

2012

LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

DISCRIMINATION AMENDMENT BILL 2012

EXPLANATORY STATEMENT

Presented by
Mr Simon Corbell MLA
Attorney General

Discrimination Amendment Bill 2012

Overview of Bill

The Discrimination Amendment Bill 2012 (the Bill) amends sections 66 and 67 of the *Discrimination Act 1991* (ACT) to include religion as a ground of unlawful vilification. The purpose of this bill is to promote the right to freedom of religion and to ensure that all ACT citizens are able to practise their religion with dignity, free from fear of acts of hatred.

Sections 66 and 67 of the *Discrimination Act 1991* currently provide that vilification or serious vilification is unlawful on the ground of any of the following characteristics of a person or a member of the group:

- race;
- sexuality;
- gender identity;
- HIV/AIDS status.

In relation to unlawful vilification (s 66), it is "unlawful for a person, by a public act, to incite hatred towards, serious contempt for, or severe ridicule of, a person or group of people" on the above grounds. Section 67 creates the offence of serious vilification if a person intentionally carries out an act of unlawful vilification, is reckless about whether the act is public, if the act is a threatening one and if the person is reckless about whether an act vilifies another person.

Background

The ability of an individual to observe the religion of their choice is a fundamental right for all Australians. The importance of this right is recognised in the Australian Constitution (section 116), which states that "The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth."

In the ACT, sections 14 and 27 of the *Human Rights Act 2004*, based on the *International Covenant on Civil and Political Rights* (ICCPR), specifically protect the right to freedom of religion:

Section 14 - Freedom of thought, conscience, religion and belief

(1) Everyone has the right to freedom of thought, conscience and religion. This right includes—

- (a) the freedom to have or to adopt a religion or belief of his or her choice; and
- (b) the freedom to demonstrate his or her religion or belief in worship, observance, practice and teaching, either individually or as part of a community and whether in public or private.

(2) No-one may be coerced in a way that would limit his or her freedom to have or adopt a religion or belief in worship, observance, practice or teaching.

Section 27 - Rights of minorities

Anyone who belongs to an ethnic, religious or linguistic minority must not be denied the right, with other members of the minority, to enjoy his or her culture, to declare and practise his or her religion, or to use his or her language.

In addition, the *Discrimination Act 1991* provides that it is unlawful to discriminate against a person on the ground of their religious conviction (s 7(i)).

As the ACT Human Rights Commission has identified, for residents in the ACT, there is little protection against religious vilification unless they are able to establish that "there exists a close tie between that faith and ... race, nationality or ethnic origin".¹

This bill will address this gap - providing protection from discrimination and vilification based on religion and enabling people to fully exercise their right to exercise their freedom to adopt and practise the religion of their choice, without fear of public acts of hatred.

Human Rights implications

The amendments proposed in this bill promote the following rights under the *Human Rights Act 2004* (the HRA):

- recognition and equality before the law (section 8);
- the freedom of thought, conscience, religion and belief (section 14);
- the freedom of expression (section 16);
- the rights of minorities (section 27).

The amendment may also limit:

- the right to freedom of expression under s 16.

Section 8 - Recognition and equality before the law

Under section 8 of the HRA, everyone has the right to recognition as a person before the law and the right to enjoy his or her human rights without distinction or discrimination of any kind. Everyone is also entitled to the equal protection of the law without discrimination.

The Bill supports and promotes this right by strengthening the remedies available under the *Discrimination Act* for unfavourable treatment on the ground of religion.

Section 14 - Freedom of thought, conscience, religion and belief and section 16 - Rights of minorities

As set out above, section 14 protects the right to freedom of thought, conscience, religion and belief. This right includes the freedom to have or adopt a religion or belief of his or her choice; and the freedom to demonstrate his or her religion or belief in worship, observance, practice and teaching, either individually or as part of a community and whether in public or private. This right is based on article 19 of the ICCPR.

