

**2002**

**THE LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL  
TERRITORY**

**DISCRIMINATION AMENDMENT BILL 2002 (No 2)**

**EXPLANATORY MEMORANDUM**

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## DISCRIMINATION AMENDMENT BILL 2002 (No 2)

### BACKGROUND

The *Discrimination Act 1991* (the Act) establishes the Discrimination Tribunal and the Discrimination Commissioner and makes certain kinds of discrimination unlawful. Discrimination by treating a person unfavourably because that person has one of a number of specified attributes is made unlawful in the areas of employment, education, access to premises, provision of goods, services and facilities and accommodation.

Discrimination law provisions need to be reviewed regularly in the light of experience and to take into account social developments. The Discrimination Amendment Bill 2002 (No 2) makes changes in four areas in order to reinforce the underlying policy of providing protection from inappropriate discrimination.

The Discrimination Amendment Bill 2002 (No2) amends the Act to provide for equal treatment of same-sex partnerships with marriages and de facto marriages. Although the Act makes discrimination on the ground of sexuality unlawful, it has not, to date, provided the same protection from discrimination to same-sex couples as it does to heterosexual couples. The bill inserts the inclusive new term “domestic partner” in place of “de facto spouse” and replaces “marital status” with “relationship status”.

The Act makes discrimination on the ground of impairment unlawful. Impairment includes loss, malfunction or malformation of part of the body, the presence in the body of disease causing organisms and mental dysfunction. The Discrimination Amendment Bill 2002 (No2) amends the definition of “impairment” in the Act to take into account developments in science that allow predictions to be made about a person becoming disabled in the future.

The Act allows discrimination under certain circumstances. One such circumstance is when a person with an impairment is seeking a job but would be unable to do it without special services or facilities that would cause the employer unjustifiable hardship to provide. The bill makes a change that will allow employers to terminate the employment of a person whose impairment is such as to impose unreasonable hardship on the employer to accommodate it.

Finally, the bill will amend the Act to strengthen conciliated agreements by making them enforceable as decisions of the Discrimination Tribunal.

### SUMMARY

The Discrimination Amendment Bill 2002 (No2) makes changes to the Act that implement a policy of according equal treatment to same-sex partnerships as to opposite sex partnerships. It does so by replacing the definition of “de facto spouse” in section 4 of the Act with a definition of “domestic partner”. In line with an approach inclusive of

same-sex partnerships, the term “marital status” in section 7 of the Act is replaced by “relationship status” as an attribute in section 7 of the Act. In this way “relationship status” becomes a ground for unlawful discrimination.

The Discrimination Amendment Bill 2002 (No2) inserts a new provision, section 5AA, in the Act to define impairment. Other than in relation to two exception provisions, impairment will include impairment it is thought that a person will have in the future.

The Discrimination Amendment Bill 2002 (No2) amends the exception provision for work related discrimination in section 49 of the Act so that it is not unlawful for an employer to terminate the employment of a person if that person’s disability would impose unreasonable hardship on the employer to provide essential services or facilities for that person.

The Discrimination Amendment Bill 2002 (No2) amends the provisions about conciliated agreements in section 85 of the Act to make them enforceable as if they were decisions of the Discrimination Tribunal.

## **REVENUE/COST IMPLICATIONS**

There are no cost implications.

## **SUMMARY OF CLAUSES**

### **Formal Clauses**

Clause 1 sets out the name of the Act.

Clause 2 provides for the Act to commence the day after it is notified.

Clause 3 says that the Act amends the *Discrimination Act 1991*.

### **Interpretation**

#### ***Domestic partner***

Clause 4 removes the definition of “de facto spouse” from section 4(1) of the Act.

Clause 5 inserts two new definitions into section 4(1) of the Act.

The first is a definition of “domestic partner”. The definition effectively replaces the definition of “de facto spouse” but is inclusive of same-sex partnerships. A person’s domestic partner means a person who lives with that person in a domestic partnership. It includes a spouse. The term “spouse” has a particular legal meaning, so that a person’s spouse is the person to whom that person is legally married.

The second definition is of “domestic partnership” and is a necessary complement to the definition of “domestic partner”. A domestic partnership is the relationship between two people who are living together as a couple on a genuine domestic basis. This definition

includes both heterosexual and homosexual couples. It encompasses couples of all kinds so long as the two people concerned are genuinely sharing a life partnership.

### ***Impairment***

Clause 6 removes the definition of “impairment” from section 4(1) of the Act and replaces it with a signpost to section 5AA, which defines “impairment” for the purposes of the Act. Section 5AA is a new provision inserted by clause 10.

### ***Relationship status***

Clause 7 removes the definitions of “marital status” and “near relative” from section 4(1) of the Act. Clause 8 replaces “marital status” with a new term, “relationship status”.

