary] [3.35 p.m.], in reply: I thank honourable members for their contributions to the debate. I wish to respond to some of the criticism expressed by the Coalition and the Greens, who queried why the Government took so long—approximately five years—to respond to the report of the Law Reform Commission. I point out that between 1992 and 1999 the New South Wales Law Reform Commission [LRC] conducted a full review of the Anti-Discrimination Act 1977. The LRC released its final report, report No. 92, in December 1999. The report examined the Act in detail and set out a large number of recommendations for reform—a total of 161 recommendations. I acknowledge the wonderful support for the bill expressed by the Hon. Dr Arthur Chesterfield-Evans in recognising the large number of recommendations for reform. The honourable member also recognised that the recommendations fall into three broad categories: concepts of discrimination, areas of operation of the Act and the grounds of unlawful discrimination; improved procedures for complaints handling by the Anti-Discrimination Board, which the honourable member supported particularly; and the availability of procedures and remedies in discrimination proceedings before the Administrative Decisions Tribunal.

Owing to the large number and wide range of recommendations, the Government is responding to the LRC report in a number of stages. Extensive consultation has taken place in relation to the LRC's report, but the Government is not restricted to the issues canvassed in the report in taking forward its reform agenda. The Government will continue to make sensible changes to enhance the human rights of members of our community and to make our system of human rights protection more workable and effective. The first stage concerns carers' responsibilities. This was the subject of amendments in 2000 to the Anti-Discrimination Act that prohibit discrimination in employment on the grounds of a person's responsibilities as a carer. This ground covers a number of carers' responsibilities, including the care of a child, an adult who requires a guardian, a person's spouse, a parent, grandparent, or sibling. The second stage concerns procedural reforms. A large number of procedural reforms are incorporated in the bill. Consideration has been given to approximately 60 recommendations of the LRC report in the compilation of the bill.

Overall, the bill constitutes a general renovation of the procedures for complaint handling and review under the Act. It is designed to improve the quality of decision making and thereby to contribute to the protection of the community's human rights. The third stage concerns further reforms. The Government is still considering other recommendations in the Law Reform Commission's report so further changes to the Act may be anticipated. The Coalition expressed the view that although it took five years to formulate the reforms reflected in the bill, more needs to be done.

In the meantime the Government has consulted extensively with interest groups, government agencies and the board. The process has been lengthy and has been further delayed by the appointment late last year of the new president, Mr Stepan Kerkyasharian. The new president had mooted a number of suggestions, which have been included in the bill, and that was a good reason for the Government taking its time to make sure that everything was right. I commend the bill to the House.

Motion agreed to.

Bill read a second time and passed through remaining stages.

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- Subjects:
  Discrimination; Ombudsman; Appeals Tribunals
- Speakers:
  Macdonald The Hon Ian; Pearce The Hon Greg; Rhiannon Ms Lee; Parker The Hon Robyn; Chesterfield-Evans The Hon Dr Arthur; Tsang The Hon Henry
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