

TASMANIA

ANTI-DISCRIMINATION AMENDMENT BILL 2012

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ANTI-DISCRIMINATION AMENDMENT BILL 2012

This Public Bill originated in the House of Assembly, and, having this day passed, is now ready for presentation to the Legislative Council for its concurrence.

P. R. ALCOCK, *Clerk of the House*
14 November 2012

(Brought in by the Minister for Justice, the Honourable Brian Neal Wightman)

A BILL FOR

An Act to amend the *Anti-Discrimination Act 1998*, the *Judicial Review Act 2000* and the *Personal Information Protection Act 2004*

Be it enacted by His Excellency the Governor of Tasmania, by and with the advice and consent of the Legislative Council and House of Assembly, in Parliament assembled, as follows:

PART 1 – PRELIMINARY

1. Short title

This Act may be cited as the *Anti-Discrimination Amendment Act 2012*.

2. Commencement

The provisions of this Act commence on a day or days to be proclaimed.

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Act No. of

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Part 2 – Anti-Discrimination Act 1998 Amended

PART 2 – ANTI-DISCRIMINATION ACT 1998
AMENDED

3. Principal Act

In this Part, the *Anti-Discrimination Act 1998** is referred to as the Principal Act.

4. Section 3 amended (Interpretation)

Section 3 of the Principal Act is amended as follows:

- (a) by omitting the definitions of *child* and *club* and substituting the following definitions:

child means a person who has not attained the age of 18 years and includes a natural child, adopted child, stepchild, foster child or ex-nuptial child;

club means an incorporated or unincorporated association of at least 30 persons associated together for a lawful purpose that provides and maintains its facilities, wholly or partly, from the funds of the association;

- (b) by omitting “or” first occurring from paragraph (a) of the definition of

*No. 46 of 1998

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Part 2 – Anti-Discrimination Act 1998 Amended

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competitive sporting activity and
substituting “and”;

- (c) by inserting the following definition after the definition of *family responsibilities*:

gender identity means the gender-related identity, appearance or mannerisms or other gender-related characteristics of an individual (whether by way of medical intervention or not), with or without regard to the individual’s designated sex at birth, and includes transsexualism and transgenderism;

- (d) by inserting the following definition after the definition of *inquiry*:

intersex means the status of having physical, hormonal or genetic features that are –

- (a) neither wholly female nor wholly male; or
- (b) a combination of female and male; or
- (c) neither female nor male;
- (e) by inserting the following definition after the definition of *respondent*:

schools system means a number of educational institutions with a

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common governing or
administrative body;

- (f) by omitting the definition of *sexual orientation* and substituting the following definition:

sexual orientation includes –

- (a) heterosexuality; and
 - (b) homosexuality; and
 - (c) bisexuality;
- (g) by omitting the definitions of *transsexual* and *transsexuality* and substituting the following definitions:

transgender means a person who –

- (a) does not identify, to whatever degree, with the gender identity assigned them at birth; and
- (b) at times, or permanently, has a gender identity which might be perceived as atypical for his or her birth gender;

transgenderism means the condition of being a transgender;

transsexual means a person who, whether or not intersex and

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Part 2 – Anti-Discrimination Act 1998 Amended

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having been legally assigned one
gender at birth –

- (a) assumes the bodily
characteristics of the other
gender by medical or
other means; or
- (b) identifies himself or
herself as a member of the
other gender; or
- (c) lives or seeks to live as a
member of the other
gender;

transsexualism means the condition of
being a transsexual;

5. Section 6 amended (Functions of Commissioner)

Section 6(h) of the Principal Act is amended by
omitting “conciliate” and substituting “resolve”.

6. Section 7 amended (Powers of Commissioner)

Section 7(a) of the Principal Act is amended by
omitting “conciliation” and substituting
“complaint resolution”.

7. Section 12A inserted

After section 12 of the Principal Act, the
following section is inserted in Part 3:

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Part 2 – Anti-Discrimination Act 1998 Amended

12A. Staff of Tribunal

- (1) Subject to and in accordance with the *State Service Act 2000*, there is to be appointed a registrar of the Tribunal and such other officers as are necessary for the proper functioning of the Tribunal.
- (2) The Secretary of the Department may appoint a person to be registrar of the Tribunal and may appoint such other officers as are necessary for the proper functioning of the Tribunal, and the registrar and other officers may hold office in conjunction with State Service employment.
- (3) The registrar of the Tribunal and any other officers appointed under this section are subject to the general control and direction of the chairperson of the Tribunal.

