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AUSTRALIAN CAPITAL TERRITORY LEGISLATIVE ASSEMBLY

HUMAN RIGHTS AND EQUAL OPPORTUNITY BILL 1991

EXPLANATORY MEMORANDUM

Circulated by authority of  
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Chief Minister

## HUMAN RIGHTS AND EQUAL OPPORTUNITY BILL 1991

### OUTLINE

The purposes of the Human Rights and Equal Opportunity Bill 1991 are to make certain kinds of discrimination unlawful, to establish an office of the ACT Human Rights Commissioner and to provide a mechanism to give people who believe they have been discriminated against the opportunity to seek redress through the lodgement of a complaint with the Commissioner.

It will be unlawful to discriminate against a person on the basis of one of the following attributes or because it is presumed that a person has one of these attributes: sex, sexuality, transsexuality, marital status, status as a parent or carer, pregnancy, race, religious or political conviction or an impairment. Discrimination on the basis that a person associates with someone who has one of the above attributes will also be unlawful. Subject to the exceptions set out in the Bill, discrimination will be unlawful in the areas of work, education, access to premises, provision of goods, services and facilities, accommodation and clubs.

The structure of the Bill has been simplified to make it more accessible. Part II identifies the grounds of discrimination and defines discrimination for the purposes of the Bill. Part III describes the areas of activity in which discrimination will be unlawful. Part IV sets out the exceptions to the discrimination provisions. Part V covers sexual harassment.

Part VII deals with the procedure for lodging a complaint with the Commissioner and describes the process of investigation, conciliation and determination of a complaint. Under these provisions the Commissioner is required, as far as practicable, to endeavour to resolve complaints by conciliation but where this is not possible or appropriate the Commissioner has the power to make a decision in the matter. Failure to comply with a decision of the Commissioner will be a criminal offence. The Commissioner's decisions are subject to review by the ACT Administrative Appeals Tribunal. Part VIII allows the Commissioner to grant exemptions of up to three years for behaviour which would otherwise be unlawful discrimination. Part IX establishes the Office of the Human Rights Commissioner and describes the Commissioner's functions. These include a public education function to promote equality of opportunity and to reduce discrimination and review of ACT laws to ensure consistency with the principles of the Bill.

### FINANCIAL CONSIDERATIONS

\$170,000 is available to fund this initiative for the 1991-92 financial year. This amount can be met within existing funding levels. The way in which these funds will be applied to administer the legislation is dependent upon the outcome of negotiations with the Commonwealth Human Rights and Equal Opportunity Commission concerning a joint Human Rights Office in the ACT.

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## PART I - PRELIMINARY

### Clause 1: Short Title

The legislation may be referred to as the *Human Rights and Equal Opportunity Act 1991*.

### Clause 2: Commencement

Clause 1 and 2 of the Bill will commence on the day the Bill is notified in the Gazette. The remaining clauses of the Bill will commence on a day or days to be fixed by the Minister or automatically after six months.

### Clause 3: Objects

The objects of the Bill are stated. The legislation is intended to help eliminate unfair discrimination and sexual harassment at work, in education, access to places, the provision of goods, services, facilities and accommodation and in clubs. The legislation is also intended to promote recognition and acceptance of the principle of equality of opportunity for everyone in the community.

### Clause 4: Interpretation

4(1) Terms used in the Bill are defined. Key terms include:

- 'carer'; means a person on whom another person is wholly or substantially dependent for ongoing care and attention. It is not intended that this be limited to family members. It would cover, for example, someone who provided ongoing care and attention for an elderly neighbour or someone who was caring for a friend or partner suffering from AIDS. The term 'ongoing' does not mean full-time but is intended to indicate something more than an occasional or casual responsibility;
- 'employment'; includes work as an unpaid worker;
- 'impairment'; covers any physical or mental impairment, and includes HIV/AIDS, mental illness and intellectual disability; and
- 'sexuality'; means heterosexuality, homosexuality (including lesbianism) or bisexuality.

4(2) An act includes refusing or failing to do an act.

4(3) A reference in the Bill to the reason for doing an act does not mean that the reason must be the dominant or substantial reason for doing the act. For example,

where a person discriminates for more than one reason including a ground of unlawful discrimination, it is not necessary to show that the unlawful ground was the only or even the main reason for the act of discrimination.

**Clause 5: Complainants and respondents**

This clause defines these terms for the purposes of the legislation.

**Clause 6: Position of Crown**

The Crown in right of the ACT, the States and the Northern Territory will be bound by this Bill.

**PART II - DISCRIMINATION TO WHICH ACT APPLIES**

Part II sets out the grounds on which discrimination will be unlawful and defines discrimination.