Clause 14 inserts a definition of “near relative” in section 26 of the Act, which is the only section where the term is used.

Clause 8 inserts a definition of “relationship status” into section 4(1) of the Act. The definition is very similar to the definition of “marital status” removed by clause 7.

Relationship status means being

- Single
- Married
- Married but living separately from one’s spouse
- Divorced
- Widowed
- The domestic partner of someone else, but not that person’s spouse.

The new term “relationship status” covers the conditions covered by “marital status” but also includes people in same-sex relationships.

“Relationship status” is used in section 7 to define one of the grounds of discrimination that are unlawful.

### ***Relative***

Clause 9 changes the definition of “relative” in section 4(1) of the Act. In place of the reference to a de facto spouse of a person there is a reference to a domestic partner of a person. A relative will, as a result, include a same-sex partner of a person or of a person’s relative.

### ***Impairment***

Clause 10 inserts a new section 5AA after section 5 in the Act. New section 5AA defines “impairment” for the purposes of the Act. The Act uses the term “impairment” rather than “disability”. In the Act “impairment” means:

- total or partial loss of a bodily function
- total or partial loss of a part of the body
- malfunction of a part of the body

- malformation or disfigurement of a part of the body
- the presence in the body of organisms that cause or are capable of causing disease
- an illness or condition which impairs a person's thought processes, perception of reality, emotions or judgment or which results in disturbed behaviour
- an intellectual disability or developmental delay.

An impairment is one of the listed things that a person has or is thought to have in the present, had or is thought to have had in the past, or will have or it is thought will have in the future.

Impairment is one of the attributes set out in section 7 of the Act. As such it forms a ground for discrimination that is made unlawful by the Act. New section 5AA expands on the provisions of section 7(2) that says that attributes include presumed and past attributes of a person.

The new provisions make it clear that discrimination on the basis that a person may have an impairment in the future is as unlawful as discrimination on the basis of an existing impairment. It is designed to cover situations where medical information about a person indicates a predisposition towards an illness or other impairment, although there is no present impairment or any certainty of impairment in the future.

Some exception provisions are outside the operation of the broader application of the term "impairment" in new section 5AA. They are section 49 and section 50 of the Act. These exception provisions allow otherwise unlawful acts of discrimination. Section 49 allows employers to discriminate against a person on the grounds of impairment if the person would, in order to carry out their work, require special services or facilities and providing them would cause the employer unjustifiable hardship. Unjustifiable hardship is described in section 47 of the Act. Section 50 allows discrimination by qualifying authorities if they believe that a person, because of an impairment, would be unable to carry out work essential to the relevant position.

The provisions of new section 5AA do not apply to them because if they did the scope of permitted discriminatory behaviour would be expanded to include discrimination on the basis of possible future impairment. The aim of new section 5AA is to increase the protection from discrimination provided by the Act. If sections 49 and 50 were not excluded, new section 5AA could have the unintended consequence of reducing the protection given to people with a predisposition to develop an impairment.

### ***Relationship status***

Clause 11 takes out "marital status" from section 7(1)(d) and puts "relationship status" in its place. Section 7 contains the attributes that form the grounds for discrimination that is unlawful. "Relationship status" is defined in section 4(1) of the Act with a new definition

inserted by clause 8. The change gives the same protection from discrimination to people in same-sex partnerships as to people in opposite-sex partnerships.

### ***Renumbering***

Clause 12 provides for the paragraphs in section 7(1) of the Act to be renumbered when the Act is next republished. This is a tidying up process that will give the paragraphs an alphabetical number from (a) to (o) and remove the inserted double letter numbering such as (fa) and (ia).

### ***Near relative***

Clause 13 makes a stylistic change to section 26 of the Act. It also numbers the existing section 26 as section 26(1).

Clause 14 inserts a new section 26(2) after the newly numbered section 26(1) in the Act. The new section 26(2) defines “near relative” for the purpose of section 26. “Near relative” was previously defined in section 4(1) of the Act, but that definition is removed by clause 7 because it is only used in section 26 of the Act.

Section 26 allows discrimination in the provision of accommodation under certain circumstances. One of the circumstances in which section 26 allows discrimination that would otherwise be unlawful is if the person providing accommodation or a near relative of that person lives in those premises and the accommodation is being provided for no more than six other people. The definition of “near relative” is similar to the definition removed from section 4(1) but includes a domestic partner rather than a spouse or de facto spouse. Domestic partner includes a spouse and covers people who would have been included by the definition of de facto spouse. In section 26 a near relative of a person means a parent, child, grandparent, grandchild, brother or sister of the person, or the domestic partner of the person or the domestic partner of the person’s parent, child, grandparent, grandchild, brother or sister. The new definition brings same-sex partners into the definition of “near relative”.

