

Act 1994 No. 28

ANTI-DISCRIMINATION (AMENDMENT) BILL 1994*

NEW SOUTH WALES



EXPLANATORY NOTE

(This Explanatory Note relates to this Bill as introduced into Parliament)

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

- (a) to include the concepts of descent and ethno-religion as aspects of race for racial discrimination and vilification purposes and to increase the maximum penalty which may be imposed on an individual for the offence of serious racial vilification (further details below); and
- (b) to make it unlawful to vilify another person or persons on the ground of HIV/AIDS infection and to create a criminal offence of serious vilification on that ground (further details below); and
- (c) to replace the existing provisions dealing with discrimination on the ground of physical or intellectual impairment with provisions dealing with discrimination on the ground of a broader concept of disability and to change the defences available in such cases (further details below); and
- (d) to make miscellaneous amendments (further details below).

Definition of “race” and penalties for serious racial vilification (See Schedule 1)

The Bill will expand the definition of “race” in the Act to include descent and ethno-religion as aspects of race for the purposes of the racial discrimination and racial vilification provisions of the Act. The Bill will also increase the maximum penalty that may be imposed on an individual for the offence of serious racial vilification. The current maximum penalty is 10 penalty units or 6 months imprisonment, or both. The new maximum penalty will be 50 penalty units or 6 months imprisonment, or both. The maximum penalty for corporations remains unchanged at 100 penalty units. One penalty unit currently equates to \$100 (see section 56 of the Interpretation Act 1987).

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

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Certain other amendments made by Schedule 4 to the Bill also affect the racial discrimination and vilification provisions of the Act, in particular the amendments made by Schedule 4 (26) enable a complaint of racial vilification or discrimination to be made on behalf of a person by a representative body that has a genuine concern about the conduct complained of.

HIV/AIDS vilification (See Schedule 2)

The Bill will insert provisions that make it unlawful for a person to publicly incite hatred towards or serious contempt for a person or group of persons on the ground of HIV/AIDS infection (or presumed HIV/AIDS infection).

Vilification of this kind (unless it is serious as explained Below) will not be a criminal offence but can be the subject of a complaint to the Equal Opportunity Tribunal under the Act. The Tribunal can make orders for compensation of up to \$40,000 and orders for preventing future breaches and redressing past breaches.

Serious vilification (vilification that involves the threat of or the incitement of a threat of physical harm towards persons or their property) is made a criminal offence punishable by a penalty of up to 50 penalty units or imprisonment for 6 months (or both) in the case of an individual and 100 penalty units in the case of a corporation. The consent of the Attorney General is required before a prosecution can be taken for serious vilification.

The new provisions parallel the existing provisions of the Act dealing with racial vilification except that public incitement to severe ridicule will not constitute vilification under the new provisions and religious discussion and instruction will be added to the list of conduct that does not constitute unlawful conduct under the new provisions.

Discrimination on the ground of disability (See Schedule 3)

The Bill replaces the existing separate Parts of the Act dealing with discrimination on the ground of physical or intellectual impairment with a new Part dealing with discrimination on the ground of disability and containing a broad definition of disability.

The new Part includes all that is currently covered by the existing Parts, with the following variations:

- the new definition of disability will cover all forms of disability and make it unnecessary to categorise a disability as either physical or intellectual;
- the presence of an organism (such as HIV) causing or capable of causing illness is specifically included as a form of disability;
- it will be unlawful to discriminate on the ground of past, future or presumed disability (in addition to actual existing disability as at present);
- existing defences (which permit discrimination in situations where for example the disabled person would require additional services or facilities that could not reasonably be expected to be provided) are replaced with defences based on the concept of the unjustifiable hardship that would be caused by having to accommodate a person's disability (to bring the defences into line with the defences provided for by the Disability Discrimination Act 1992 of the Commonwealth);

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- existing defences which permit discrimination in sport are brought into line with the defences provided for by the Disability Discrimination Act 1992 of the Commonwealth so that there will be a defence generally where a person's disability would prevent the person taking part in a sporting activity and so as not to prevent sporting events for the disabled;
- an existing defence which permits discrimination by a registered club in the services it provides to members on the basis of unjustifiable hardship in accommodating a person's disability is extended to the services provided by industrial organisations and educational authorities;
- an existing defence that applies to provisions in superannuation schemes is limited so that it will only apply when the discrimination is reasonable based on statistical or actuarial data or is reasonable having regard to other relevant factors when no such data is available;
- a new defence is added for discrimination in cases of infectious disease where the discrimination is reasonably necessary to protect public health.