**Clause 7: Grounds**

7(1) The Bill applies to discrimination on the following grounds:

- sex;
- sexuality;
- transsexuality;
- marital status;
- status as a parent or carer;
- pregnancy;
- race;
- religious or political conviction; and
- impairment.

Discrimination on the basis that someone is associated with a person with any of the above attributes is also covered. Provision has been made to include further grounds by regulation in the future.

Religious and political conviction are not defined for the purposes of the Bill but are to be given a wide interpretation.

7(2) It will also be unlawful to discriminate against a person on the basis of:

- a characteristic that a person with that attribute generally has, for example, parents generally have time commitments to their children;

- a characteristic that a person with that attribute is generally presumed to have, for example, the presumption that single people are more likely to be available to work overtime;
- an attribute that they are presumed, perhaps mistakenly, to have, for example, the presumption that all intravenous drug users are HIV positive; or
- an attribute that they had in the past but no longer have, for example, a mental illness which has been successfully treated.

#### Clause 8: What Constitutes Discrimination

8(1) Discrimination is defined for the purposes of the Bill. There are two kinds of discrimination - direct discrimination and indirect discrimination. Direct discrimination occurs when a person treats another person unfavourably because that person has one of the attributes in clause 7.

Indirect discrimination occurs when a person imposes a condition or requirement which, although sometimes apparently neutral on its face, has the effect of disadvantaging a group of people who share one of the attributes in clause 7. An example of indirect discrimination would be imposing a minimum height requirement which was not a reasonable requirement for the job. Although this condition may appear neutral, it may well have the effect of disadvantaging women and people of Asian background if more men and people of European background meet the requirement.

The Bill applies not only to an act which has had a discriminatory effect but also to 'proposed' discrimination, for example, the adoption of a policy to do that act. A complaint may therefore be lodged before a decision is implemented.

8(2) With respect to indirect discrimination, it is not unlawful to impose a condition or requirement which is reasonable in the circumstances.

8(3) In deciding whether a condition or requirement is reasonable some of the matters which should be taken into account are the nature and extent of the discriminatory effect and the feasibility of overcoming or mitigating that effect. It is also necessary to weigh the disadvantage the condition will impose on the protected group against the benefit the condition will allow the person imposing the condition.

#### Clause 9: Impairment - Guide Dogs etc.

Treating a person with an impairment unfavourably because they possess or are accompanied by a guide dog or other aid is also discrimination but the Bill does not affect the liability of a person for any injury, loss or damage caused by a guide dog or other aid.

### PART III - UNLAWFUL DISCRIMINATION

This Part sets out the areas of activity in which discrimination is unlawful.

#### *Division 1 - Discrimination in work*

Division 1 covers discrimination by employers, principals, partners, professional or trade organisations, qualifying bodies, and employment agencies.

#### Clause 10: Applicants and employees

10(1) Employers may not discriminate in determining who will be offered employment at any stage in the selection process.

10(2) An employer may not discriminate against an employee in any way in connection with the employment including, for example, in the terms or conditions of employment afforded the employee, by denying the employee access to opportunities for promotion, transfer or training, or by dismissing the employee.

#### Clause 11: Employees - religious practice

An employer may not discriminate by refusing to allow an employee to carry out a religious practice in working hours which does not subject the employer to unreasonable detriment. This may involve some action or accommodation on the part of the employer to enable the person to carry out that practice.

#### Clause 12: Commission agents

A commission agent is a person who does work for another person called a principal as the agent of that person and is paid, wholly or partially, by commission. Discrimination by a principal against a person or a commission agent is defined in the same way as discrimination by an employer in clause 10.

#### Clause 13: Contract workers

A contract worker is a person who works for another, called the principal, on the basis of a contract which has been agreed between the principal and the contract worker's employer. A principal may not discriminate in any way in connection with the employment of a contract worker.

#### Clause 14: Partnerships

Persons in a proposed or existing partnership may not discriminate in deciding who to invite to join the partnership or in the terms and conditions on which a person is invited to become a partner. A partner may not discriminate against another partner in any way in connection with the partnership.

**Clause 15: Professional or trade organisations**

An organisation of employers or employees may not discriminate in determining membership or against a member in any way.

**Clause 16: Qualifying bodies**

An authority or body which provides an authorisation or qualification which is necessary in order to practice a trade, profession or occupation cannot discriminate against a person in deciding whether to qualify them, on what terms or conditions it is prepared to qualify them, by withdrawing the qualification unfairly or in any other way.

**Clause 17: Employment agencies**

An employment agency is a person or body that, whether for payment or not, assists people to find employment or other work or assists employers to find employees or workers. Such an agency may not discriminate against a person by refusing to provide its services, in the way in which it provides its services or in any other way.