8. Section 16 amended (Discrimination on ground of attribute)

Section 16 of the Principal Act is amended by inserting after paragraph (e) the following paragraphs:

- (ea) gender identity;
- (eb) intersex;

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Part 2 – Anti-Discrimination Act 1998 Amended

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9. Section 17 amended (Prohibition of certain conduct and sexual harassment)

Section 17(1) of the Principal Act is amended by omitting “section 16(e), (f), (fa), (g), (h), (i) or (j)” and substituting “section 16”.

10. Section 22 amended (Areas of activity)

Section 22(1) of the Principal Act is amended as follows:

- (a) by omitting from paragraph (f) “on any ground specified in section 16(e), (f), (fa), (g), (h), (i) or (j)”;
- (b) by omitting from paragraph (g) “on any ground specified in section 16(e), (f), (fa), (g), (h), (i) or (j)”.

11. Part 6, Division 1: Heading amended

Division 1 of Part 6 of the Principal Act is amended by omitting “*Complaints*” from the heading to that Division and substituting “*Interpretation*”.

12. Section 59A inserted

Before section 60 of the Principal Act, the following section is inserted in Division 1:

59A. Interpretation

In this Part –

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Part 2 – Anti-Discrimination Act 1998 Amended

complaint includes a part of a complaint and, if the complaint relates to more than one respondent, any part of the complaint that relates to a specific respondent.

13. Part 6, Division 1A: Heading inserted

Part 6 of the Principal Act is amended by inserting the following heading after section 59A:

Division 1A – Complaints

14. Section 60 amended (Who may complain)

Section 60 of the Principal Act is amended by inserting after subsection (2) the following subsections:

- (3) The Commissioner may accept a complaint from a child if the Commissioner is satisfied that the child has sufficient maturity to make the complaint.
- (4) A person may not make a complaint on behalf of another person without the approval of the Commissioner.
- (5) If the Commissioner investigates any discrimination or prohibited conduct under subsection (2) –

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-
- (a) the discrimination or prohibited conduct is taken to be the subject of a complaint made by a person; and
 - (b) the provisions of this Act have effect as if the complaint had been made by a person; and
 - (c) the Commissioner may pursue the complaint as if the Commissioner were the complainant.
 - (6) If the Commissioner investigates any discrimination or prohibited conduct in the circumstances described in section 68(5) –
 - (a) the discrimination or prohibited conduct is taken to be the subject of a complaint made by the person; and
 - (b) the provisions of this Act have effect as if the complaint had not been withdrawn by the person; and
 - (c) the Commissioner may pursue the complaint as if the Commissioner were the complainant.
 - (7) If the Commissioner investigates any discrimination or prohibited conduct pursuant to a complaint made on behalf of another person in the circumstances described in subsection (4) –

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- (a) the discrimination or prohibited conduct is taken to be the subject of a complaint made by the person on whose behalf it is made; and
- (b) the provisions of this Act have effect as if the complaint had been made by the person.

15. Section 60A inserted

After section 60 of the Principal Act, the following section is inserted in Division 1A:

60A. Appointment of litigation guardian

- (1) If a child or other person is unable to make a complaint due to disability, age or other incapacity, the Commissioner may appoint a litigation guardian for the child or other person.
- (2) A litigation guardian may make a complaint on behalf of a child or other person referred to in subsection (1).
- (3) If a litigation guardian has been appointed on behalf of a child or other person referred to in subsection (1), the provisions of this Act apply to the litigation guardian as if that guardian were the complainant.

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16. Section 62A inserted

After section 62 of the Principal Act, the following section is inserted in Division 1A:

62A. Combining complaints

(1) If –

- (a) the Commissioner has received a complaint, (the *original complaint*); and
- (b) at any time before an investigation into the original complaint has been completed the Commissioner receives another complaint (the *second complaint*) whether by the person who lodged the original complaint or by another person in relation to the matter to which the original complaint refers or a matter related to the original complaint; and
- (c) the Commissioner considers it administratively or otherwise convenient to do so –

the Commissioner may determine that the original complaint and the second complaint be treated as one complaint.

- (2) The Commissioner is not to determine under subsection (1) that two or more complaints be treated as one complaint

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unless satisfied that any attempt at resolution, including by conciliation, is not likely to be prejudiced by the making of the determination.

- (3) On determining under subsection (1) that two or more complaints be treated as one complaint, the Commissioner is to notify, in writing, all parties to all the complaints of the combining of the complaints.

