

Anti-Discrimination Amendment (Miscellaneous Provisions) Bill 2004

New South Wales

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The objects of this Bill are:

(a) to amend the *Anti-Discrimination Act 1977*:

(i) to replace the provisions of Divisions 1, 2 and 3 of Part 9 of the Act which relate to the making and investigation of complaints of unlawful discrimination by the President of the Anti-Discrimination Board and to the review of the President's decisions by the Equal Opportunity Division of the Administrative Decisions Tribunal, and

(ii) to make other miscellaneous amendments to the Act, and

(b) to make related amendments to the *Administrative Decisions Legislation Amendment Act 1997*, the *Administrative Decisions Tribunal Act 1997*, the *Defamation Act 1974* and the *Freedom of Information Act 1989*.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides that the proposed Act commences on a day or days to be appointed by proclamation.

Clause 3 provides for the amendment of the *Anti-Discrimination Act 1977* (the **Principal Act**) as set out in Schedules 1 and 2.

Clause 4 provides for the amendment of the Acts specified in Schedule 3.

Schedule 1 Amendments to Anti-Discrimination Act 1977 concerning complaints

Schedule 1 [1] omits an unnecessary definition.

Schedule 1 [2] enables the inclusion of notes in the Principal Act and indicates their status.

Schedule 1 [3] substitutes Divisions 1, 2 and 3 (proposed sections 87–116) of Part 9 of the Principal Act.

Division 1 (Preliminary) contains proposed section 87 which defines certain words and expressions for the purposes of Part 9.

Division 2 (Complaints—the functions of the President) contains proposed sections 87A–94C. Division 2 is further divided into 7 Subdivisions according to subject-matter.

Proposed section 87A sets out the persons who may make a complaint that another person has contravened a provision of the Principal Act or the regulations made under the Principal Act. A complaint will be able to be made by an agent of a person or by the parent or guardian (within the meaning of the *Guardianship Act 1987*) of a person who lacks legal capacity.

Proposed section 87B deals with complaints made on behalf of others. It reproduces the current provisions of section 88 (2A) but also enables the President to test the confidence of the persons on whose behalf the complaint has been made in the person making the complaint, and the nature of the authority given by them to that person.

Proposed section 87C reproduces the current provisions of section 88 (1A), (1B) and (1C) relating to the making of complaints by representative bodies.

Proposed section 88 reproduces the current provisions of section 88 (1D) relating to the making of vilification complaints.

Proposed section 88A enables the President to assist a person to make a complaint.

Proposed section 88B provides that a person is not prevented from making a complaint only because the person has prosecuted the subject-matter of the

complaint in another jurisdiction.

Proposed section 88C enables a person who has consented to a complaint being made on his or her behalf to withdraw the consent.

Proposed section 89 requires a complaint to be in writing, but it does not have to take any particular form or to demonstrate a prima facie case.

Proposed section 89A provides that a complaint is made by lodging it with the President. In addition to delivery by post or hand, or by facsimile, the regulations will be able to extend the means of lodgment to include, for example, lodgment by email.

Proposed section 89B provides that the President is to determine whether a complaint is to be accepted in whole or in part. The section sets out the grounds on which the President may decline a complaint in whole or in part. Generally, the determination is to be made within 28 days after the complaint is made. A decision to decline a complaint is not reviewable by the Tribunal.

Proposed section 90 requires the President to investigate each complaint that has been accepted. Several complaints may be jointly investigated.

Proposed 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 an offence of serious vilification has been committed. A person who fails to comply with the requirement is guilty of an offence.

Proposed section 90B empowers the President to require a party to a complaint, or a person who has material relevant to a complaint, to provide information and documents to the President within 28 days or such other period as the President may specify. A person who fails to comply with the requirement is guilty of an offence. In addition, the President may refer the complaint to the Tribunal.

Proposed section 90C requires the President, at intervals of not more than 90 days, to notify parties of the progress of an investigation.

Proposed section 91 reproduces the current provisions of section 89B with respect to prosecutions for serious vilification.

Proposed section 91A enables the President to endeavour to resolve a complaint by conciliation at any stage. The section sets out the relevant process and provides for the registration and enforcement of an agreement reached as a consequence of a successful conciliation.

