

DRAFT SECOND READING SPEECH

HON. MICHAEL FERGUSON MP

Anti-Discrimination Amendment Bill 2016

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Madam Speaker, I move that the Bill be read a second time.

This Bill makes amendments to the *Anti-Discrimination Act 1998* in response to concerns about the impact of the Act on free speech and public debate.

As members are aware, the Act prohibits discrimination on the basis of protected attributes including, amongst others, gender, race, age, disability, sexual orientation, intersex, gender identity, marital status, family responsibilities, religious beliefs and affiliation, and political beliefs and affiliations. The Act also prohibits various other forms of conduct including sexual harassment, victimisation of complainants, offensive and insulting conduct and incitement of hatred.

This Bill is concerned with the provisions that relate to offensive conduct and the incitement of hatred and severe contempt.

Madam Speaker, section 17(1) of the Act provides that:

A person must not engage in any conduct which offends, humiliates, intimidates, insults or ridicules another person on the basis of an attribute referred to in section 16(e), (a), (b), (c), (d), (ea), (eb) and (k), (f), (fa), (g), (h), (i) or (j) in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated, intimidated, insulted or ridiculed.

Section 17(1) has been a part of the Act since its commencement in December 1999. It was transferred over from the *Sex Discrimination Act 1994*, which was subsequently repealed by the *Anti-Discrimination Act*, and was initially limited to the attributes of gender, marital status, pregnancy, breastfeeding, parental status and family responsibilities.

Madam Speaker, in the years since the Act came into effect, section 17(1) has been amended twice and on both occasions, extra attributes were added.

Section 17(1) now prohibits conduct which offends, humiliates, intimidates, insults or ridicules another person on the basis of one or more of the following attributes: race, age, sexual orientation, lawful sexual activity, gender, gender identity, intersex, marital status, relationship status, pregnancy, breastfeeding, parental status, family responsibilities and disability.

Madam Speaker, no other Australian state or territory has a law prohibiting conduct that offends, humiliates, insults or ridicules. Other states and territories have laws in

relation to vilification similar to section 19 of our Act. Some states only prohibit racial vilification, some prohibit racial and religious vilification, and others are broader, covering other attributes including sexual orientation.

More serious conduct is provided for in section 19 of the Act, which provides that:

A person, by a public act, must not incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of-

- (a) the race of the person or any member of the group; or*
- (b) any disability of the person or any member of the group; or*
- (c) the sexual orientation or lawful sexual activity of the person or any member of the group; or*
- (d) the religious belief or affiliation or religious activity of the person or any member of the group.*

Section 55 of the Act provides an exception to sections 17(1) and 19 for certain conduct, including a public act done in good faith for academic, artistic, scientific or research purposes or for any purpose in the public interest.

Madam Speaker, during the debate on the most recent amendments to section 17(1) in 2012 which were introduced by the former Labor-Green Government, the Liberal Party strongly opposed the proposal to extend the provision to additional attributes and at that time warned about the potential impact on freedom of speech in our State.

In fact, during the 2012 debate in the House of Assembly, the then Attorney-General reassured members that the amendments were intended to address the issue of bullying and would not operate to stifle public debate about issues such as same sex marriage which had been the subject of public forums and meetings held by the Christian community that very year with the introduction of the *Same Sex Marriage Bill 2012* in the Tasmanian Parliament. Unfortunately this reassurance has failed to stand the test of time.

Section 17(1) has again become the focus of public attention and debate due to the same sex marriage debate and a recent complaint made using that provision.

The complaint related to a publication concerning same sex marriage that was distributed to members of the Catholic school community. This complaint generated much discussion on section 17(1) and has received significant attention across this state, and indeed, throughout Australia. Concerns were raised directly with the Government, and also in commentary in the media, that section 17(1) imposes a low threshold on unlawful behaviour and would stifle public debate on issues of importance such as same sex marriage and no doubt any number of other issues.

This complaint also highlighted an apparently low threshold for acceptance of a complaint by the Anti-Discrimination Commissioner. Under section 64(2) of the Act, the Commissioner is to accept or reject a complaint within 42 days of receiving it. Section 64(1) allows the Commissioner to reject a complaint in certain circumstances including, amongst other things, if in the Commissioner's opinion, it is trivial, vexatious, misconceived or lacking in substance or there is a more appropriate remedy that is reasonably available, or it does not relate to discrimination or prohibited conduct.

The Government acknowledges concerns about the impact of the current Act on free speech and has considered whether legislative reform is required. The Government is mindful that the Act should provide an appropriate balance between providing protection from discrimination and other prohibited conduct whilst allowing for genuine respectful public debate and discussion on important issues. The Premier acknowledged this during his contribution to the November 2015 debate, when he said “it is important to ensure that there is an appropriate balance and that the very important feature of our society - free speech - is preserved. As a government and as a community, we would want to ensure the balance is right and we need to consider the adequacy and appropriateness of current laws and protections”.

This Bill does not make any amendments to section 17(1) or 19.

However, the Government also believes that it is necessary to make some adjustments to the Act to strengthen the exceptions for free speech, particularly in the current climate where there are important issues generating public debate and discussion.

The Bill proposes an amendment to section 55 to clarify that the exception will apply in relation to public acts done for religious purposes. This means that the provisions of sections 17(1) and 19 will not apply if the relevant conduct is:

- (a) a fair report of a public act; or
- (b) a communication or dissemination of a matter that is subject to a defence of absolute privilege in proceedings for defamation; or
- (c) a public act done in good faith for-
 - (i) academic, artistic, scientific, religious or research purposes; or
 - (ii) any purpose in the public interest.