***Division 2 - Discrimination in other areas***

Division 2 covers discrimination in the areas of education, access to premises, the provision of goods, services and facilities, accommodation, clubs and requests for information.

**Clause 18: Education**

An educational authority is a body or person administering a school, college, university or other institution at which education or training is provided. Such an authority may not discriminate against a person in determining who will be admitted to an educational institution or against a student in any way.

**Clause 19: Access to premises**

Premises includes open places (such as parks), aircraft, vehicles or vessels as well as buildings but the clause is limited to those premises that the public or a section of the public is entitled or allowed to enter or use, whether for payment or not. A person may not discriminate by refusing to allow someone access to or the use of such premises, in the terms on which they allow access or the manner in which they provide access. Paragraph (c) which deals with the manner in which access to premises is provided, is intended to ensure that access to premises is not provided in a way which excludes, for example, people with an impairment.

Clause 20: Goods, services and facilities

A person may not discriminate against another person in the way in which goods, services or facilities are provided. 'Services' include those relating to banking, insurance, the provision of grants, loans, credit or finance, entertainment, recreation, refreshment, transport, travel, any profession, trade or business, or services provided by government. 'Services' also cover the provision of awards, scholarships and prizes.

Clause 21: Accommodation

A person may not discriminate against another person in determining who should be offered accommodation or in any way against someone who is occupying accommodation.

Clause 22: Clubs

A club is defined as a licensed club. A club may not discriminate against a person in determining who should be a member of the club or against members in any way.

Clause 23: Requests etc for information

A person may not discriminate by asking a person to provide information, whether on a form or otherwise, in connection with or for the purposes of doing something which is or would be discriminatory under the Bill.

**PART IV - EXCEPTIONS TO UNLAWFUL DISCRIMINATION**

Part IV excepts certain situations which would otherwise amount to unlawful discrimination under Part III. Some of these exceptions are general while others are limited to particular grounds of discrimination.

*Division 1 - General Exceptions*

The exceptions set out in this Division apply to all grounds of discrimination.

Clause 24: Domestic duties

A person may discriminate when selecting a person to perform domestic duties in the employer's home. This means that, for example, an elderly woman who wanted to employ a woman to cook and clean for her in her own home, could do so.

Clause 25: Residential care of children

A person may discriminate when selecting a person to care for a child in the child's home.

Clause 26: Domestic accommodation etc

A person may discriminate in offering premises for accommodation if that person or a near relative lives on those premises. This is only the case where the accommodation being offered is for seven people or less.

Discrimination will not be unlawful where accommodation is provided by a religious, charitable or voluntary body to people who are covered by one of the grounds in Part II, for example, the offer of accommodation for single women by a religious organisation would not be unlawful.

Clause 27: Measures intended to achieve equality

Measures intended to ensure that people who are covered by one of the grounds in Part II of the Bill are given equal opportunities, or to provide access to facilities, services or opportunities to meet their special needs are not unlawful discrimination. Employing a person in accord with an affirmative action program, for example, will not be unlawful.

Clause 28: Insurance

It is not unlawful to offer insurance policies on terms which discriminate as long as the discrimination is based on valid statistical information and is reasonable.

Clause 29: Superannuation

It is not unlawful to discriminate in relation to superannuation. This exception is intended to be a temporary exception and the exception will be examined further in light of recent amendments to the Commonwealth *Sex Discrimination Act 1984*.

Clause 30: Acts done under statutory authority etc

A person will not be guilty of discrimination if they are acting in accordance with ACT laws, court orders or directions of the Human Rights Commissioner. The exception for actions done under ACT laws is a temporary exception which will only apply for a limited period to allow time for the laws to be brought into line with the policy of the Bill.

Clause 31: Voluntary bodies

It is not unlawful for voluntary bodies to discriminate in admitting persons as members or in providing benefits, facilities or services to their members. A voluntary body is defined as an incorporated or unincorporated association or body which does not engage in activities for the purpose of making profit. Specifically exempted from this definition are bodies which fall into the definition of 'club' in the Bill, a body established by a law of the ACT or other Territory, the Commonwealth or a State, and an association that provides grants, loans, credit or finance to its members.

Clause 32: Religious bodies

This Bill will not apply in relation to the training and ordination of priests or ministers of religion, or to choosing persons to perform duties connected with religious observances. Also exempt are acts or practices of a religious nature.

Clause 33: Educational institutions conducted for religious purposes

This clause covers educational institutions which are conducted in accordance with the doctrines of a particular religion. It is not unlawful to discriminate in employing staff or contract workers to work at such an institution or in training students at the institution if the discrimination is done in good faith to avoid offending the religious feelings of people who belong to that particular religion.

*Division 2 - Exceptions relating to discrimination on the ground of sex, marital status or pregnancy*

This Division only applies to discrimination on the grounds of sex, marital status or pregnancy.