In addition to the right set out in article 19, article 20(2) of the ICCPR states "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or

¹ Khan v Commissioner, Department of Corrective Services & anor [2002] NSWADT 131 (31 July 2002) at 21.

violence shall be prohibited by law." As a signatory to ICCPR, Australia has indicated that the right provided for by article 19 is interpreted as consistent with article 20.²

By providing for unlawful vilification on the ground of religion, this bill strengthens the ACT legal framework for the protection of freedom of religion and the right of people to practise the religion of their choice.

Section 27

Under section 27, anyone who belongs to an ethnic, religious or linguistic minority must not be denied the right, with other members of the minority, to enjoy his or her culture, to declare and practise his or her religion, or to use his or her language.

The Bill engages this right positively by extending the protections in s 66 and s 67 to include religion as a ground for unlawful vilification, thereby reinforcing the right of a person to declare and practise his or her religion.

Section 16 - Freedom of expression

Section 16 of the HRA states:

- (1) Everyone has the right to hold opinions without interference.
- (2) Everyone has the right to freedom of expression. This right includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of borders, whether orally, in writing or in print, by way of art, or in another way chosen by him or her.

This right is based on article 19 of the ICCPR.

The Bill positively engages this right as it promotes the right of expression through greater protection for people who may experience unlawful vilification on the ground of their religion.

Arguably, the bill may also limit this right by providing that it is unlawful to publicly express views that may incite hatred towards, serious contempt for, or severe ridicule of a person or a group of people in the ground of their religion.

Reasonable limits under section 28

Under section 28 of the *Human Rights Act 2004*, human rights may be subject to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society.

In deciding whether a limit is reasonable, all relevant factors must be considered, including the following:

- a) the nature of the right affected;
- b) the importance of the purpose of the limitation;
- c) the nature and extent of the limitation;
- d) the relationship between the limitation and its purpose;
- e) any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.

² Reservations and declarations contained in Australia's ratification of ICCPR, viewed at <http://www.austlii.edu.au/au/other/dfat/treaties/ATS/1980/23.html>

The right to freedom of opinion and expression is regarded as “essential for any society. They constitute the foundation stone for every free and democratic society. ... Freedom of expression is a necessary condition for the realization of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights.”³

However, article 19 also provides that “the exercise of [these] rights carries with it special duties and responsibilities. It may therefore be subject to certain restrictions ... (a) for respect of the rights or reputations of others; (b) for the protection of national security or of public order...”⁴

General comment 34 notes that article 19 and article 20 (which proscribe any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence) are compatible with and complement each other.⁵ In the case of this bill, the purpose of restrictions placed on the right to freedom of expression is specifically for the respect of the rights, reputation and safety of others.

In *Eatock v Bolt* [2011], the Federal Court stated that while freedom of expression can be regarded as a fundamental human right, the right is not absolute or unqualified.⁶ Bromberg J stated:

“In my view, even outside of political discourse, freedom of expression is not merely a freedom to speak inoffensively: *R (on the application of Gaunt) v Office of Communications (OFCOM)* [2011] EWCA Civ 692 at [22] (Lord Neuberger MR). But there are areas of discourse where incivility is less acceptable, including because it is more damaging to social harmony. Additionally, a distinction may be drawn between harsh language directed at a person and harsh language directed at a person’s opinion: *R v Office* at [27] (Lord Neuberger MR); *Catch the Fire* at [34] (Nettle JA). In *Bropho* at [69], French J recognised that freedom of speech is not limited to expression which is polite or inoffensive. However, the minimisation of harm which French J spoke of involves a restraint upon unnecessarily inflammatory and provocative language and gratuitous insults. The language utilised should have a legitimate purpose in the communication of a point of view and not simply be directed to disparaging those to whom offence has been caused: *Toben* at [77] (Kiefel J). (*Eatock* at 410 and 411)⁷

The limitations imposed by the bill are not absolute. Section 66 (2) enshrines the right of freedom of expression by providing that the following are not unlawful:

- (a) a fair report of an act mentioned in subsection (1); or
- (b) a communication or the distribution or dissemination of any matter consisting of a publication that is subject to a defence of absolute privilege in a proceeding for defamation; or

³ United National Human Rights Committee, General comment no. 34: Article 19: Freedoms of opinion and expression, Geneva, 11-29 July 2011, viewed at <http://www2.ohchr.org/english/bodies/hrc/docs/CCPR-C-GC-34.doc>.

