



New South Wales

# Anti-Discrimination Amendment (Miscellaneous Provisions) Act 2004 No 79

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New South Wales

# **Anti-Discrimination Amendment (Miscellaneous Provisions) Act 2004 No 79**

Act No 79, 2004

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An Act to make miscellaneous amendments to the *Anti-Discrimination Act 1977* and consequential amendments to other Acts; and for other purposes. [Assented to 26 October 2004]

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**The Legislature of New South Wales enacts:**

**1 Name of Act**

This Act is the *Anti-Discrimination Amendment (Miscellaneous Provisions) Act 2004*.

**2 Commencement**

This Act commences on a day or days to be appointed by proclamation.

**3 Amendment of Anti-Discrimination Act 1977 No 48**

The *Anti-Discrimination Act 1977* is amended as set out in Schedules 1 and 2.

**4 Amendment of other Acts**

Each Act specified in Schedule 3 is amended as set out in that Schedule.

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## Schedule 1 Amendments to Anti-Discrimination Act 1977 concerning complaints

(Section 3)

**[1] Section 4 Definitions**

Omit the definition of *inquiry* from section 4 (1).

**[2] Section 4 (5)**

Insert after section 4 (4):

(5) Notes included in this Act do not form part of this Act.

**[3] Part 9, Divisions 1, 2 and 3**

Omit the Divisions. Insert instead:

### Division 1 Preliminary

#### 87 Definitions

In this Part:

*agent* includes legal practitioner.

*complainant* means a person by whom or on whose behalf a complaint is made.

*complaint* means a complaint made under section 87A and includes a matter referred to the Tribunal as a complaint under section 95 (2).

*representative body* means a body (whether incorporated or unincorporated) that represents or purports to represent a group of people within New South Wales (whether or not the body is authorised to do so by the group concerned) and that has as its primary object the promotion of the interests or welfare of the group.

*representative complaint* means a complaint made by one or more persons (which may comprise or include a representative body) on his, her or their own behalf as well as on behalf of another person or persons, and that is treated by the Tribunal as a representative complaint.

*respondent* means a person about whose conduct a complaint has been made.

*vilification complaint* means a complaint in respect of a contravention of section 20C, 38S, 49ZT or 49ZXB.

## **Division 2 Complaints—the functions of the President**

### **Subdivision 1 Lodgment of complaints**

#### **87A Persons who may make a complaint**

- (1) A complaint alleging that a named person has, or named persons have, contravened a provision of this Act or the regulations (other than a provision for which a specific penalty is imposed) may be made by any of the following:
  - (a) one or more persons:
    - (i) on his, her or their own behalf, or
    - (ii) on his, her or their own behalf as well as on behalf of another person or persons,
  - (b) a parent or guardian of a person who lacks the legal capacity to lodge a complaint (for example, because of age or disability),
  - (c) a representative body on behalf of a named person or persons, subject to section 87C,
  - (d) an agent of any of the persons referred to in paragraph (a), (b) or (c).
- (2) Nothing in this Division prevents a person from making a complaint (not being a representative complaint) even though the conduct in respect of which the complaint is made is also conduct in respect of which a representative complaint has been made.
- (3) In this section, *guardian* has the same meaning as it has in the *Guardianship Act 1987*.

#### **87B Complaints made on behalf of others**

- (1) When a complaint is made on behalf of another person or persons (*the other complainants*):
  - (a) the person who makes the complaint is, for the purposes of this Division, taken to have the same rights, obligations and interests with respect to the investigation, conciliation or referral of the complaint as the other complainants, and
  - (b) the complaint is, for the purposes of this Part, taken to have been made by the other complainants on their own behalf.
- (2) In respect of a complaint made wholly or partly on behalf of another person or persons (not including a complaint made on behalf of a person who lacks legal capacity), the President may require:

- (a) the person or persons on whose behalf the complaint is made to show that the complaint has been made with his, her or their consent, or
  - (b) the person or persons making the complaint to prove that he, she or they have authority to act at all times in the complaint handling process,
- or both.
- (3) In respect of a complaint made wholly or partly on behalf of another person or persons (including a complaint made on behalf of a person who lacks legal capacity), if at any time the President is not satisfied that the person who made the complaint is acting in the best interests of the person or persons on whose behalf the complaint was made or retains the confidence of that person or those persons, the President may (without limiting section 92):
    - (a) appoint another person to act in that behalf, or
    - (b) decline the complaint.

The regulations may make provision for or with respect to matters that may be taken into consideration by the President in making a decision under this subsection.
  - (4) On declining a complaint under subsection (3) (b), the President is to advise the complainant, by notice in writing, of:
    - (a) the declining of the complaint, and
    - (b) the rights of the complainant under section 93A.
  - (5) This section does not apply to a complaint made by:
    - (a) an agent, or
    - (b) a representative body.

**87C Complaints by representative bodies**

- (1) Before a complaint can be made by a representative body as referred to in section 87A (1) (c), the representative body must satisfy the President:
  - (a) that each person on whose behalf the complaint is made consents to the complaint being made by the body on his or her behalf, and
  - (b) that the body has a sufficient interest in the complaint, that is, that the conduct that constitutes the alleged contravention is a matter of genuine concern to the body because of the way conduct of that nature adversely affects, or has the potential to adversely affect:
    - (i) the interests of the body, or

(ii) the interests or welfare of the group of people it represents or purports to represent.