Madam Speaker, I note that some may argue that this amendment is not required as a public act done in good faith for religious purposes may already fall within the general catch all provision of section 55(c)(ii) – a public act done in good faith for any purpose in the public interest. This may or may not be the case. The question of whether this type of matter would fall within the existing exception was not resolved in the recent matter involving a complaint about material relating to same-sex marriage. The complaint was withdrawn before it could be referred to the Tribunal. It is the Government’s view that this amendment will make it clear, upfront in the Act, that the exception includes public acts done in good faith for religious purposes.

The additional exception in section 55, as it applies to section 19 does not, as some have claimed, allow for hate speech. Section 55 (c) is clear that it must be “a public act done in good faith”. The Bill does not override this important test and exceptions already exist for a diverse range of other purposes, including artistic, academic and scientific. In addition, the ‘any purpose in the public interest’ catch all applies to section 19 as well as section 17(1).

I want to make it clear that the Act currently does not, and as proposed will not, allow hate speech or vilification.

Similar types of exceptions are provided in legislation in New South Wales, Victoria and Western Australia in relation to their vilification provisions.

The Government acknowledges that this proposed amendment will not entirely address concerns about the limitations imposed by section 17(1) on freedom of speech or on what some see as the low threshold for unlawful conduct. However, it may provide some greater certainty or comfort in relation to comments made in the context of religious discussions or debates.

As I mentioned earlier, another concern which has been raised more broadly relates to what some perceive to be a low threshold for acceptance of complaints. If a complaint is accepted by the Commissioner then the respondent may be subjected to lengthy, costly and stressful proceedings. Even if the complaint is ultimately dismissed, there is a substantial cost to the respondent. The concern is that the mere threat of a complaint may, in itself, suppress discussion and debate, as we have seen occur in Tasmania.

The Bill proposes amendments to section 64 of the Act to require the Commissioner to reject a complaint under section 17(1) or 19 in certain specified circumstances.

In the case of section 17(1), the new provisions will require the Commissioner to reject a complaint if satisfied that a reasonable person, having regard to all the circumstances, would not have anticipated that the person in respect of whom the complaint was made would be offended, humiliated, intimidated, insulted or ridiculed by the conduct.

For section 19, the Commissioner will be required to reject a complaint if he or she is satisfied that the public act does not constitute an incitement of hatred towards, serious contempt for or severe ridicule of the person or persons in respect of whom the complaint is made.

The proposed new provisions also require the Commissioner to reject a complaint if satisfied that an exception under section 55 applies.

Consequential amendments are proposed to sections 71 and 99 to take account of the new provisions in section 64.

Madam Speaker, some have expressed the opinion that these amendments are otiose as the Commissioner can already reject a complaint if the complaint does not relate to prohibited conduct. However, these amendments are intended to make it clear that the Commissioner must turn his or her mind to consider the question of jurisdiction and whether the conduct was reasonable (in the case of section 17(1)). I note that the proposed new provisions are mandatory – the Commissioner must reject the complaint if satisfied of the relevant matters.

Madam Speaker, the Government's intention to make amendments to the way the Anti-Discrimination Act works was foreshadowed by the Premier in November last year during debate on the issue of same sex marriage. I quote from the motion that was passed by the House during that debate:

[That the House] “affirms its strong support for every Tasmanian to enjoy full freedom of belief and freedom of expression in a respectful national debate.”

More than one month ago, prior to the release of the Bill in draft form, the Premier also clearly outlined the scope of the proposed changes. A draft version of the Bill was then released for public consultation on 25 August 2016, and key stakeholders and interested parties were written to directly and invited to provide comment on the Bill.

There were a large number of submissions received and the Government is grateful to the many organisations and individuals who took the time to consider the Bill and provide feedback.

As could be expected on an issue such as this, there are divergent views. Many submissions argued that no change should be made to the Act at all as any change would weaken the Act and open the door to hate speech. On the other side of the spectrum, there were many submissions strongly advocating the complete removal or amendment of section 17(1). Clearly this is a matter upon which there are very strongly held views on both sides of the debate. As such, the Government has attempted to take a balanced approach – to attempt to provide some protection for debate and discussion engaged in in good faith for religious, artistic, academic, scientific or research purposes whilst fully preserving the current provisions protecting members of the community from offensive conduct and vilification.

Madam Speaker, I can indicate that as a result of feedback received, a change was made to the Bill. The consultation draft of the Bill inserted a reasonableness test in section 55 so that the exception would only apply if the public act was done reasonably and in good faith. The inclusion of the word 'reasonably' in the consultation draft of the Bill was based on a relevant Victorian provision which also forms the basis of the wording of the 'religious purpose' amendment. The proposed reasonableness test was taken out of the Bill after a number of stakeholders expressed concerns about this test, given that there is already a reasonableness test in section 17(1). It was submitted that the duplication would lead to confusion and uncertainty, although I note that the *Commonwealth Racial Discrimination Act 1975* effectively does the same thing in sections 18C and 18D.

In conclusion, this Bill makes changes to the Anti-Discrimination Act to clarify the existing exceptions in relation to sections 17(1) and 19. The Government has endeavoured to strike the right balance with these changes but acknowledges that attempting to reform the Act to address the free speech concerns raised is contentious and complex, as evidenced by the opposing views on the matter.

Madam Speaker, I commend the Bill to the House.