Proposed section 91B provides that a party to conciliation proceedings has no right to be represented by another person except with leave granted by the President.

Proposed section 91C specifies the circumstances in which a complaint may be amended and provides for the manner of making amendments.

Proposed section 92 enables the President, at any stage during the investigation of a complaint, to decline the complaint on any of the grounds set out in the proposed section. Notice of the decision and of the right of the complainant to have the decision referred to the Tribunal is to be given to the complainant.

Proposed section 92A enables the President, at any stage during the investigation of a complaint, to terminate a complaint if satisfied that the complaint has been settled or resolved by agreement between the parties. There is no right of review by the Tribunal of the termination decision.

Proposed section 92B enables the withdrawal of complaints, other than representative complaints.

Proposed section 92C sets out the circumstances in which a complaint is taken to have been abandoned and the means by which an abandoned complaint may be revived.

Proposed section 93 reproduces the current provisions of section 88A to the effect that the death of the complainant or respondent does not terminate the complaint.

Proposed section 93A sets out the circumstances in which a complainant may require the President to refer a complaint to the Tribunal. They are that the President has declined a complaint because the President is of the opinion that the person

prosecuting the complaint is not acting in the best interests of the person on whose behalf the complaint is made or has lost the confidence of that person, that the President has referred a vilification complaint to the Attorney General, and that the President, on investigating a complaint, has declined it.

Proposed section 93B enables a party to a complaint to request the President to refer the complaint to the Tribunal if it has not been resolved within 18 months.

Proposed section 93C enables the President to refer a complaint to the Tribunal.

Proposed section 94 enables the President to split a complaint if there are several complainants or respondents.

Proposed section 94A provides that if a complaint is referred to the Tribunal, it is to comprise the original complaint lodged with the President, any amendments, and any other relevant documents or information identified by the President. The complaint is to be accompanied by any report relating to any investigation by the President of the complaint.

Proposed section 94B provides that the calculation of a period of time specified in the proposed Division for the doing of something in response to a notice given by post commences from the fourth day after the notice was posted.

Proposed section 94C broadens the power of the President to delegate the President's functions under the Principal Act.

Division 3 (Complaints—the functions of the Administrative Decisions Tribunal) contains proposed sections 95–116.

Proposed section 95 sets out the circumstances in which complaints may be referred to the Tribunal by the President or the Minister. The referral of a complaint is taken to be an application for an original decision within the meaning of the *Administrative Decisions Tribunal Act 1997*.

Proposed section 96 provides that complaints referred to the Tribunal under proposed section 93A (other than certain complaints giving rise to serious vilification offences) may not be the subject of proceedings before the Tribunal without the leave of the Tribunal. The section also provides that an issue that is the subject of proceedings before the Industrial Relations Commission may not be the subject of proceedings before the Tribunal relating to a complaint without the leave of the Tribunal.

Proposed section 97 identifies the parties to proceedings before the Tribunal relating to a complaint.

Proposed section 98 provides that the parties have a right of appearance in proceedings before the Tribunal but may only be represented in those proceedings by an agent (which is defined to include a legal practitioner) with the leave of the Tribunal.

Proposed section 99 reproduces the current provisions of section 101A relating to the making of arrangements for an officer of the Board to assist the Tribunal in proceedings relating to a complaint.

Proposed section 100 reproduces the current provisions of section 97 which enable the Tribunal to deal with several complaints in the same proceedings.

Proposed section 101 combines the current provisions of sections 102, 103 and 104 relating to determinations with respect to representative complaints.

Proposed section 102 sets out the circumstances in which the Tribunal may dismiss a complaint.

Proposed section 103 enables the Tribunal to amend a complaint on the application of a party or on its own motion.

Proposed section 104 reproduces the current provisions of section 109 under which the proof of conduct that is excepted from unlawful conduct lies on the respondent.

Proposed section 105 sets out the circumstances in which the Tribunal may make interim orders in proceedings before it relating to a complaint.

Proposed section 106 provides that an appeal against an interim order of the Tribunal

may be made only with the leave of an Appeal Panel.