(2) The President may require a representative body that has made a complaint to nominate a person to appear for the representative body in conciliation proceedings concerning the complaint before the President.

**88 Vilification complaints**

A vilification complaint cannot be made unless each person on whose behalf the complaint is made:

- (a) has the characteristic that was the ground for the conduct that constitutes the alleged contravention, or
- (b) claims to have that characteristic and there is no sufficient reason to doubt that claim.

**88A Assistance by President in making complaints**

The President may assist a person to make a complaint.

**88B Making of complaints in more than one jurisdiction**

A person is not prevented from making a complaint under this Division only because the person has made a complaint or taken proceedings in relation to the same facts in another jurisdiction, whether in New South Wales or elsewhere.

**88C Withdrawal of consent for complaint**

- (1) If a complaint has been made on a person's behalf with the person's consent, the person may withdraw the consent:
  - (a) by notice in writing to the President, at any time before the complaint is declined, terminated or otherwise resolved by the President, or referred to the Tribunal, or
  - (b) by notice in writing to the Tribunal, at any time before the complaint is dismissed, or found to be substantiated, by the Tribunal.
- (2) If a consent is withdrawn, the President or the Tribunal may make such arrangements as the President or the Tribunal, as the case requires, thinks appropriate for the further management of the complaint.

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## **Subdivision 2 Making of complaints**

### **89 Form and content of complaints**

- (1) A complaint is to be in writing but does not have to take any particular form.
- (2) A complaint, as made, need not demonstrate a prima facie case.

### **89A Making of complaint**

- (1) A complaint is made by lodging it with the President.
- (2) A complaint may be lodged with the President:
  - (a) by delivery by post or hand to an office of the Board, or
  - (b) by facsimile to an office of the Board, or
  - (c) by such other means as may be prescribed by the regulations.

### **89B Acceptance or declining of complaints by the President**

- (1) The President is to determine whether or not a complaint made to the President is to be accepted or declined, in whole or in part.
- (2) The President may decline a complaint if:
  - (a) no part of the conduct complained of could amount to a contravention of a provision of this Act or the regulations, or
  - (b) the whole or part of the conduct complained of occurred more than 12 months before the making of the complaint, or
  - (c) the conduct complained of could amount to a contravention of a provision of this Act (not including section 20D, 38T, 49ZTA or 49ZXC) for which a specific penalty is imposed, or
  - (d) in the case of a vilification complaint, it fails to satisfy the requirements of section 88, or
  - (e) the President is not satisfied that the complaint was made by or on behalf of the complainant named in the complaint.
- (3) The President is to give notice of a decision to accept or decline a complaint to:
  - (a) the person who made the complaint, and



- (b) if the respondent has been given notice of the complaint, the respondent,  
so far as is reasonably practicable, within 28 days after the decision is made.
- (4) A decision under this section to decline a complaint in whole or in part is not reviewable by the Tribunal.

### **Subdivision 3 Investigation and conciliation of complaints**

#### **90 President to investigate complaints**

- (1) The President is to investigate each complaint that the President has accepted under section 89B.
- (2) The President may conduct a joint investigation into more than one complaint.
- (3) The President must give notice to the parties if a joint investigation is undertaken.

#### **90A Investigation of vilification complaints**

- (1) If a complaint to be investigated is a vilification complaint, or alleges an offence under section 20D, 38T, 49ZTA or 49ZXC, the President may, by notice in writing, require any person to produce a copy or transcript of any broadcast the subject of the complaint at a specified place.
- (2) A person must not fail to comply with the terms of a notice under this section.  
Maximum penalty: 50 penalty units, in the case of a body corporate, or 10 penalty units in any other case.

#### **90B Supplying information and documents**

- (1) The President may, by notice in writing, require a complainant or a person against whom a complaint is made to provide:
  - (a) information (orally or in writing), or
  - (b) documents,(such information or documents, or both, being referred to in this section as *the relevant material*) within 28 days after the date of the notice or such other period as the President determines and specifies when making the requirement.

- (2) A person of whom a requirement is made under subsection (1):
- (a) must provide to the President any of the relevant material that is in the person's possession, custody or control within the period specified in the notice, unless the person has a reasonable excuse for not doing so, and
  - (b) must, if the person has a reasonable excuse for not providing the relevant material, or any part of it, give notice to the President of the excuse and of the relevant material to which the excuse relates within the period specified in the notice under subsection (1).

Maximum penalty: 50 penalty units, in the case of a body corporate, or 10 penalty units in any other case.

- (3) The President may, by notice in writing, require a person other than a person referred to in subsection (1) to supply the relevant material within 28 days after the date of the notice or such other period as the President determines and specifies in the notice.

- (4) A person who receives a notice under subsection (3):

- (a) must provide to the President any of the relevant material specified in the notice that is in the person's possession, custody or control within the period specified in the notice, unless the person has a reasonable excuse for not doing so, and
- (b) must, if the person has a reasonable excuse for not providing the relevant material, or any part of it, give notice to the President of the excuse and of the relevant material to which the excuse relates within the period specified in the notice under subsection (3).