Clause 34: Genuine occupational qualifications

34(1) It is not unlawful to discriminate in the area of work on the ground of sex if the nature of the job requires that the person be of a particular sex, that is, that the sex of the person is a genuine occupational qualification for the job in question.

34(2) Examples of situations where it is a genuine occupational qualification that a person be of a particular sex are provided, for example, the provision of welfare services for women where those services can most effectively be provided by women.

Clause 35: Educational institutions for members of one sex

It is not unlawful for schools, colleges and other educational institutions for one sex to refuse applications from members of the opposite sex.

Clause 36: Pregnancy or childbirth

Granting rights and privileges to women in connection with pregnancy or childbirth does not amount to sex discrimination against men.

Clause 37: Services for members of one sex

It is not unlawful to discriminate in providing services when the services, by their nature, can only be provided to one sex.

Clause 38: Accommodation provided for employees or students

38(1) Where an employer offers accommodation to employees, offering differing standards of accommodation to different employees is not discrimination where the standard of accommodation offered is determined by the number of people in the employee's household and it is not reasonable to expect the employer to provide the same standard for everyone. An example of this is where special accommodation is offered to employees who have a family.

38(2) It is not unlawful discrimination to provide single sex accommodation for students at educational institutions.

Clause 39: Clubs for members of one sex etc

39(1) It is not unlawful for a club to discriminate on the ground of sex if the club is for members of one sex only.

39(2) Where club membership is available to both sexes and the club offers benefits which cannot be used simultaneously or to the same extent by men and women and the same benefit is provided for both men and women separately, or men and women are entitled to a fair and reasonable proportion of the use and enjoyment of the benefit, it is not unlawful to discriminate on the ground of sex in relation to the use or enjoyment of the benefit.

39(3) Lists the factors to be taken into consideration in determining any matter under sub-clause 39(2).

Clause 40: Sport

Where the strength, stamina or physique of a competitor is relevant in sporting competition, exclusion of members of one sex does not amount to discrimination. This does not apply to coaching, umpiring or to the administration of sport.

*Division 3 - Exceptions relating to discrimination on the ground of race*

This Division only applies to discrimination on the ground of race.

Clause 41: Genuine occupational qualifications

41(1) It is not unlawful to discriminate in the area of work on the ground of race if the nature of the job requires that the person be of a particular race, that is, that the race of the person is a genuine occupational qualification.

41(2) Examples of situations where it is a genuine occupational qualification that a person be of a particular race are provided.

Clause 42: Clubs for members of one race etc

Where a club has been set up for persons of a particular race, it will not discriminate unlawfully if it refuses membership to persons not of that race, so long as membership is not defined by reference to colour. Matters which will be taken into account when deciding whether a club was established for a particular race are set out.

*Division 4 - Exceptions relating to discrimination on the ground of religious or political conviction*

This Division only applies to discrimination on the grounds of religious or political convictions.

Clause 43: Religious workers

It is not unlawful to discriminate on the basis of religious conviction in relation to work in an educational institution or a hospital or other health services facility where the work would involve the teaching, observance or practice of religion.

Clause 44: Political workers etc

It is not unlawful to discriminate on the basis of political conviction where the job is of a political nature, such as working for a member of the Legislative Assembly.

Clause 45: Religious educational institutions

Religious educational institutions may refuse to accept students if they are not members of the relevant religion.

*Division 5 - Exceptions relating to discrimination on the ground of impairment*

This Division only applies to discrimination on the ground of impairment.

Clause 46: Unjustifiable hardship

The general rule is that it is unlawful to discriminate against a person with an impairment in the areas of activity covered by the Bill. In order not to discriminate it will sometimes be necessary to make reasonable accommodation to provide for the special needs of the person. This may involve, for example, providing a special piece of equipment to allow the person to do a job or modifying access to a building. Only where such positive measures would impose unjustifiable hardship will discrimination not be unlawful.

This clause sets out the matters to be taken into consideration in determining unjustifiable hardship. These include what benefits and detriments would be caused and the costs involved.

Clause 47: Genuine occupational qualifications

It is not unlawful to discriminate in favour of people with an impairment in connection with work where the job genuinely requires a person with that impairment. For example, the provision of welfare services for people with a particular impairment may be most effectively done by a person with a similar impairment who understands most clearly the problems faced by someone with that kind of impairment.

Clause 48: Work related discrimination

48(1) It is not unlawful to discriminate against a person with an impairment with respect to work if the person offering the work believes on reasonable grounds that because of their impairment the person would be unable to do the essential elements of the job, or in order to do the job they would need special facilities or services and it would cause unjustifiable hardship to the employer to provide these.

