

[Act 1997 No 9]



New South Wales

Anti-Discrimination Amendment Bill 1996

Explanatory note

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

Overview of Bill

The object of this Bill is to amend the *Anti-Discrimination Act 1977* so as:

- to prohibit sexual harassment, and
- to ensure that Ministers and other Members of Parliament are liable for any unlawful discrimination against, or sexual harassment of, people employed in their offices, and
- to provide that a complaint of unlawful discrimination or sexual harassment does not automatically lapse on the death of the complainant or the respondent, and
- to make a number of miscellaneous amendments relating to the handling of complaints, the proceedings of the Equal Opportunity Tribunal and the coverage of the Act, and
- to update references to Acts of the New South Wales and Commonwealth Parliaments, and
- to make other minor amendments.

* Amended in committee—see table at end of volume.

Outline of provisions

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

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Clause 3 is a formal provision giving effect to the amendments to the *Anti-Discrimination Act 1977* set out in Schedule 1.

Schedule 1 Amendments

Employment in the Public Service and in the office of a Minister or Member of Parliament

At present, discrimination in employment is prohibited in respect of each ground of unlawful discrimination. For instance, section 8 provides that it is unlawful for an employer to discriminate against a person on the ground of race in respect of arrangements made for determining who should be offered employment and in the terms on which the employer offers employment. (Similar provisions are made in respect of each other ground of unlawful discrimination.)

Those provisions operate by reference to an “employer”. At present, section 4 (7) of the Act says, in effect, that a public servant’s employer is the relevant Department Head.

Schedule 1 [6] and [7] replace the provisions that set out who is the “employer” of a public servant and updates the terminology of that provision.

In addition, Schedule 1 [7] inserts proposed section 4C, which makes provision for Ministers and Members of Parliament to be regarded as the “employer” of people employed in their offices. As a result, a Minister or other Member of Parliament will be prohibited from unlawfully discriminating against, or sexually harassing, such people and will also be liable for unlawful conduct of other employees in their offices, as are other employers (by virtue of section 53 of the Act).

Proposed section 4C (1) states that the section applies where a Minister or member is not the employer of staff in his or her office.

Proposed section 4C (2) provides that a Minister or member is taken to be the employer of staff in his or her office for the purposes of the Principal Act.

Proposed section 4C (3) provides that Ministers employ on behalf of the Crown.

Proposed section 4C (4) provides that if, because of the section, there would be more than one employer, the Principal Act applies to each employer jointly and severally. Accordingly, obligations under the Principal Act will have to be complied with by each employer, and proceedings will be able to be taken against each employer jointly or separately.

Proposed section 4C (5) makes it clear that section 4B is not affected by the proposed section. (Section 4B treats the relevant Department Head as the employer of certain public sector employees.)

Proposed section 4C (6) makes it clear that the proposed section extends to prospective employment.

Proposed section 4C (7) contains definitions.

Amendments relating to sexual harassment

The Schedule inserts Part 2A (Prohibition of sexual harassment) into the Act. (See Schedule 1 [10]) The Part renders it unlawful to sexually harass a person in the circumstances set out in the Part.

At present, sex-based harassment is regarded as an element of sex discrimination within the meaning of Part 3 of the Act (see the decision of the Equal Opportunity Tribunal in *Hill v Water Resources Commission* (1985) EOC 92-127).

Part 2A specifically makes sexual harassment unlawful. The prohibition against sexual harassment applies in all areas covered by the Act in relation to other grounds of discrimination, namely accommodation, the provision of goods and services, education, registered clubs and employment, although the exemptions applicable in relation to such unlawful discrimination (that is exemptions for small businesses and private educational authorities) will not apply to sexual harassment. It will also apply to participants in organised sporting competitions and related matters. The consequences of sexual harassment are that a person can make a complaint, dealt with under Part 9, which may lead to orders or other decisions of the Equal Opportunity Tribunal, including an order for damages of up to \$40,000.

Part 2A Prohibition of sexual harassment

Part 2A is modelled on the provisions relating to sexual harassment in the *Sex Discrimination Act 1984* of the Commonwealth.

Proposed section 22A defines sexual harassment. A person sexually harasses another person if he or she makes an unwelcome sexual advance, an unwelcome request for sexual favours or engages in any other unwelcome conduct of a sexual nature in relation to the other person in circumstances in which a reasonable person would have anticipated that the other person would be offended, humiliated or intimidated.

Proposed section 22B renders it unlawful to sexually harass an employee, a prospective employee, a fellow employee, commission agent, contract worker, a partner or participant at the same workplace. The liability of a principal or employer for the acts of their agent or employee, or for the acts of any other person in relation to their agent or employee, is limited in respect of sexual harassment. Proposed Part 2A does not operate so as to confer liability on a principal or employer if the principal or employer took all reasonable steps to prevent sexual harassment by their agent or employee. (See Schedule 1 [19])

Proposed section 22C renders it unlawful for a member of an industrial organisation, or a member of staff of such an organisation, to sexually harass a member of the organisation or prospective member.

Proposed section 22D renders it unlawful for a member of a qualifying body to sexually harass a person seeking action in connection with an occupational qualification.

Proposed section 22E renders it unlawful for a person who operates, or is a member of staff of, an employment agency, to sexually harass another person in the course of providing or offering to provide any of the agency's services to that person.

Proposed section 22F renders it unlawful for a member of staff of an educational institution to sexually harass a student or a potential student, and for an adult student to sexually harass a member of staff or student of an institution at the institution or while on an event organised by the institution.