### ***Relationship status***

Clause 15 removes the heading for Division 4.2 in the Act and inserts a new heading. The new heading reads: “Exceptions about sex, relationship status, pregnancy or breastfeeding.” The change is necessary because the “marital status” ground for discrimination is changed to “relationship status”. The new heading reflects that change.

Clause 16 replaces section 35 of the Act with a new section 35. The effect of the provision is not materially changed but there are stylistic differences. In addition the term “marital status” is replaced by the new term “relationship status” and the expression “bona fide domestic relationship” is replaced with “domestic partnership”, which is defined in section 4(1) of the Act.

Section 35 allows for discrimination against single people and in favour of a couple in certain employment situations where two jobs are offered but it is intended that they be held by two people who normally live together. The use of the term “relationship status” rather than “marital status” and the requirement for a domestic partnership means that people in same-sex partnerships are given the benefit of this provision where previously it could have been argued that it was only available to heterosexual couples.

Clause 17 replaces the first paragraph in section 39(1) of the Act with a new paragraph. The effect of the provision is not changed except that the inclusive term “relationship status” is substituted for the term “marital status”. Stylistic changes are also made. Section 39 allows discrimination on the grounds of sex, relationship status, pregnancy or breastfeeding in the provision of accommodation under certain circumstances.

### ***Exceptions relating to impairment and work***

Clause 18 inserts a replacement section 49(1) in the Act. The new provisions include a reference to sections 10(2)(c), 12(2)(c) and 14(3)(b). In this way the exception provisions in section 49 are extended to cover termination of employment as well as refusal to employ.

Section 49 allows acts that would otherwise be unlawful discrimination to be done in certain circumstances. It applies to discrimination on the grounds of impairment. Employers can discriminate in making decisions about whom to employ and about the type of work or the terms and conditions of work offered to employees if they do so because a person has an impairment that would require the employer to provide special facilities or services that would cause the employer unjustifiable hardship to provide.

The amendment extends the scope of the exception so that an employer can terminate the employment of a person if accommodating the person’s impairment would cause unjustifiable hardship to the employer. Previously an employer would be unlawfully discriminating against an employee in terminating employment because of the person’s impairment. That would be so even though the employer could have decided not to employ the person because accommodating the person’s impairment would have caused unjustifiable hardship. As a result, if an employee developed an impairment after being employed, the employer could not terminate the employment even though, if the person had had the impairment prior to getting the job, the employer could have used the unjustifiable hardship exception to refuse to employ the person.

By including references to sections 10(2)(c), 12(2)(c) and 14(3)(b) in section 49 the Discrimination Amendment Bill 2002 (No2) resolves this anomaly.

Clause 19 inserts a new section 49(3) in the Act. It provides that a reference in section 49 to a person’s impairment is a reference to an impairment that a person has at the time of the discriminatory action. It reinforces the provisions of new section 5AA that say that the extended application of “impairment” does not apply to section 49. In order for discrimination to be allowed under the exception in section 49, it must be because of a person’s presently existing impairment.

Clause 20 makes a stylistic change to section 50 of the Act. It also numbers the existing section 50 as section 50(1). Section 50 allows discrimination by qualifying authorities if they believe that a person, because of an impairment, would be unable to carry out work essential to the relevant position.

Clause 21 inserts a new section 50(2) after the newly numbered section 50(1) in the Act. The new section 50(2) provides that in section 50 a reference to “impairment” means an impairment that a person has at the time of the discriminatory action. It reinforces the provisions of new section 5AA that say that the extended application of “impairment” does not apply to section 50. In order for discrimination to be allowed under the exception in section 50, it must be because of a person’s presently existing impairment.

### ***Conciliated agreements***

Clause 22 replaces section 85 of the Act with a new provision. Section 85 provides for conciliation of complaints under the Act. If the parties have, through conciliation, reached an agreement about how to resolve a complaint, the agreement is to be put in writing and each party is to get a copy. Once an agreement is reached the parties should be able to rely on it.

The new section 85 is not substantially different from the provision it replaces. There are stylistic differences. Unlike the replaced provision, the new section 85 provides that a conciliated agreement, once signed, is to be given by the Discrimination Commissioner to the Discrimination Tribunal and will be enforceable as if it was an order of the Tribunal. The previous provision said that if the agreement was breached a party could request the Commissioner to refer the complaint to the Tribunal. The new provision strengthens the position of conciliated agreements by putting them on an equal footing with a resolution of a complaint achieved through a hearing by the Tribunal.

The new section 85 provides that if a complaint has been resolved through conciliation, the Commissioner must help the parties to put their agreement into writing. The agreement must then be signed by the parties. The Commissioner must then give each party a copy of the agreement, explain that the Commissioner will take no further action on the complaint and give the agreement to the Tribunal. After that the agreement is enforceable as if it is an order made by the Tribunal.