48(2) An employer may impose certain terms and conditions on the employment of a person with an impairment which will not amount to unlawful discrimination. The terms and conditions must be reasonable in the circumstances and must relate to a restriction that the impairment places on the person's ability to do the job or to any special facilities that the person may require in order to do the job.

Clause 49: Discrimination by qualifying bodies etc

It is not unlawful for a qualifying body to discriminate against an impaired person by refusing to qualify them or by qualifying them subject to certain terms or

conditions if it believes the person could not do the essential elements of the work because of their impairment.

Clause 50: Discrimination by educational institutions

It is not unlawful for an educational institution for students with a particular impairment to discriminate by not accepting a student who does not have that impairment.

An educational institution may reject the application of a person with an impairment if to admit them would require the provision of facilities or services which would impose an unjustifiable hardship on the education authority.

Clause 51: Discrimination concerning access to premises

51(1) It is not unlawful discrimination where premises are inaccessible to a person with an impairment and altering the premises to provide access would impose unjustifiable hardship.

51(2) This does not apply to buildings constructed in the future after a date to be set by the Minister which will be required to provide such access.

Clause 52: Discrimination in the provision of goods, services or facilities

It is not unlawful to discriminate in providing goods, services or facilities where they would have to be provided in a special manner which would impose unjustifiable hardship on the provider.

Clause 53: Discrimination concerning accommodation

It is not unlawful to discriminate in providing accommodation to a person with an impairment where special services or facilities would be necessary to accommodate the special needs of the person and the provision of the special services would impose unfair hardship on the person providing the accommodation.

Clause 54: Discrimination by clubs

54(1) It is not unlawful to discriminate on the ground of impairment in relation to club membership where the club in question has as its principal object the provision of benefits to people with a particular impairment. It would not be unlawful discrimination, for example, not to admit people who do not have that impairment as members.

54(2) Factors to be considered in determining the principal aim of a club are set out.

54(3) It is not unlawful for a club to discriminate in providing benefits to a person with an impairment where it would be necessary to provide those benefits in a special way and to do so would impose unjustifiable hardship on the club.

Clause 55: Public health

It is not unlawful to discriminate against a person on the ground of impairment where the discrimination is reasonable and necessary to protect public health.

Clause 56: Sport

It is not unlawful to exclude a person with an impairment from sporting competition where they cannot participate fully because of their impairment, or because the activity is for persons with an impairment which they do not possess. This does not apply to participation in the administration, coaching or umpiring of any sporting activity.

#### PART V - SEXUAL HARASSMENT

Part V deals with a particular type of discrimination: sexual harassment.

Clause 57: Meaning of sexual harassment

Sexual harassment is defined as an unwelcome sexual advance, an unwelcome request for sexual favours, or other unwelcome conduct of a sexual nature which makes a person feel offended, humiliated or intimidated and it is reasonable for them to feel so. Sexual harassment can include making statements of a sexual nature.

Clause 58: Employment

A person may not sexually harass their employee, contract worker or commission agent, or anyone applying for a job as one of the above. A person may not harass their partner, their fellow employee, contract worker or commission agent, or anyone applying for a job as such.

Clause 59: Educational institutions

A staff member at an educational institution may not sexually harass a student or prospective student of that institution. A student may not sexually harass another student or a member of staff.

Clause 60: Access to premises

A person may not sexually harass another person in the course of providing or offering to provide access to premises.

Clause 61: Provision of goods, services and facilities

A person may not sexually harass another person in the course of providing or offering to provide goods, services or facilities.

Clause 62: Accommodation

A person may not sexually harass another person in the course of providing or offering to provide accommodation.

Clause 63: Clubs

A member of the management committee of a club may not sexually harass a member or prospective member of that club.

**PART VI - OTHER UNLAWFUL ACTS**

Part VI specifies other acts besides discrimination which are unlawful under this Bill.

Clause 64: Victimisation

It is unlawful for someone to cause detriment to another person because the other person has made a complaint or been involved in action under this Bill, or because the first person believes that the other person intends to do so.

Clause 65: Unlawful Advertising

Advertising in a way that indicates an intention to discriminate or sexually harass someone is itself unlawful.

## PART VII - RESOLUTION OF COMPLAINTS

Part VII describes the process by which complaints are lodged, investigated and resolved.

### *Division 1 - Complaints*

#### Clause 66: Complaints about unlawful acts

66(1) A person who believes they have been discriminated against, or a person acting on their behalf, may lodge a complaint with the Commissioner. A trade union, for example, may lodge a complaint on behalf of a member.

66(2) A person may not lodge a complaint on behalf of another person without that person's consent or where the person is unable to give their consent, with the consent of the Commissioner. This situation may arise, for example, in relation to someone with a serious intellectual impairment.