Maximum penalty: 50 penalty units, in the case of a body corporate, or 10 penalty units in any other case.

- (5) If the relevant material is not provided or supplied under subsection (2) or (4), the President may refer the complaint to the Tribunal.

### **90C Progress reports**

The President must, as frequently as is reasonably convenient and, in any event, at periods not exceeding 90 days, give notice to the parties to the complaint of the steps taken for the purpose of the investigation.

**91 Prosecution for serious vilification**

- (1) The President:
  - (a) after investigating a vilification complaint, and
  - (b) before endeavouring to resolve the complaint by conciliation,is to consider whether an offence may have been committed under section 20D, 38T, 49ZTA or 49ZXC in respect of the matter the subject of the complaint.
- (2) If the President considers that an offence may have been so committed, the President is to refer the complaint to the Attorney General.
- (3) The President may only make such a referral within 28 days after receipt of the complaint.
- (4) On making the referral, the President is to give notice in writing to the complainant of:
  - (a) the making of the referral, and
  - (b) the rights of the complainant under section 93A.
- (5) The Tribunal may stay proceedings relating to the complaint until the conclusion of proceedings for the alleged offence under section 20D, 38T, 49ZTA or 49ZXC.

**91A Resolution of complaint by conciliation**

- (1) If the President is of the opinion that a complaint, other than a complaint that the President has declined under section 92, may be resolved by conciliation, the President may, at his or her discretion, at any stage after acceptance of the complaint endeavour to resolve the complaint by conciliation.
- (2) The President may, by notice in writing, require the complainant and the respondent, or either of them, to appear before the President, either separately or together, for the purpose of endeavouring to resolve the complaint by conciliation.
- (3) A person must not fail to comply with the terms of a notice under subsection (2).

Maximum penalty: 50 penalty units, in the case of a body corporate, or 10 penalty units in any other case.
- (4) Evidence of anything said or done in the course of conciliation proceedings under this section is not admissible in any subsequent proceedings relating to the complaint.

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- (5) A written record is to be prepared by the parties, and signed by or on behalf of each of them, of any agreement reached, following conciliation, with respect to the subject-matter of the complaint if any party requests the making of such a record within 28 days after the agreement is reached.
  - (6) If a party to a recorded agreement is of the opinion that any other party has not complied with the terms of the agreement, the party may, not later than 6 months after the date of the agreement, apply to the Tribunal to have the agreement registered.
  - (7) The party making the application must serve a copy of the application and the agreement on each other party.
  - (8) If the member of the Tribunal who hears the application is satisfied that a party to the agreement has not complied with the terms of the agreement, the member is to register those provisions of the agreement (if any) that, in the exercise of the Tribunal's jurisdiction, could have been the subject of an order in proceedings relating to a complaint.
  - (9) The provisions of an agreement that are registered in accordance with this section are taken to be an order of the Tribunal and may be enforced accordingly.

**91B No right to representation**

A complainant or respondent in conciliation proceedings before the President cannot be represented by any other person, except by leave of the President.

**91C Amendment of complaint**

- (1) If, at any time after a complaint is made and before the complaint is declined, terminated or otherwise resolved by the President, or referred to the Tribunal:
  - (a) the person making the complaint seeks to amend the complaint, or
  - (b) the President becomes aware of information that could conveniently be dealt with as part of the complaint,the person making the complaint is to be offered the opportunity to amend the complaint.
- (2) An amendment may be made in writing but, if further written material is already in the possession of the President or the Board, the President may treat the written material as if it formed part of the complaint.

- (3) If a complaint is amended at any time, the respondent must be informed in writing by the President of the substance of the amendment and, if the effect of the amendment is to cause the complaint to be made against further or other persons, they must be informed in writing of the complaint as amended.
- (4) Section 89B applies to the amendment of a complaint in the same way as it applies to the making of a complaint.

#### **Subdivision 4 Declining of complaints during investigation**

##### **92 President may decline complaint during investigation**

- (1) If at any stage of the President's investigation of a complaint:
    - (a) the President is satisfied that:
      - (i) the complaint, or part of the complaint, is frivolous, vexatious, misconceived or lacking in substance, or
      - (ii) the conduct alleged, or part of the conduct alleged, if proven, would not disclose the contravention of a provision of this Act or the regulations, or
      - (iii) the nature of the conduct alleged is such that further action by the President in relation to the complaint, or any part of the complaint, is not warranted, or
      - (iv) another more appropriate remedy has been, is being, or should be, pursued in relation to the complaint or part of the complaint, or
      - (v) the subject-matter of the complaint has been, is being, or should be, dealt with by another person or body, or
      - (vi) the respondent has taken appropriate steps to remedy or redress the conduct, or part of the conduct, complained of, or
      - (vii) it is not in the public interest to take any further action in respect of the complaint or any part of the complaint, or
    - (b) the President is satisfied that for any other reason no further action should be taken in respect of the complaint, or part of the complaint,
- the President may, by notice in writing addressed to the complainant, decline the complaint or part of the complaint.

- (2) The President, in a notice under this section, is to advise the complainant of:
  - (a) the reason for declining the complaint or part of the complaint, and
  - (b) the rights of the complainant under sections 93A and 96.