17. Section 64 amended (Rejection of complaints)

Section 64(1) of the Principal Act is amended as follows:

- (a) by omitting from paragraph (g) “authority.” and substituting “authority; or”;
- (b) by inserting the following paragraph after paragraph (g):
 - (h) in the opinion of the Commissioner, the complaint relates to conduct that is within the scope of an exemption granted under Division 11 of Part 5.

18. Section 65A inserted

After section 65 of the Principal Act, the following section is inserted in Division 1A:

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65A. Amendment of complaints

- (1) At any time before an investigation into a complaint has been completed –
 - (a) the person who lodged the complaint with the Commissioner may, in writing given to the Commissioner, amend the complaint by removing a matter from it; and
 - (b) the Commissioner may, in writing, amend the complaint by adding or removing a matter from it or by naming a respondent who has not been identified in the complaint or change the name of a respondent.
- (2) Within 14 days of amending a complaint under subsection (1)(b) or receiving notice of an amendment under subsection (1)(a), the Commissioner is to –
 - (a) notify, in writing, each party to the complaint of the amendment; and
 - (b) give each party to the complaint a copy of the amendment or the complaint as amended.

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s. 19

Part 2 – Anti-Discrimination Act 1998 Amended

19. Section 67 amended (Notification of acceptance of complaints)

Section 67 of the Principal Act is amended by omitting paragraph (c) and substituting the following paragraph:

- (c) give the respondent a copy of the complaint and a summary of the complaint.

20. Section 68 amended (Application to Commissioner to withdraw complaint)

Section 68 of the Principal Act is amended by inserting after subsection (6) the following subsection:

- (7) The Commissioner may allow a person who has withdrawn a complaint involuntarily to reinstitute the complaint if the Commissioner considers it is in the public interest to do so.

21. Section 71 amended (Completion of investigation)

Section 71(1)(a) of the Principal Act is amended by omitting “section 64(1)(a), (b), (c), (d) or (f)” and substituting “section 64(1)(a), (b), (c), (d), (f) or (h)”.

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Part 2 – Anti-Discrimination Act 1998 Amended

s. 22

22. Section 73 amended (Lapsed complaints)

Section 73 of the Principal Act is amended by inserting “or part of whose complaint” after “whose complaint”.

23. Part 6, Division 3: Heading amended

Division 3 of Part 6 of the Principal Act is amended by omitting “*Conciliation*” from the heading to that Division and substituting “*Resolution of complaints*”.

24. Section 74 substituted

Section 74 of the Principal Act is repealed and the following section is substituted:

74. Resolution of complaints

- (1) The Commissioner or an authorised person is to attempt to resolve by conciliation or in any other way any complaint that the Commissioner or authorised person believes may be resolved in that way.
- (2) An attempt to resolve a complaint under subsection (1) may be undertaken either before, during or after the investigation of a complaint.

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s. 25

Part 2 – Anti-Discrimination Act 1998 Amended

25. Section 75 amended (Conciliation conference)

Section 75(1) of the Principal Act is amended by inserting “whether before, during or after the investigation of the complaint” after “place”.

26. Section 75A inserted

After section 75 of the Principal Act, the following section is inserted in Division 3:

75A. Further investigation by Commissioner if no agreement reached by conciliation

If a complaint is not resolved before the Commissioner makes a determination under section 71(1), the Commissioner or authorised person may further investigate the complaint and may direct a person to take part in a further conciliation conference at a specified time and place.

27. Section 78 amended (Referral for inquiry)

Section 78 of the Principal Act is amended by inserting after subsection (3) the following subsection:

- (4) The Commissioner may decline to refer a complaint to the Tribunal and dismiss the complaint if the complainant has, in the opinion of the Commissioner, failed to pursue the complaint or the resolution of the complaint.

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Part 2 – Anti-Discrimination Act 1998 Amended

s. 28

28. Section 79 amended (Referral report)

Section 79 of the Principal Act is amended as follows:

- (a) by inserting the following paragraphs after paragraph (a) in subsection (3):
 - (ab) a description of the complaint;
 - (ac) any amendments that were made to the complaint;
- (b) by omitting from subsection (3)(f) “provided.” and substituting “provided;”;
- (c) by inserting the following paragraphs after paragraph (f) in subsection (3):
 - (g) any material evidence to substantiate the complaint or to support the position of the respondent;
 - (h) attempts at resolving the complaint by conciliation, excluding details of the matters discussed during the attempts.
- (d) by inserting in subsection (4) “or other complaints resolution” after “conciliation”.