66(3) Two or more people may make a complaint to the Commissioner together.

66(4) The complaint must be in writing and identify, as far as possible, the person or persons against whom the complaint is made and the details of the alleged act of discrimination.

#### Clause 67: Complaints not requiring investigation or further investigation

The Commissioner may decide not to investigate a complaint or to stop an investigation which has already started in certain circumstances. For example, the Commissioner may decide not to investigate a complaint where he or she believes that the complainant doesn't wish the matter to be investigated or the complainant found out about the discriminatory acts more than twelve months before lodging a complaint. If the Commissioner decides not to investigate a complaint, he or she must inform the complainant and others involved in the investigation in writing of this decision and the reasons for the decision.

#### Clause 68: Preliminary Inquiries

The Commissioner may make preliminary inquiries of the respondent in order to decide whether or not to investigate a complaint and whether the Commissioner has the power to investigate the complaint under the terms of the legislation.

### ***Division 2 - Investigations***

Division 2 describes the methods of investigating a complaint.

#### **Clause 69: Initiation**

The Commissioner must investigate complaints, unless he or she decides not to investigate a complaint for the reasons set out in clause 67. The Commissioner can also initiate investigations where it appears to the Commissioner that a person has done an act which is discriminatory.

#### **Clause 70: Parties to an investigation**

70(1) The parties to an investigation are the person making the complaint, the person complained of, and any other person who the Commissioner makes a party to the investigation.

70(2) The Commissioner can make someone a party to the investigation at any time before or during an investigation.

#### **Clause 71: Single investigation of several complaints**

The Commissioner may hold a single investigation where several complaints relate to the same subject matter.

#### **Clause 72: Notice of investigation**

The Commissioner must notify the parties to an investigation before it commences, and invite each party to present his or her case to the Commissioner.

#### **Clause 73: Representative complaints**

Where there is a group of people who have a complaint against the same respondent and the basic facts in each case are the same or related the Commissioner may deal with one of the complaints as representative of the group's complaints. If a complaint is heard as a representative complaint, however, the remedies available are limited under clause 86 and do not include the payment of monetary damages to the individual complainant.

#### **Clause 74: Ordinary complaints not precluded by representative complaints**

An ordinary complaint can be lodged in relation to conduct which is also the subject of a representative complaint.

Clause 75: Conduct of investigations

Investigation of complaints will be informal, non-technical and as speedy as possible. The Commissioner must examine all relevant matters, allow both parties to present their cases, and give directions as to procedure as necessary. He or she is not bound by the rules of evidence. While a party may choose not to appear at an investigation, no decision will be made unless a party has been offered the opportunity to appear before the Commissioner.

Clause 76: Conciliation

The Commissioner must, as far as possible, try to resolve complaints by conciliating between the parties.

Clause 77: Compulsory conferences

The Commissioner may require parties to the investigation and other persons who may have relevant information or be able to assist at the investigation to attend a compulsory conference. The conference will be private, presided over by the Commissioner or a member of his or her staff, and attended in person by those required to be there, unless they have the Commissioner's consent to be represented by someone else.

Clause 78: Public hearings

The Commissioner may hold a public hearing where a complaint cannot be settled by conciliation or the matter is of such a nature that it is necessary or desirable to do so.

Clause 79: Notice of public hearings

The Commissioner must notify the parties in writing of a public hearing, but if one party fails to appear after being notified, the hearing may go ahead regardless.

Clause 80: Appearance and representation at public hearings

Persons requested to attend public hearings must attend personally, unless they have the Commissioner's consent to be represented by another person. Where the party is a body of people (such as a corporation or an association), the body may be represented by an officer, employee or agent.

Clause 81: Power to obtain information and documents

The Commissioner may require persons to produce papers or information relevant to an investigation, by written notice specifying where and when they are to be

produced. The Commissioner may also require people to attend a compulsory conference or public hearing and to answer questions relevant to an investigation.

Clause 82: Taking evidence

82(1) The Commissioner may take evidence on oath or affirmation as part of an investigation. The Commissioner may require persons to take an oath or make an affirmation, and may administer the oath or affirmation.

82(2) The Commissioner has the power to require people to answer questions and produce documents relevant to an investigation.

82(3) The Commissioner may consider trial transcripts, judgements and past decisions and reports of the Commissioner as evidence in an investigation.

Clause 83: Reliance on exceptions and exemptions

Where an act would be unlawful but for an exception or exemption provided for in the Bill the Commissioner is not required to consider the exception or exemption unless the Commissioner has information that it is relevant.

The onus of establishing an exception or exemption is on the person who is attempting to rely on it. This means, for example, that the employer is required to show that providing the special facilities or services to enable a person with an impairment to do a particular job would impose unjustifiable hardship on the employer.