Proposed section 107 enables the Tribunal to dismiss proceedings before it relating to a complaint if it is satisfied that the complainant does not want to proceed, the proceedings are subject to a want of prosecution or the proceedings have been abandoned.

Proposed section 108 sets out the findings and orders that may be made by the Tribunal. The section adds to the current provisions of section 113 to enable the making of an order, subject to certain requirements, that extends to conduct of the respondent that affects persons other than the complainant and to require the respondent to pay compensation to the complainant if the respondent fails to comply with an order directing the respondent to take the action specified in the order.

Proposed section 109 requires the Tribunal to notify the President if it makes an order that affects an industrial award or agreement.

Proposed section 110 generally requires each party to an inquiry to pay his or her own costs, but allows the Tribunal to make an order for costs in particular circumstances.

Proposed section 111 makes it an offence to refuse or neglect to comply with certain orders, or an interim order, of the Tribunal.

Proposed section 112 provides for the accrual of interest on an unpaid amount of damages ordered to be paid by the Tribunal at the same rate as that applicable to a judgment of the District Court.

Proposed section 113 enables the President, in the public interest, to take steps to enforce an order of the Tribunal.

Proposed section 114 provides for the enforcement of non-monetary orders of the Tribunal as a judgment of the Supreme Court on the filing in that Court of a certificate of the Registrar of the Tribunal as to the terms of the order.

Proposed section 115 enables the making of appeals from an order or other decision made by the Tribunal to an Appeal Panel of the Tribunal.

Proposed section 116 provides that the proposed Division applies in addition to the provisions of the *Administrative Decisions Tribunal Act 1997* but prevails over those provisions to the extent of any inconsistency.

Schedule 1 [4] enables the Board to enter into agreements providing for payment to the Board for any services or materials it supplies for the purposes of the exercise of its functions under section 119.

Schedule 1 [5] makes a consequential amendment.

Schedule 1 [6] substitutes section 123 to make it clear that a person is not restricted to the provisions of the *Anti-Discrimination Act 1977* in seeking relief for unlawful discriminatory conduct if other legal or administrative remedies are available.

Schedule 1 [7] amends section 127 to enable the making of regulations with respect to complaints.

Schedule 2 Miscellaneous amendments to Anti-Discrimination Act 1977

Schedule 2 [1] provides that the fact that a person who has a disability has with them a palliative or therapeutic device, or other mechanical equipment, that provides assistance to alleviate the disability, or is accompanied by an interpreter, a reader, an assistant or a carer who assists them with their disability, is taken to be a characteristic that appertains generally to persons who have that disability.

Schedule 2 [2] inserts proposed section 120A which enables the Board to develop codes of practice and provides for their effect.

Schedule 2 [3] changes the date by which the Board is to present its annual report to the Minister from 30 September to 31 October.

Schedule 2 [4] inserts proposed section 124A which imposes an obligation of confidentiality on persons engaged in the administration of the Principal Act in dealing with information that they acquire in that capacity.

Schedule 2 [5] and [6] relate to the making of savings and transitional provisions

consequent on the enactment of the proposed Act. **Schedule 2 [5]** enables the making of regulations of a savings and transitional nature. **Schedule 2 [6]** generally applies the amendments made by the proposed Act to any thing commenced, but not completed, before the amendments commence.

Schedule 3 Amendment of other Acts

Schedule 3.1 amends the *Administrative Decisions Legislation Amendment Act 1997* to omit 2 uncommenced amendments to the *Anti-Discrimination Act 1977* that have been overtaken by the amendments in the proposed Act.

Schedule 3.2 amends the *Administrative Decisions Tribunal Act 1997* by way of statute law revision to remove an obsolete reference and to provide for the constitution of the Tribunal for the purposes of certain applications.

Schedule 3.3 amends the *Defamation Act 1974* to make amendments consequential on the substitution and consequential renumbering of the provisions of Divisions 1, 2 and 3 of Part 9 of the *Anti-Discrimination Act 1977*.

Schedule 3.4 amends the *Freedom of Information Act 1989* to grant an exemption from the provisions of that Act to the President of the Anti-Discrimination Board in relation to the complaints handling process.