Miscellaneous amendments (See Schedules 4 and 5)

The Act will be amended as follows:

- (a) to update the definition of "trade union" in the Act (See Schedule 4 (1) and (2) (c));
- (b) to update the definition of "registered club" in the Act (See Schedule 4 (2) (b));
- (c) to make it clear that references in the Act to homosexuality include references to female (as well as male) homosexuality (See Schedule 4 (2) (a));
- (d) to provide that when discrimination occurs on more than one ground, the relevant ground of discrimination for the purposes of the Act is whichever is the dominant ground of discrimination (See Schedule 4 (3));
- (e) to extend the definitions in the Act of discriminatory conduct so that it will be unlawful to discriminate against a person on the basis of a characteristic of a relative or associate of the person (See Schedule 4 (2) (a), (4), (5), (8), (9), (10), (13), (14), (17), (18));
- (f) to make it unlawful for members of local councils to discriminate against fellow councillors on any of the grounds of discrimination to which the Act applies (See Schedule 4 (6), (11), (15), (19));
- (g) to change the existing race discrimination exemption for special needs facilities and services so that it will accord with the principles applicable to the proposed provisions for exempting special needs programs in other areas of discrimination referred to in (s) below (See Schedule 4 (7));
- (h) to limit the existing defences that apply for sex and marital status discrimination provisions in superannuation schemes so that they will only apply when the discrimination is reasonable based on statistical or actuarial data or is reasonable having regard to other relevant factors when no such data is available (See Schedule 4 (12));
- (i) to expand an existing provision of the Act concerning discrimination on the ground of marital status in respect of the provision of services to include discrimination in the provision of goods, for consistency with other grounds of discrimination under the Act (See Schedule 4 (16));

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- (j) to amend various sections of the Act which create offences so as to provide a separate and higher maximum penalty (\$5,000) for corporations and to increase (from \$500 to \$1,000) the maximum penalty for the offence of failing to attend conciliation proceedings when committed by an individual (See Schedule 4 (20), (29), (31), (32), (35), (36));
 - (k) to clarify the operation of provisions dealing with the liability of persons who cause, induce or permit a contravention of the Act and the liability of employers and principals for the actions of their employees and agents (See Schedule 4 (21));
 - (l) to remove the current exemption in the Act for things done in compliance with industrial orders, awards and agreements but with the amendments not applying to current orders, awards and agreements until 12 months after the commencement of the amendments (See Schedule 4 (22) and proposed clause 7 of the provisions to be inserted by Schedule 4 (39));
 - (m) to extend the general exemption in the Act that applies to practices of a religious nature to include acts of a religious nature (See Schedule 4 (23));
 - (n) to re-write the current exemption in the Act for institutions providing housing accommodation and ancillary services for aged persons which restrict admission on the basis of class, type, sex, race or age so as to provide an exemption for restrictions on the basis of race, sex and marital status, and to remove the requirement that those institutions must also provide ancillary services to qualify for the exemption (See Schedule 4 (24));
 - (o) to enable a complaint of discrimination to be made on behalf of a person by a representative body that has a genuine concern about the conduct complained of, but only if the aggrieved person consents to the complaint being made on his or her behalf (See Schedule 4 (26) (a)—proposed section 88 (1A)–(1C));
 - (p) to enable a complaint of discrimination to be made on behalf of a person under 18 years of age, or who has a disability of any kind, by another person with the aggrieved person's consent (not just on behalf of an intellectually handicapped person as at present) (See Schedule 4 (26) (a)—proposed section 88 (2) and (2A) and Schedule 4 (26) (c)—proposed section 88 (2C));
 - (q) to make it clear that a complaint under the Act can be formally dismissed or the complainant removed from the complaint if the complainant does not wish to proceed with the complaint (See Schedule 4 (28), (33));
 - (r) to provide that a person who is joined as a complainant or respondent to a complaint is considered to be a complainant or respondent to remove any doubt that such a person can be the subject of an order of the Equal Opportunity Tribunal (See Schedule 4 (30));
 - (s) to provide for the exemption of “special needs” programs and activities that promote equality of opportunity for groups protected by the Act (except in relation to racial discrimination, for which exemption is already available under section 21) (See Schedule 4 (37));
 - (t) to enact consequential savings and transitional provisions (See Schedule 4 (38), (39));
 - (u) to make consequential amendments (See Schedule 4 (25), (26) (b), (27), (34));
 - (v) to make the language of the Act gender neutral (See Schedule 5).
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Clause 1 specifies 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 gives effect to the Schedules of amendments to the Anti-Discrimination Act 1977.

Schedule 1 makes the amendments explained above concerning the definition of “race” and the penalty for the offence of serious racial vilification.

Schedule 2 makes the amendments explained above concerning HIV/AIDS vilification.

Schedule 3 makes the amendments explained above concerning discrimination on the ground of disability.

Schedule 4 makes the miscellaneous amendments explained above.

Schedule 5 amends the Act to make its language gender neutral.