Clause 84: Commissioner may prohibit publication of evidence etc

The Commissioner may restrict the publication of evidence given before the Commissioner, the contents of any document produced to the Commissioner or any information that might enable a person who has appeared before the Commissioner to be identified.

*Division 3 - Decisions of the Commissioner*

Clause 85: Interim decisions

The Commissioner may give directions to the parties during an investigation in order to preserve the rights of the parties and to ensure that the situation between the parties does not change so as to adversely affect the rights of the parties until an investigation into the matter has been completed. Such directions must be in writing, and must be accompanied by a written statement setting out the Commissioner's reasons for giving the direction.

Clause 86: Decisions following investigation

When the Commissioner has completed an investigation and is satisfied that the complaint has not been made out, he or she must dismiss the complaint. Where the Commissioner is satisfied that the complaint has been made out, however, he or she may make various decisions and directions. The Commissioner may direct the person complained of not to repeat the unlawful conduct, to do certain things to make up for any loss or damage caused by that conduct, or to pay compensation to the complainant. The amount of compensation may include an amount to cover what the complainant spent in bringing the complaint.

The Commissioner cannot direct the payment of compensation where the complaint has been dealt with as a representative complaint under clause 73. In order to have such a direction made in his or her favour a complainant would have to bring an individual complaint. In hearing that complaint the Commissioner would be able to have regard to the findings and decisions made in the representative complaint.

The Commissioner may also decide to take no further action in a matter where, for example, the matter has been settled by conciliation.

The Commissioner must notify the parties to a complaint of a direction or decision in writing and include a statement of his or her reasons for the decision or direction.

Clause 87: Contravention of directions

If a person does not obey a direction made by the Commissioner, they are liable to a penalty of \$500 for each day during which they do not comply with the direction.

Clause 88: Recovery of compensation

Where the Commissioner has directed the respondent to pay the complainant an amount of compensation, that amount is a debt due to the complainant.

Clause 89: Vexatious complaints - costs

Where the Commissioner dismisses a complaint because he or she believes that the complaint was vexatious, frivolous or not made in good faith, the Commissioner may order the person who lodged the complaint to reimburse the respondent for any costs the respondent incurred in answering the complaint.

Clause 90: Review of decisions

Decisions of the Commissioner may be reviewed by the Administrative Appeals Tribunal.

Clause 91: Notice of review rights

When the Commissioner gives a person notice in writing of a decision or direction, the Commissioner must inform them of their right to appeal.

*Division 4 - Miscellaneous*

Clause 92: Self incrimination etc

A person must provide information or documents to the Commissioner when required to do so, even though they may show that the person has acted unlawfully. This information may not be used as evidence in criminal proceedings against that person except:

- where the proceedings relate to an offence under this Bill for failure to provide information or providing false information; or
- a related offence under the Crimes Act.

Clause 93: Unlawful act not an offence

Unlawful discrimination, sexual harassment, victimisation and unlawful advertising are made unlawful by this Bill but are not made criminal offences.

Clause 94: Unlawful act no basis for civil action

This Bill does not give a person any civil right of action other than those specifically mentioned in the Bill.

Clause 95: Aiding etc unlawful acts

Where a person helps, allows or encourages another person to, for example, unlawfully discriminate against or sexually harass someone, then they are also taken to have done the act for the purposes of the Bill.

Clause 96: Conduct of directors, servants and agents

Where a director, servant or agent of a body corporate acts on behalf of the body corporate and within the scope of his or her actual or apparent authority, the body corporate will be vicariously liable for that act where it is unlawful or an offence under this Bill unless the body corporate can establish that it took reasonable precautions to prevent such behaviour. This is also the case where the servant or agent of a natural person acts on behalf of the person.

Where it is necessary to establish the state of mind, for example, the intention or belief, of a person or a body corporate it is sufficient to show that a director, servant

or agent of the body corporate or the servant or agent of the person had that state of mind.

Clause 97: Protection from civil proceedings

A person cannot bring a civil action for loss, injury or damage which they suffered as a result of another person lodging a complaint with the Commissioner or providing information to the Commissioner where the person did so in good faith.

Clause 98: Expenses of witnesses etc

The expenses of witnesses appearing before the Commissioner may be paid by the Territory.

Clause 99: Failure to attend before Commissioner

A person who does not appear before the Commissioner when required to do so under the Bill without a reasonable excuse is liable to a penalty of \$2000.

Clause 100: Failure to furnish information etc

A person who does not provide information, produce documents, or answer questions when required to do so by the Commissioner without a reasonable excuse is liable to a penalty of \$2000.

Clause 101: Refusing to take oath etc

A person who fails to take an oath or make an affirmation when required to do so under the Bill without a reasonable excuse is liable to a penalty of \$2000.