29. Section 79A inserted

After section 79 of the Principal Act, the following section is inserted in Division 4:

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Part 2 – Anti-Discrimination Act 1998 Amended

79A. Representation in inquiry

- (1) At any stage during the hearing of an inquiry, the Tribunal may permit a party to be represented or accompanied by another person and may withdraw that permission.
- (2) A party may be represented or accompanied by another person in an inquiry only with the permission of the Tribunal.
- (3) If the Tribunal gives permission for one party to be accompanied or represented by another person at the hearing of an inquiry, any other party taking part in the hearing may also be accompanied or represented by another person.

30. Section 80 amended (Directions conference)

Section 80(4) of the Principal Act is amended by inserting “, without reasonable excuse,” after “not”.

31. Section 80A inserted

After section 80 of the Principal Act, the following section is inserted in Division 4:

80A. Referral to conciliation of Tribunal

The Tribunal may refer a matter for conciliation or other means of resolution

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Part 2 – Anti-Discrimination Act 1998 Amended

s. 32

either before an inquiry is commenced or
during an inquiry.

32. Section 82 substituted

Section 82 of the Principal Act is repealed and
the following section is substituted:

82. Representative complaints

The Tribunal may deal with a complaint
as a representative complaint if satisfied
that –

- (a) the complaint was made by a person or an agent of a person who is a member of a class of persons against whom the alleged similar discrimination or prohibited conduct was directed on behalf of that class; and
- (b) the majority of members of that class of persons consent, or are likely to consent, to the complaint being dealt with as a representative complaint.

33. Section 85 amended (Hearing of inquiry)

Section 85 of the Principal Act is amended as
follows:

- (a) by omitting from subsection (1) “An inquiry” and substituting “The hearing of an inquiry”;

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Part 2 – Anti-Discrimination Act 1998 Amended

- (b) by omitting subsections (2) and (3).

34. Section 88 amended (Publication of evidence)

Section 88(1) of the Principal Act is amended as follows:

- (a) by omitting from paragraph (c) “published.” and substituting “published; and”;
- (b) by inserting the following paragraph after paragraph (c):
 - (d) the name of a child or information that might enable a child to be identified is not to be published.

35. Section 89 amended (Orders)

Section 89 of the Principal Act is amended by inserting after subsection (4) the following subsection:

- (5) The Tribunal, on completion of an inquiry, may order that a trust fund under the control of the Public Trustee be established into which a specified sum is to be paid if the persons referred to in subsection (4)(a) cannot be identified.

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Part 2 – Anti-Discrimination Act 1998 Amended

s. 36

36. Section 94 amended (Conciliation and agreement)

Section 94(1) of the Principal Act is amended by inserting “as if the Tribunal were the Commissioner” after “conference”.

37. Section 96A inserted

Before section 97 of the Principal Act, the following section is inserted in Division 5:

96A. Appeal of terms of settlement in relation to complaint involving children, &c.

If the complainant and the respondent agree to settle a complaint which involves children or persons who do not have the capacity to approve a settlement by reason of a disability –

- (a) after the complaint is accepted by the Commissioner or authorised person, the Commissioner is to approve the terms of the settlement only if the Commissioner considers that the terms are satisfactory; and
- (b) after the complaint has been referred for inquiry, the Tribunal is to approve the terms of the settlement only if the Tribunal considers that the terms are satisfactory.

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s. 38

Part 2 – Anti-Discrimination Act 1998 Amended

38. Section 98 amended (Interim orders)

Section 98 of the Principal Act is amended by omitting subsection (1) and substituting the following subsections:

- (1) The Tribunal at any stage of the inquiry into a complaint that has been referred to it may make an interim order pending the completion of the inquiry.
- (1A) The Tribunal, on the application of the Commissioner, at any stage of the investigation, conciliation or other resolution of a complaint may make an interim order pending the completion of the investigation or conciliation.

39. Section 98A inserted

After section 98 of the Principal Act, the following section is inserted in Division 5:

98A. Application to Tribunal to withdraw complaint from inquiry or review

- (1) A complainant may apply to the Tribunal to withdraw a complaint from inquiry or review.
- (2) The Tribunal, after considering an application under subsection (1), may approve the withdrawal of the complaint from inquiry or review.
- (3) A complainant whose application to withdraw a complaint from inquiry or

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s. 40

review has been approved by the Tribunal is not entitled to make another complaint or to apply for an application for review in relation to the same matter without the permission of the Tribunal.