## **Subdivision 5 Termination of complaints**

### **92A Settlement or resolution of complaint**

- (1) If at any stage of the President's investigation of a complaint the President is satisfied that the complaint, or part of the complaint, has been settled or resolved by agreement between the parties, the President may terminate the complaint, or part of the complaint.
- (2) If the President terminates a complaint, or part of a complaint, under this section, the complainant has no right under section 93A to require the President to refer the complaint, or part of the complaint, to the Tribunal.

### **92B Withdrawal of complaint**

- (1) A person who has made a complaint, other than a representative complaint, may at any time, by notice in writing lodged with the President, withdraw the complaint.
- (2) If the President receives a notice under subsection (1) signed by or on behalf of the complainant or, if more than one, all the complainants, the President is to terminate the complaint.
- (3) If the President receives a notice under subsection (1) signed by or on behalf of some, but not all, of the complainants, the President is to treat the notice as an amendment removing the names of those persons as complainants from the complaint.
- (4) The President is to give notice in writing of any decision by the President under this section to the complainant and respondent and to each person on whose behalf the complaint was made.
- (5) The President is not required to give a respondent notice of the President's decision to terminate a complaint if the President had not given notice to the respondent that the complaint had been made.

### **92C Abandonment of complaint**

- (1) If a complainant has:
  - (a) failed to respond to a request for documents or information, or

- (b) failed to give notice to the President of an address (or new address) at which he or she may be contacted,  
the President may serve a notice on the complainant at his or her address last known to the President stating that, if a response is not received within 28 days, the complaint will be taken to be abandoned and the President will terminate the complaint.
- (2) If a complaint is taken to have been abandoned under this section, it may be revived if, within 12 months after the end of the 28-day period referred to in subsection (1), the complainant satisfies the President that:
- (a) he or she wishes to pursue the complaint, and
  - (b) the failure relied on for the purpose of subsection (1) did not take place or ought reasonably to be excused, and
  - (c) no undue prejudice would be caused to the respondent by reviving the complaint.

**93 Death of complainant or respondent does not terminate complaint**

- (1) If a complainant dies before his or her complaint is finally determined, the complaint survives and the legal personal representative of the complainant:
- (a) may continue the carriage of the complaint, including any referral, review or appeal, and
  - (b) the estate of the complainant is entitled to the benefit of any monetary sum ordered to be paid by the respondent in respect of the complaint.
- (2) If a respondent dies before any complaint against him or her is finally determined, the complainant may continue to pursue the complaint (including any referral, review or appeal) and any monetary sum ordered to be paid in respect of the complaint is payable from the estate of the respondent.

**Subdivision 6 Referral of complaints to Tribunal**

**93A Referral of complaints to Tribunal at requirement of complainant**

- (1) If the President has given a complainant a notice under section 87B (4), 91 (4) or 92, the complainant may, within 21 days after the date on which the notice was given, require the President, by notice in writing, to refer the complaint to the Tribunal.
- (2) On receipt of a notice under subsection (1) from the complainant, the President is to refer the complaint to the Tribunal.

**93B Referral of unresolved complaints to Tribunal after 18 months**

- (1) If a complaint has not been declined, terminated or otherwise resolved within 18 months after the date on which it was made, a party to the complaint may request the President by notice in writing to refer the complaint to the Tribunal.
- (2) On receipt of the notice, the President must give notice in writing to all the other parties to the complaint of the request.
- (3) If, within 28 days after the President gives notice to all the other parties, no party has objected to referral of the complaint, the President is to refer the complaint to the Tribunal.
- (4) If the complainant objects to the referral of the complaint, the President must not refer the complaint to the Tribunal, but may, if satisfied that there is no reasonable prospect of a conciliated agreement, terminate the complaint.
- (5) If the respondent objects to the referral of the complaint, the President is to refer the complaint to the Tribunal, unless satisfied that there are reasonable prospects of a conciliated agreement.

**93C Other referral of complaints to Tribunal**

If the President:

- (a) is of the opinion that a complaint cannot be resolved by conciliation, or
- (b) has endeavoured to resolve a complaint by conciliation but has not been successful in his or her endeavours, or
- (c) is of the opinion that the nature of a complaint is such that it should be referred to the Tribunal, or
- (d) is satisfied that all parties wish the complaint to be referred to the Tribunal and that it is appropriate in the circumstances to do so,

the President is to refer the complaint to the Tribunal.

**Note.** The President may also refer a complaint to the Tribunal under section 90B (5).

**94 Severing complaints**

If there is more than one complainant or respondent to a complaint, the President may, in dealing with the complaint under section 93B or 93C, if the President thinks fit, treat the complaint as a number of complaints by or against each such complainant or respondent.



**94A Form of complaint to be referred to Tribunal**

- (1) If a complaint is referred to the Tribunal under this Division, the complaint is to comprise:
  - (a) the original complaint lodged with the President, and
  - (b) any amendment made pursuant to section 91C, and
  - (c) any other documents or information obtained or recorded by the President that, in the opinion of the President, help to identify the subject-matter of the complaint or otherwise contain an allegation of a contravention of a provision of this Act or the regulations.
- (2) A complaint that is referred to the Tribunal is to be accompanied by a report relating to any investigation by the President of the complaint.

**Subdivision 7 Miscellaneous**

**94B Calculation of time**

If a notice under this Division is given by post, a period calculated from the day on which the notice is given is taken to run from, and includes, the fourth day after the notice was posted.