⁴ ICCPR art. 19(3).

⁵ United National Human Rights Committee, General comment no. 34: Article 19: Freedoms of opinion and expression, Geneva, 11-29 July 2011, at 50, viewed at <http://www2.ohchr.org/english/bodies/hrc/docs/CCPR-C-GC-34.doc>

⁶ *Eatock v Bolt* [2011] FCA 1103 (28 September 2011) at 235 - 236.

⁷ *Ibid* at 410-411

(c) a public act, done reasonably and honestly, for academic, artistic, scientific or research purposes or for other purposes in the public interest, including discussion or debate about and presentations of any matter.

In light of the discussion above, the Government believes that limits imposed by the Bill are reasonable and proportionate in the context of the underlying purpose of the legislation, which is to protect members of the ACT community from vilification on the grounds of their religion.

These amendments to the *Discrimination Act 1991* will further strengthen the ACT's already robust anti-discrimination and human rights framework, by introducing more protection for minorities.

The Government believes that any limitations imposed by the Bill are balanced with the promotion of the right to freedom of religion in a fair, democratic and multicultural society.

Clause Notes

Clause 1 Name of Act

This clause names the Act.

Clause 2 Commencement

This clause provides that the Act commences on the day after it is notified.

Clause 3 Legislation amended

This clause specifies that the Act amends the *Discrimination Act 1991*.

Clause 4 Part 6 heading

This clause replaces the existing heading for part 6, ‘Racial, sexuality and HIV/AIDS vilification’, substituting a new heading, ‘Vilification’. This amendment was made for the sake of clarity, as to insert religion into the existing heading would make it unnecessarily long. The new heading acts as a “catch all” title which encapsulates the purpose of the part.

Clause 5 Section 66

This clause inserts the word ‘religion’ into section 66(1) of the *Discrimination Act 1991*, making it one of the grounds that can be used to establish an unlawful vilification offence under part 6 of the Act.

It is currently unlawful under section 66 for “a person, by a public act, to incite hatred towards, serious contempt for, or severe ridicule of, a person or group of people on the ground of any of the following characteristics of the person or members of the group – race; sexuality; gender identity; HIV/AIDS status”. This amendment will add ‘religion’ to these characteristics.

Clause 6 Section 67

This clause inserts the word ‘religion’ into section 67(1) of the *Discrimination Act 1991*, making it one of the grounds that can be used to establish a serious vilification offence under part 6 of the Act.

A person commits an offence under section 67 if “the person intentionally carries out an act; and the person is reckless about whether the act is a public act; and the act is a threatening act; and the person is reckless about whether the act incites hatred towards, serious contempt for, or severe ridicule of, a person or group of people on the ground of any of the following characteristics of the person or members of the group – race; sexuality; gender identity; HIV/AIDS status”. This amendment will add ‘religion’ to these characteristics.

Clause 7 Dictionary, definition of *HIV/AIDS status* and *public act*

This clause amends the signpost definition of ‘HIV/AIDS status’ in the dictionary, and is consequential to clause 4, which amended the heading in part 6 of the Act. Currently, this definition is worded as follows:

- ‘*HIV/AIDS status*, for part 6 (Racial, sexuality and HIV/AIDS vilification) - see section 65’.

Clause 7 also amends the signpost definition of ‘public act’ in the dictionary. Currently, this definition is worded as follows:

- ‘*public act*, for part 6 (Racial, sexuality and HIV/AIDS vilification) - see section 65’.

Clause 7 simply omits ‘racial, sexuality and HIV/AIDS status’ from both of the definitions, so that section 66 reads ‘*HIV/AIDS status*, for part 6 (Vilification) - see section 65’ (section 66), and section 67 reads ‘*public act*, for part 6 (Vilification) - see section 65’.