

## **SECOND READING SPEECH**

### **ANTI-DISCRIMINATION AMENDMENT BILL 2012**

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

This Bill amends the Anti-Discrimination Act 1998.

The Anti-Discrimination Act prohibits discrimination and other related wrongful conduct and provides for the investigation and conciliation of, and inquiry into, complaints in relation to such discrimination and conduct.

The amendments introduced by this Bill stem from the *Report of the Review of Administrative Processes* released in 2003 by the State Service Commissioner, which made suggestions for changes to the *Anti-Discrimination Act 1998*.

In 2006 the then Attorney-General announced a review of the complaints handling and dispute resolution provisions of the Act.

A Discussion Paper was released in 2006 and over 40 submissions were received from a variety of interested people and organisations. These submissions were analysed and recommendations for change were incorporated in a Recommendations Paper which was released for public comment in 2008.

The Recommendations Paper commented on the issues raised in the previous paper, incorporated a new issue regarding enrolments in denominational schools and made recommendations for a number of legislative changes.

The Final Report of the Review was tabled in Parliament during 2009. The Report made 38 recommendations for changes to the Act. Most of these are minor corrections and changes to

improve the administrative processes of the Anti-Discrimination Commissioner and Anti-Discrimination Tribunal. The majority of those recommendations will be implemented through this Bill.

I will now describe the amendments that are of most significance.

### **Gender attributes**

The definitions surrounding gender attributes have required updating for some time. This Bill amends sections 3 and 16 of the Principal Act to deal with this issue. In drafting these amendments consultation took place with the Tasmanian Gay and Lesbian Rights Group.

The changes include a new definition of 'gender identity', to be included in section 16 as an attribute which must not be a ground for discrimination. The definition covers gender related identity such as transexualism and transgenderism. In line with this definition, modern definitions of transgender and transsexual have been inserted.

In a separate sex related definition 'intersex' has been inserted to mean a person who is born with physical, hormonal or genetic features that are not wholly identifiable as male or female. Intersex has also been added to the list of attributes in section 16.

### **Attributes subject to section 17 and 22**

Section 17 currently states that a person must not engage in any conduct which offends, humiliates, intimidates, insults or ridicules another person on the basis of gender, marital status, relationship status, pregnancy, breastfeeding, parental status or family responsibilities 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.

The attributes in section 17 currently represent only 7 of the 20 attributes listed in section 16 that are covered by the *Anti-Discrimination Act 1998*, meaning that humiliation or insults based on the other 13 attributes are not contrary to the Act. The seven attributes which are covered by Section 17 are essentially the attributes which were subject to similar prohibitions of discrimination in the *Sex Discrimination Act* which formed at least part of the basis of the *Anti-Discrimination Act*.

This is an inconsistent approach, as there is nothing to distinguish the two groupings of attributes from one another. It would be an artificial distinction to say that humiliation on the basis of one attribute is more serious than that upon another.

This amendment addresses extensive concern in the community about bullying and a strong desire to have better mechanisms to deal with bullying, whether it be in the workplace, at school or on-line. Much of the conduct prohibited by section 17 is the kind of conduct that people refer to as bullying. The extension of that protection to people on the basis of, for example, disability, race, religion and age is consistent with our desire to provide greater protection against bullying.

While such conduct is already potentially caught by the prohibition on direct discrimination—that is, less favourable treatment on the basis of a protected attribute—providing the express protection through section 17 will enable greater clarity and facilitate community awareness that bullying is not only a social ill, but one that this Parliament has acted to expressly deal with.

There will no doubt be those who would suggest that to prohibit conduct which offends, humiliates, intimidates, insults or ridicules another person on the basis of religion is tantamount to a restriction on free speech. It is interesting

that the same argument is not mounted when people are being protected from being humiliated or insulted because they have any of the attributes already listed in section 17. One cannot imagine that there would be widespread support for the view that people should be allowed to humiliate or insult others because of, for example, their race, age or sex.

The Bill amends section 17 to allow all attributes in respect of which discrimination is generally prohibited or limited, being those I have already mentioned, with the addition of race; age; sexual orientation; lawful sexual activity; disability; industrial activity; political belief or affiliation; political activity; religious belief or affiliation; religious activity; irrelevant criminal record; irrelevant medical record or association with a person who has, or is believed to have, any of these attributes.