**94C Delegation—officers of President**

- (1) The President:
  - (a) may designate a specified person or the holder of a specified office for the purposes of this section, and
  - (b) may delegate to such a person or office holder the exercise of such of the President's functions (other than this power of delegation) as may be specified in the delegation.
- (2) A person who is a delegate of the President under this section is an officer of the President.
- (3) Nothing in this section limits the application of section 49 of the *Interpretation Act 1987*.

**Division 3 Complaints—the functions of the Administrative Decisions Tribunal**

**95 Referral of complaints to Tribunal**

- (1) A complaint may be referred to the Tribunal by the President under section 90B, 93A, 93B or 93C.
- (2) The Minister may refer any matter to the Tribunal as a complaint.

- (3) For the purposes of the *Administrative Decisions Tribunal Act 1997*, the referral of a complaint to the Tribunal is taken to be an application for an original decision within the meaning of that Act.

**96 Leave of Tribunal required for inquiry into certain matters**

- (1) A complaint that is referred to the Tribunal on the requirement of a complainant under section 93A (1), but not including a complaint to which section 91 (2) applies, may not be the subject of proceedings before the Tribunal without the leave of the Tribunal.
- (2) An issue that is the subject of proceedings before the Industrial Relations Commission may not be the subject of proceedings relating to a complaint before the Tribunal without the leave of the Tribunal.
- (3) Subsection (2) does not affect the operation of section 73 (Procedure of the Tribunal generally) of the *Administrative Decisions Tribunal Act 1997* in relation to evidence given before, or findings made by, the Industrial Relations Commission.
- (4) A decision of the Tribunal under this section with respect to the granting of leave cannot be the subject of an appeal to an Appeal Panel of the Tribunal under Part 1 of Chapter 7 of the *Administrative Decisions Tribunal Act 1997*.

**97 Parties to proceedings before Tribunal**

- (1) Despite section 67 (1) of the *Administrative Decisions Tribunal Act 1997*, the parties to proceedings before the Tribunal relating to a complaint are:
- (a) the complainant who, for the purposes of the *Administrative Decisions Tribunal Act 1997*, is taken to be the applicant, and
  - (b) the respondent, and
  - (c) any other person who has been made a party to the proceedings in accordance with section 67 (4) of the *Administrative Decisions Tribunal Act 1997*, and
  - (d) if the Attorney General intervenes in the proceedings under section 69 of the *Administrative Decisions Tribunal Act 1997*, the Attorney General.
- (2) The Tribunal may substitute a complainant or respondent if the Tribunal is of the opinion that the other parties to the proceedings will not be prejudiced by the substitution.

- (3) The Tribunal may remove or agree to the withdrawal of a complainant from proceedings if the Tribunal is satisfied that the complainant does not wish to proceed with the complaint.

**98 Rights of appearance and representation**

- (1) A party to proceedings before the Tribunal relating to a complaint:
- (a) is entitled to appear personally or, if the party is a corporation, by a director, the secretary, or an agent of the corporation, and
  - (b) if the party is not a corporation, may, by leave of the Tribunal, be represented by an agent.
- (2) In deciding whether to grant leave under subsection (1) (b), the Tribunal is to take the following matters into consideration:
- (a) whether both parties intend, and are able, to obtain representation,
  - (b) the complexity and importance of the proceedings to each party and their importance in the public interest,
  - (c) the likely length of the proceedings,
  - (d) whether the proceedings are likely to turn on issues of fact,
  - (e) the likely cost of representation as compared with the financial benefit of the relief sought,
  - (f) the likely consequences of appointing an officer of the Board to assist the Tribunal if leave is not granted.
- (3) A person, other than a legal practitioner, is not entitled to demand or receive a fee or reward that is provided for the purpose of representing a party in proceedings before the Tribunal relating to a complaint.
- (4) Except to the extent provided by this section, section 71 of the *Administrative Decisions Tribunal Act 1997* applies to proceedings before the Tribunal relating to a complaint.

**99 Officer assisting Tribunal**

- (1) The Tribunal may make arrangements with the Board for an officer of the Board to appear and assist the Tribunal in proceedings before the Tribunal relating to a complaint.
- (2) An officer of the Board in assisting the Tribunal in proceedings pursuant to arrangements made under this section is subject to the control and direction of the Tribunal.

**100 Single proceeding in relation to several complaints**

If the Tribunal is of the opinion that two or more complaints arise out of the same or substantially the same circumstances or subject-matter, it may deal with those complaints in the same proceedings.

**101 Determinations with respect to representative complaints**

- (1) In proceedings relating to a representative complaint, the Tribunal is to determine, as a preliminary matter, whether the complaint should be dealt with as a representative complaint.
- (2) The Tribunal must not permit a complaint to be dealt with as a representative complaint unless it is satisfied that the complaint is made in good faith as a representative complaint.
- (3) In considering whether a complaint is made in good faith as a representative complaint, the Tribunal is to satisfy itself:
  - (a) that:
    - (i) the complainant is a member of a class of persons whose members have been affected, or may reasonably be likely to be affected, by the conduct of the respondent, and
    - (ii) the complainant has in fact been affected by the conduct of the respondent, and
    - (iii) the class is so numerous that joinder of all its members is impracticable, and
    - (iv) there are questions of law or fact common to all members of the class, and
    - (v) the claims of the complainant are typical of the claims of the class, and
    - (vi) multiple complaints would be likely to produce varying determinations which could have incomparable or inconsistent results for the individual members of the class, and
    - (vii) the respondent has acted on grounds apparently applying to the class as a whole, thereby making relief appropriate for the class as a whole, or
  - (b) that, even though the requirements of paragraph (a) are not satisfied, the justice of the case demands that the matter be dealt with and a remedy provided by means of a representative complaint.