Clause 102: Obstructing Commissioner etc

A person who obstructs the Commissioner or a member of his or her staff or disrupts proceedings without a reasonable excuse is liable to a penalty of \$2000.

Clause 103: Prohibited publications

A person who, without reasonable excuse, publishes evidence that the Commissioner has directed shall not be published is liable to a penalty of \$5000.

Clause 104: False information

A person who gives the Commissioner false or misleading information is liable to a penalty of \$5000 or imprisonment for six months or both.

### PART VIII - EXEMPTIONS

The Commissioner may grant a person an exemption from the provisions of the Bill for behaviour which would otherwise amount to unlawful discrimination. This power is in addition to the specific statutory exceptions set out in the Bill.

#### Clause 105: Grant of exemptions

The Commissioner may grant exemptions from the provisions of the Bill for up to three years and may also grant extensions to existing exemptions. Where the Commissioner refuses to grant an exemption he or she must notify the applicant in writing of the refusal and of the reasons for the refusal. The Commissioner must also notify the applicant of the right to appeal to the Administrative Appeals Tribunal.

#### Clause 106: Review of decisions

A person may appeal to the Administrative Appeals Tribunal against a decision of the Commissioner to grant or refuse an application for an exemption.

### PART IX - HUMAN RIGHTS COMMISSIONER

Part IX establishes the office of the Human Rights Commissioner and sets out the duties of the Commissioner.

#### Clause 107: Functions

The Commissioner has a wide range of functions conferred on him or her by the Bill. These include conducting research and education programs to promote understanding and acceptance of the principles of non-discrimination and equal opportunity. The Commissioner is also required to advise the Minister on matters relevant to the Bill and to review ACT laws to ensure consistency with the Bill.

#### Clause 108: Appointment

The Executive will appoint the Human Rights Commissioner for up to seven years. The appointment is renewable.

#### Clause 109: Remuneration and allowances

The Commissioner will be paid such remuneration and allowances as are set by determination of the Commonwealth Remuneration Tribunal. If there is no relevant determination the Commissioner will be paid as set out in the regulations.

Clause 110: Resignation

The Commissioner may resign by giving written notice of his or her resignation to the Minister.

Clause 111: Termination of appointment

The Commissioner's appointment may be terminated by the Executive for misbehaviour or physical or mental incapacity.

Clause 112: Terms and conditions generally

The Minister may determine any terms and conditions of the Commissioner's appointment not provided for by the Bill.

Clause 113: Acting Commissioner

The Minister may appoint an acting Commissioner during any vacancy in the office of Commissioner or during any period when the Commissioner is absent from duty or unable to perform the duties of Commissioner. The acting appointment cannot be for longer than 12 months.

Clause 114: Staff

The Commissioner's staff will be public servants.

Clause 115: Annual report

The Commissioner is to present an annual report to the Minister as soon as practicable after the end of each financial year and, in any event, within six months of the end of each financial year for presentation to the Legislative Assembly. The report will include details of the administration, operation and working of the Bill.

Clause 116: Delegation

The Commissioner may delegate his or her powers to decide whether to proceed with complaints, to conciliate, to conduct preliminary inquiries, and to arrange compulsory conferences to his or her staff.

**PART X - MISCELLANEOUS****Clause 117: Immunity from suit**

The Commissioner and his or her staff are protected from any action, suit or proceeding for anything they do in good faith in performing the functions set out in this Bill.

**Clause 118: Secrecy**

The Commissioner and his or her staff may only record private information about individuals or disclose it to others for the purposes of this legislation. They may not use that information for any other purpose without the consent of the individual concerned and if they do they will be subject to a penalty of \$5000 or six months imprisonment.

**Clause 119: Corporations - Penalties**

Where a fine is imposed on a body corporate under the legislation, the fine can be an amount up to five times the amount specified in the offence provisions for individuals.

**Clause 120: Inter-governmental arrangements**

Arrangements may be entered into whereby the Commonwealth Human Rights and Equal Opportunity Commission performs functions under this legislation on behalf of the Commissioner. The reverse arrangement is also possible or a combination of the two. These arrangements must be published in the *Gazette*.

**Clause 121: Performance of functions under inter-governmental arrangement**

If a function of the ACT Human Rights Commissioner is performed by the Commonwealth Commission under clause 120, the ACT Commissioner is deemed to be performing the function for the purposes of this Bill.

**Clause 122: Relationship to other laws**

This clause is intended to protect provisions in other legislation which offer protection from discrimination from being impliedly limited by the provisions of this Bill. The protection offered by this Bill is intended to operate in addition to any protection offered under any other Act.

**Clause 123: Regulations**

The power to make regulations under this Bill lies with the Executive.