Proposed section 22G renders it unlawful for a person to sexually harass another person in the course of providing, or offering to provide, goods, services or facilities to that other person.

Proposed section 22H renders it unlawful for a person to sexually harass another person in the course of providing or offering to provide accommodation to that person.

Proposed section 22I renders it unlawful for a person to sexually harass another person in the course of dealing with that other person in the disposal or acquisition by that person of an estate or interest in land.

Proposed section 22J renders it unlawful for a member of the committee of management of a registered club, or a member of a registered club, to sexually harass a member of the club or a potential member of the club.

Proposed section 22K renders it unlawful for a person to sexually harass another person in the course of a sporting activity.

Proposed section 22L renders it unlawful for a person performing any function under a State law or for the purpose of a State program to sexually harass another person.

Schedule 1 [19] makes a consequential amendment.

Discrimination in relation to access to places and vehicles

At present, discrimination in relation to access to places and vehicles is treated separately from discrimination in the provision of goods and services, but only in respect of discrimination on the ground of race or age or on transgender grounds.

Schedule 1 [5] makes the provision of access to a place or vehicle a category of “services”, which will apply to all types of discrimination.

Schedule 1 [8], [13] and [16] omit provisions that render discrimination in the provision of access unlawful, since such discrimination will now be encompassed by the provisions dealing with discrimination in the provision of goods and services.

Schedule 1 [12] omits a provision which prohibits discrimination on the grounds of sex in relation to access to places where liquor is sold. (There is no analogous provision in respect of other types of discrimination.) Such discrimination will be covered by the extended definition of *service*.

Tribunal proceedings

Section 69N of the Act is amended to allow a judicial member of the Equal Opportunity Tribunal sitting alone to deliver any judgment of the Tribunal or to make an order in respect of costs. (See Schedule 1 [24])

Schedule 1 [26] allows the Registrar of the Equal Opportunity Tribunal to deliver any judgment of the Tribunal.

Proposed section 69NA confers protection from personal liability on members of the Tribunal or members of staff of the Tribunal in respect of any act, matter or thing done or omitted in good faith for the purposes of carrying out the provisions of the Act. (See Schedule 1 [25])

Pursuit of a complaint when the complainant or respondent has died

At present, a person has a right to make a complaint under the Act, which is required to be investigated by the President of the Anti-Discrimination Board and may be referred to the Equal Opportunity Tribunal.

Schedule 1 [30] provides that if a complainant dies before a complaint is finally heard, the person's estate may pursue the complaint and is entitled to any damages that may be ordered in respect of the complaint. Similarly, the death of the respondent does not cause the complainant's cause of action to cease.

Notification of respondent of decision not to proceed with complaint

At present, section 90A (3) requires the President of the Anti-Discrimination Board to notify both the complainant and the respondent when the President makes a decision not to proceed with a complaint. This decision may be made after the Board has commenced an initial investigation of the complaint, or where the complainant has elected not to pursue the complaint. In either case, the respondent may not be aware that the complainant has lodged a complaint.

Schedule 1 [34] amends the subsection so the President is required to notify the respondent of the President's decision only if the respondent had been notified that the complaint was made.

Exemptions from the Act

Section 126 of the Act provides that the Minister may grant an exemption from the Act or regulations (or any part of the Act or regulations) on the recommendation of the Anti-Discrimination Board.

At present, such an exemption may not exceed 5 years and may only be renewed once, for a further 5 years. Schedule 1 [43] allows for the initial exemption to remain in force for a maximum of 10 years and provides for an unlimited number of renewals of that exemption.

Section 126A provides for exemptions from the application of Parts 3–4C of special needs programs and activities. The section allows an “appropriate authority” to certify a program or activity to be a special needs program or activity in certain circumstances. If the program or activity is one for which a Government Department or public or local authority is responsible, the appropriate authority is the Minister responsible for the Department or authority. In any other case, the appropriate authority is the Minister administering the Act. Schedule 1 [44] and [45] provide for such exemptions to be granted only by the Minister administering the Act.

Updating references to repealed Acts

The Schedule makes numerous amendments updating references to repealed Acts of the New South Wales and Commonwealth Parliaments. (See Schedule 1 [1], [2], [3], [11], [14], [18], [20], [21], [23], [27], [37], [38] and [40]) The Schedule also replaces out of date references to statutory bodies. (See Schedule 1 [15], [41] and [42])

Other minor amendments

Schedule 1 [9] repeals and re-enacts section 19, which renders it unlawful to discriminate on the grounds of race in the provision of goods and services. The new provision is consistent with the language of analogous provisions in respect of other types of discrimination.

Schedule 1 [17] provides an exemption from the prohibition on discrimination on the grounds of age in relation to the provision of accommodation. As a result of the amendment, an accommodation concession based on a person’s age will not amount to unlawful discrimination on the grounds of age.

Schedule 1 [22] empowers the senior judicial member of the Equal Opportunity Tribunal to authorise the taking of leave by a member of the Equal Opportunity Tribunal.

Schedule 1 [31] empowers the President of the Anti-Discrimination Board, during conciliation proceedings, to order the production of broadcast material in relation to a broadcast that is the subject of a vilification complaint.

Explanatory note

Schedule 1 [28], [29], [32], [33], [35] and [36] remove the unnecessary distinction between “vilification complaint” and a “homosexual vilification complaint”. Such complaints are dealt with identically in the Act.

Schedule 1 [39] omits a redundant provision.

Schedule 1 [46] inserts certain savings and transitional provisions consequent on the enactment of the proposed Act.