- (4) If the Tribunal is satisfied that a complaint could be dealt with as a representative complaint if the class of persons on whose behalf the complaint was made is increased, reduced or otherwise altered, the Tribunal may amend the complaint so that it can be dealt with as a representative complaint.
- (5) If the Tribunal is satisfied that a complaint has been wrongly made as a representative complaint, the Tribunal may amend the complaint by removing the names of the persons or the class of persons on whose behalf the complaint was made so that it can be dealt with as a complaint other than a representative complaint.

**102 Tribunal may dismiss complaint**

The Tribunal may, at any stage in proceedings relating to a complaint, dismiss the whole or any part of the complaint on a ground on which the President may decline the whole or any part of a complaint under section 92 (1) (a) (i) or (ii) or (b).

**103 Tribunal may amend complaint**

- (1) The Tribunal may, on the application of a party to a complaint or on its own motion, at any stage in proceedings relating to the complaint, amend the complaint.
- (2) A complaint may be amended to include additional complaints and anything else that was not included in the complaint as investigated by the President.
- (3) An amendment may be made subject to such conditions as the Tribunal thinks fit.

**104 Proof of exceptions**

Where by any provision of this Act or the regulations conduct is excepted from conduct that is unlawful under this Act or the regulations or that is a contravention of this Act or the regulations, the onus of proving the exception in any proceedings before the Tribunal relating to a complaint lies on the respondent.

**105 Interim orders**

- (1) The Tribunal may, on the application of the President after a complaint is made and before the complaint is declined, terminated or otherwise resolved by the President, or referred to the Tribunal, or on the application of a complainant or respondent at any time, make an interim order:
  - (a) to preserve the status quo between the parties to the complaint, or

- (b) to preserve the rights of the parties to the complaint, or
  - (c) to return the parties to the complaint to the circumstances they were in before the contravention of this Act or the regulations alleged in the complaint occurred,
- pending determination of the matter the subject of the complaint.
- (2) Section 89 of the *Administrative Decisions Tribunal Act 1997* applies to an interim order of the Tribunal in the same way as it applies to an original decision of the Tribunal.

**106 Appeals against interim orders**

An appeal against an interim order of the Tribunal may be made under Part 1 of Chapter 7 of the *Administrative Decisions Tribunal Act 1997* only with the leave of an Appeal Panel under that Part.

**107 Dismissal of proceedings**

- (1) The Tribunal may dismiss proceedings before it relating to a complaint if satisfied that:
  - (a) the person or (in the case of a complaint made on behalf of more than one person) each person on whose behalf the complaint was made does not wish to proceed with the complaint, or
  - (b) the proceedings are subject to a want of prosecution, or
  - (c) the proceedings have been abandoned.
- (2) The provisions of this section are in addition to the provisions of section 73 (5) (g) and (h) of the *Administrative Decisions Tribunal Act 1997*.

**108 Order or other decision of Tribunal**

- (1) In proceedings relating to a complaint, the Tribunal may:
  - (a) dismiss the complaint in whole or in part, or
  - (b) find the complaint substantiated in whole or in part.
- (2) If the Tribunal finds the complaint substantiated in whole or in part, it may do any one or more of the following:
  - (a) except in respect of a matter referred to the Tribunal under section 95 (2), order the respondent to pay the complainant damages not exceeding \$40,000 by way of compensation for any loss or damage suffered by reason of the respondent's conduct,

- (b) make an order enjoining the respondent from continuing or repeating any conduct rendered unlawful by this Act or the regulations,
  - (c) except in respect of a representative complaint or a matter referred to the Tribunal under section 95 (2), order the respondent to perform any reasonable act or course of conduct to redress any loss or damage suffered by the complainant,
  - (d) order the respondent to publish an apology or a retraction (or both) in respect of the matter the subject of the complaint and, as part of the order, give directions concerning the time, form, extent and manner of publication of the apology or retraction (or both),
  - (e) in respect of a vilification complaint, order the respondent to develop and implement a program or policy aimed at eliminating unlawful discrimination,
  - (f) make an order declaring void in whole or in part and either ab initio or from such time as is specified in the order any contract or agreement made in contravention of this Act or the regulations,
  - (g) decline to take any further action in the matter.
- (3) An order of the Tribunal may extend to conduct of the respondent that affects persons other than the complainant or complainants if the Tribunal, having regard to the circumstances of the case, considers that such an extension is appropriate.
- (4) The power of the Tribunal to award damages to a complainant is taken, in the case of a complaint lodged by a representative body, to be a power to award damages to the person or persons on behalf of whom the complaint is made and not to include a power to award damages to the representative body.
- (5) In making an order for damages concerning a complaint made on behalf of a person or persons, the Tribunal may make such order as it thinks fit as to the application of those damages for the benefit of the person or persons.
- (6) If two or more vilification complaints are made in respect of the same public act of the respondent and those complaints are found to be substantiated in whole or in part, the Tribunal must not make an order or orders for damages that would cause the respondent to pay more than \$40,000 in the aggregate in respect of that public act.