Associated with the section 17 amendments are those to section 22. In the case of administration of State laws, State programs, awards, enterprise agreements or industrial agreements, currently the prevention of discrimination only applies on the grounds of gender; marital status; relationship status; pregnancy; breastfeeding; parental status; family responsibilities and does not apply to the other attributes. The removal of the limitations in subsections 22(f) and (g) mean that all 20 attributes will be taken into account when applying legislation, programs or awards.

These two amendments simplify the approach to discrimination in Tasmania, and ensure a greater level of consistency in how the law is applied.

### **Religious schools admission exemption**

This amendment will give limited exemptions from the Anti-Discrimination Act for religious schools in regards to admission to those schools. The amendment is the product of intense negotiation between stakeholders. I believe a very suitable outcome has been reached.

The capacity to apply for an exemption is a very limited one. The exemption will only apply to the provision of the Act relating to religious belief, affiliation or activity. The only exempted activity will be the admission of a student at the beginning of their career at that school. The exemption will not be able to be used to exclude a child for a reason other than their religious belief, affiliation or activity. It cannot be used to exclude a previously admitted child.

There are also strict provisos that in order to apply for an exemption the school must fulfil a series of criteria to the satisfaction of the Commissioner. These include: that the school must be an educational institution conducted in accordance with the beliefs of a particular religion; that the policy for admission doesn't discriminate in relation to any of the other attributes covered by the Act; that an objective test for religious affiliation is to be applied to the child and their family; and most importantly, that the school is oversubscribed with applicants for a particular school year group at the time of wanting the exemption.

This last requirement is specifically laid out so that the school will not only have to prove that the school has more prospective students than places, but also that the school has more prospective students than places in a particular year group or grade.

The Commissioner, in deciding whether to grant the exemption, must take into account any government equity guidelines, conditions of government funding of schools, and the public interest in granting the exemption.

This amendment has also been crafted to deal with a schools system, being a group of schools with a common governing or administrative body, for example Catholic Education Tasmania. The process for a schools system to be granted an exemption

relies on them fulfilling mostly the same criteria, but a schools system has the added possibility of applying for an ‘in principle’ exemption. This process will facilitate a schools system gaining an exemption, and then having to prove the oversubscription criteria on a class by class basis across its collection of schools.

New Section 56A is concerned with a single school applying for an exemption, and 56B is concerned with a schools system applying for an exemption.

### **Commissioner’s own motion complaints**

Section 6 of the Act provides that the Commissioner has a role in promoting the recognition and approval of acceptable attitudes, acts and practices relating to discrimination and prohibited conduct. Sometimes people may not come forward and complain about discrimination because of fear, entrenched bias, disinterest or an inability to fund or take carriage of a matter, but the discrimination may nonetheless come to the attention of the Commissioner.

In light of section 6 it is appropriate that the Commissioner should not only be able to investigate matters on his/her own motion, but these matters should be treated as complaints so that the full set of processes, sanction and remedies under the Act are available to address discriminatory behaviour.

Therefore changes have been made to section 60 to allow the Commissioner to pursue complaints as if he or she were the complainant.

### **Part acceptance of complaints**

This Bill will insert a definition at the beginning of Part 6, and a new section 65A which will allow the Commissioner and Tribunal to accept, reject and dismiss part of a complaint or that part of a complaint that is directed at a particular person in appropriate circumstances.

Under the Act as it stands, persons who have been named in the complaint but are clearly not responsible for the discrimination must remain as parties and be served with documents even though there is no need for them to be involved in all subsequent proceedings. The Act similarly does not facilitate the separation of parts of a complaint and separate dealings where some should be dismissed at an early stage.

The capacity to split the complaint or eliminate inappropriate respondents would reduce costs and increase the efficiency of the processes. The capacity to dismiss the complaint as against particular respondents or in respect of particular aspects of the allegations ensures that only the appropriate parties continue to be involved and that these parties are able to focus on the substantive issues that fall within the jurisdiction of the Act.

### **Early resolution**

The philosophy behind early resolution is that in some cases if the parties can be brought together earlier, before proceedings become protracted and positions entrenched, there is a better chance of resolving the matter.

To allow this process a chance, the Bill amends the Act to allow the Commissioner or an authorised person to attempt to resolve a complaint by conciliation or any other method they believe viable. This attempt to resolve matters can be initiated at any time before, during, or after the investigation of the complaint.

This Bill is the culmination of a lengthy process of consultation with the public. This has been achieved by means of a Discussion Paper, and close consultation with the former and current Anti-Discrimination Commissioners in the drafting stages. The amendments represent a great improvement to the inclusiveness, the flexibility and the complaints handling and dispute resolution provisions of the *Anti-Discrimination Act 1998*.