- (4) The withdrawal of a complaint does not prevent the Tribunal from conducting an inquiry in relation to the complaint or the Commissioner from investigating the complaint under section 69 if satisfied that –
- (a) the complaint was not withdrawn voluntarily; or
 - (b) it is in the public interest to do so.

40. Section 99A substituted

Section 99A of the Principal Act is repealed and the following section is substituted:

99A. Order for costs

- (1) The Tribunal may make an order as to costs in relation to any inquiry or review before it if the Tribunal considers circumstances justify the order.
- (2) Without limiting subsection (1), the Tribunal may make an order that a party's representative at any inquiry or review before it pay all or part of the costs of the inquiry or review.

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- (3) The Tribunal may make an order that costs in relation to an inquiry or review before it be taxed by a district registrar of the Magistrates Court (Civil Division), the registrar of the Tribunal or such other person as the Tribunal considers appropriate.
- (4) The provisions of Division 2 of Part 9 of the *Magistrates Court (Civil Division) Rules 1998* apply to the taxation of costs referred to in subsection (3) as if references to an action were read as references to an inquiry or review.

41. Section 100 amended (Appeals)

Section 100 of the Principal Act is amended by omitting subsection (2) and substituting the following subsection:

- (2) A person may appeal to the Supreme Court against a decision under section 78(4) or a dismissal under section 99 within 28 days after the decision or dismissal was made.

42. Section 101 amended (Proof of exceptions)

Section 101 of the Principal Act is amended by omitting “or exemption” twice occurring.

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Part 2 – Anti-Discrimination Act 1998 Amended

s. 43

43. Section 102 amended (Immunity for complainants and witnesses)

Section 102 of the Principal Act is amended by omitting “person” third occurring and substituting “person in good faith”.

44. Section 103 amended (Immunities)

Section 103(1) of the Principal Act is amended as follows:

- (a) by omitting “Commissioner and” and substituting “Commissioner,”;
- (b) by inserting “and any other person” after “Tribunal”;
- (c) by omitting “of their respective offices” and substituting “under this Act”.

45. Section 107A inserted

After section 107 of the Principal Act, the following section is inserted in Part 7:

107A. Publication of decisions

- (1) The Tribunal may publish any of its decisions, including decisions made at a directions conference referred to in section 80.
- (2) In publishing a decision under subsection (1) other than a decision made at an inquiry held in public under

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Act No. of

s. 46

Part 2 – Anti-Discrimination Act 1998 Amended

section 85(1), the Tribunal is to ensure that the identities of the parties to the complaint to which the decision relates are protected.

46. Section 109 amended (Regulations)

Section 109 of the Principal Act is amended by inserting after subsection (1A) the following subsection:

- (1B) Without limiting the generality of subsection (1), regulations may be made in respect of –
- (a) the referral of complaints from the Commissioner to the Tribunal; and
 - (b) the review of rejected complaints; and
 - (c) the hearing and determinations of an inquiry; and
 - (d) any matter relating to the process and procedure of any of the matters referred to in paragraphs (a), (b) and (c).

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Part 3 – Judicial Review Act 2000 Amended

s. 47

PART 3 – JUDICIAL REVIEW ACT 2000 AMENDED

47. Principal Act

In this Part, the *Judicial Review Act 2000** is referred to as the Principal Act.

48. Schedule 2 amended (Enactments that provide for non-review or limited review of decisions)

Schedule 2 to the Principal Act is amended by inserting before clause 1 the following item:

1AA. *Anti-Discrimination Act 1998*

*No. 54 of 2000

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s. 49

Part 4 – Personal Information Protection Act 2004 Amended

**PART 4 – PERSONAL INFORMATION PROTECTION
ACT 2004 AMENDED**

49. Principal Act

In this Part, the *Personal Information Protection Act 2004** is referred to as the Principal Act.

50. Section 3 amended (Interpretation)

Section 3 of the Principal Act is amended by inserting after paragraph (m) in the definition of *law enforcement agency* the following paragraph:

- (ma) the Anti-Discrimination Commissioner appointed under the *Anti-Discrimination Act 1998*;

*No. 46 of 2004

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Part 5 – Repeal

s. 51

PART 5 – REPEAL

51. Repeal of Act

This Act is repealed on the three hundred and sixty fifth day from the day on which all the provisions of this Act commence.