- (7) If the Tribunal makes an order under subsection (2) (b), (c), (d) or (e), it may also order that, in default of compliance with the order within the time specified by the Tribunal, the respondent is to pay the complainant damages not exceeding \$40,000 by way of compensation for failure to comply with the order.

**109 Order affecting industrial instrument**

If the Tribunal makes an order that affects an industrial instrument within the meaning of the *Industrial Relations Act 1996*, it must give notice in writing to the President of the Industrial Relations Commission of the order as soon as practicable after the order is made.

**110 Costs**

- (1) Each party to an inquiry is to pay his or her own costs, except as provided by this section.
- (2) If the Tribunal is of the opinion in a particular case that there are circumstances that justify it doing so, it may make such order as to costs and security for costs, whether by way of interim order or otherwise, as it thinks fit.

**111 Compliance with order of Tribunal**

A person must not refuse or neglect, or for any other reason fail to obey or comply with, an order under section 108 (2) (b), (c), (d) or (e), or an interim order, of the Tribunal.

Maximum penalty: 50 penalty units, in the case of a corporation, or 10 penalty units in any other case.

**112 Interest on damages**

- (1) Interest accrues on an amount of damages ordered to be paid by the Tribunal from the date on which the order takes effect until payment.
- (2) Despite subsection (1), the Tribunal may order that interest accrues on an amount of damages ordered to be paid by it from a date that is earlier than the date on which its order is made.
- (3) Interest referred to in this section accrues at the same rate as that applicable to a judgment of the District Court.



**113 Enforcement of orders by the President**

If the President believes it is in the public interest to do so, the President may:

- (a) in the case of an individual complaint, take steps to enforce an order of the Tribunal on behalf of the complainant, with the complainant's consent, or
- (b) in the case of a representative complaint, take steps to enforce an order of the Tribunal, on the President's own motion.

**114 Enforcement of non-monetary orders**

- (1) This section applies to an order, or part of an order, of the Tribunal other than an order, or part of an order, for the recovery of an amount ordered to be paid by the Tribunal or a civil or other penalty ordered to be paid by the Tribunal.
- (2) For the purpose of enforcing an order, or part of an order, to which this section applies, the Registrar may certify the making of the order, or part, and its terms.
- (3) A certificate of the Registrar under this section that is filed in the registry of the Supreme Court operates as a judgment of that Court.
- (4) Nothing in this section limits or otherwise affects section 82 or 82A of the *Administrative Decisions Tribunal Act 1997*.

**115 Appeals to Appeal Panel against decisions of Tribunal**

An order or other decision made by the Tribunal pursuant to this Act (other than a decision under section 96) may be appealed to an Appeal Panel of the Tribunal under Part 1 of Chapter 7 of the *Administrative Decisions Tribunal Act 1997* by a party to the proceedings in which the order or decision is made.

**116 Relationship between this Division and Administrative Decisions Tribunal Act 1997**

This 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.

**[4] Section 119 General functions of the Board**

Insert at the end of the section:

- (2) The Board may, for the purposes of the exercise of any of its functions under this section, enter into an agreement with any person that provides for payment to the Board for any services or materials it supplies.

**[5] Section 122T Definitions**

Omit “section 94A” from section 122T (3). Insert instead “section 94C”.

**[6] Section 123**

Omit the section. Insert instead:

**123 Effect of contravention of Act or regulations**

This Act is in addition to, and not in derogation of, any other law in force in New South Wales that provides for the protection of a person from conduct that is or would be unlawful under this Act or the regulations.

**[7] Section 127 Regulations**

Insert after section 127 (4) (c):

- (d) making complaints, amending complaints, dealing with complaints, declining complaints and terminating complaints,

## **Schedule 2 Miscellaneous amendments to Anti-Discrimination Act 1977**

(Section 3)

### **[1] Section 49B What constitutes discrimination on the ground of disability**

Insert after section 49B (3):

- (3A) For the purposes of, but without limiting, this section, the fact that a person who has a disability:
- (a) is accompanied by, or possesses, a palliative or therapeutic device, or other mechanical equipment, that provides assistance to the person to alleviate the effect of the disability, or
  - (b) is accompanied by an interpreter, a reader, an assistant, or a carer, who provides interpretive, reading or other services to the person because of the disability, or because of any matter related to that fact,

is taken to be a characteristic that appertains generally to persons who have that disability.

### **[2] Section 120A**

Insert after section 120:

#### **120A Codes of practice**

- (1) The Board may develop and promote codes of practice.
- (2) The Board may consult with a representative body and persons operating in an industry or other area of conduct to which this Act applies for the purpose of developing a code of practice.
- (3) A code of practice is to provide guidance to persons in a specified area of conduct as to:
  - (a) the kinds of activity that may involve or constitute a contravention of this Act, and
  - (b) means of limiting, avoiding or restricting the width of any such activity or contravention, and
  - (c) any other matter that the Board considers necessary or convenient in the exercise of its functions under section 119.

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- (4) A code of practice is not legally binding on any person, but evidence of compliance with or contravention of a code may be considered by the President and the Tribunal in the exercise of functions under this Act or the *Administrative Decisions Tribunal Act 1997*.
- (5) To avoid doubt, a code of practice does not have the effect:
- (a) of rendering lawful any conduct that contravenes this Act, or
  - (b) of rendering unlawful any conduct not otherwise unlawful.

**[3] Section 122 Annual report**

Omit “the thirtieth day of September” from section 122 (1).

Insert instead “31 October”.

**[4] Section 124A**

Insert after section 124:

**124A Secrecy**

- (1) This section applies to every person who is or has been:
- (a) a member of the Board, or
  - (b) an officer of the Board within the meaning of section 86 (2), or
  - (c) an officer of the President within the meaning of section 94C (2), or
  - (d) any other person acting under the authority of the Board.
- (2) This section applies to information concerning the affairs of any person that is or has been obtained by a person to whom this section applies:
- (a) in the course of exercising functions under this Act, or
  - (b) as a result of another person exercising functions under this Act,
- unless the information is otherwise publicly available or is information the disclosure of which is authorised or required under a provision of another Act.

- (3) A person to whom this section applies must not, either directly or indirectly, make a record of, disclose or communicate to any person any information to which this section applies unless it is necessary to do so for the purposes of, or in connection with, the exercise of a function under this Act or is otherwise permitted by this Act.

Maximum penalty: 10 penalty units.

- (4) Information concerning the affairs of any person that is or has been obtained by a person to whom this section applies:
- (a) in the course of exercising functions under this Act, or
  - (b) as a result of another person exercising functions under this Act,

is inadmissible in a court and a person cannot be required, by subpoena or otherwise, to produce or disclose it except in proceedings (including any prosecution) under or arising out of this Act.

- (5) Information to which this section applies may be disclosed or communicated to the Minister, or recorded for that purpose, if the President certifies in writing that it is necessary to do so in the public interest.

- (6) In this section:

***court*** includes a tribunal having power to require the production of documents or the answering of questions.

***produce*** includes permit access to.

**[5] Schedule 1 Savings and transitional provisions**

Insert at the end of clause 1 (1):

*Anti-Discrimination Amendment (Miscellaneous Provisions)  
Act 2004*

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**[6] Schedule 1, Part 5**

Insert after Part 4:

**Part 5 Anti-Discrimination Amendment  
(Miscellaneous Provisions) Act 2004**

**14 Operation of amendments**

- (1) An amendment made to this Act by the *Anti-Discrimination Amendment (Miscellaneous Provisions) Act 2004* (including a provision inserted by such an amendment) extends to anything commenced to be done but not completed before the commencement of the amendment, except as provided by clauses 15 and 16.
- (2) Without limiting subclause (1), that subclause applies to a complaint made but not finalised before the commencement of such an amendment.

**15 Order or other decision of the Tribunal**

Section 113, as in force immediately before its repeal by the *Anti-Discrimination Amendment (Miscellaneous Provisions) Act 2004*, continues to apply to proceedings before the Tribunal relating to a complaint that were not finally determined by the Tribunal before the repeal of that section.

**16 Interest on damages**

Section 112, as inserted by the *Anti-Discrimination Amendment (Miscellaneous Provisions) Act 2004*, does not apply to an order of the Tribunal made in respect of proceedings before the Tribunal relating to a complaint that were commenced but not finally determined by the Tribunal before the commencement of that section.

## **Schedule 3 Amendment of other Acts**

(Section 4)

### **3.1 Administrative Decisions Legislation Amendment Act 1997 No 77**

#### **Schedule 2 Amendments concerning abolished Equal Opportunity Tribunal**

Omit Schedule 2.1 [3] and [5].

### **3.2 Administrative Decisions Tribunal Act 1997 No 76**

#### **[1] Section 36 What are the principal kinds of decisions that the Tribunal may make?**

Omit “Part 7A” from the note to the section.

Insert instead “Division 3 of Part 9”.

#### **[2] Schedule 2 Composition and functions of Divisions**

Omit “For the” from clause 3 (1) of Part 2.

Insert instead “Except as provided by subclause (1A), for the”.

#### **[3] Schedule 2, Part 2, clause 3 (1A)**

Insert after clause 3 (1):

- (1A) For the purposes of exercising its functions under sections 91A, 96 and 105 of the Act, the Tribunal is to be constituted by 1 Division member of the Equal Opportunity Division of the Tribunal who is a judicial member.

### **3.3 Defamation Act 1974 No 18**

#### **Section 17D Matters arising under Anti-Discrimination Act 1977**

Omit “section 91 (2) or 94 (1)” from section 17D (2) (a).

Insert instead “section 94A (2)”.

### **3.4 Freedom of Information Act 1989 No 5**

#### **Schedule 2 Exempt bodies and offices**

Insert at the end of the Schedule:

The President of the Anti-Discrimination Board—complaint handling, investigative and reporting functions in relation to a complaint that is in the course of being dealt with by the President.

[Second reading speech made in—

Legislative Assembly on 16 September 2004

Legislative Council on 19 October 2004]

BY AUTHORITY