

# **ANTI-DISCRIMINATION AMENDMENT BILL 2001**

## **EXPLANATORY NOTES**

### **GENERAL OUTLINE**

#### **Objectives of the Legislation**

This Bill will amend the *Anti-Discrimination Act 1991* by:

- (a) repealing the existing racial/religious vilification provision and inserting new civil and criminal vilification laws of wider scope; and
- (b) remedying various deficiencies and anomalies in the operation of the Act, in particular by:
  - providing for the extra-territorial operation of the Act so that it will apply to proscribed conduct on vessels outside Queensland territorial waters;
  - ensuring the Act applies to discrimination in work arrangements where the principal does not have a direct contractual relationship with the worker; and
  - providing for minor technical/procedural amendments.

#### **Reasons for the objectives and how they will be achieved**

Until now, the Act has proscribed only racial or religious vilification which incites unlawful discrimination or another breach of the Act. The Anti-Discrimination Commissioner Queensland has consistently called for laws of wider scope that will strengthen protection against racial and religious vilification and reinforce the social unacceptability of such conduct.

Vilification can take many forms, including hate-speech, graffiti and the distribution of propaganda or other forms of offensive literature. It is damaging not only to the individuals or groups vilified but to the cohesion and harmony of a culturally diverse society.

The Bill enacts new racial and religious vilification laws modelled on the New South Wales racial vilification legislation. It provides both civil remedies and criminal sanctions for public acts of racial or religious vilification. If a complaint of racial or religious vilification discloses a possible contravention of the Act it will be dealt with in accordance with the dispute resolution and enforcement mechanisms already established under the Act.

The criminal sanctions will apply only to the offence of serious racial or religious vilification which must contain the additional element of threatening, or inciting others to threaten, physical harm towards the person or group of persons or any property of the person or group. A prosecution will be by way of summary proceeding under the *Justices Act 1886* on complaint of the Commissioner or a person authorised by the Commissioner.

In addition to the vilification laws, the Bill contains a number of other, unrelated amendments to improve the operational efficiency of the Act..

In particular, the Bill will remedy two limitations highlighted in Anti-Discrimination Tribunal decisions.

The first of these amendments results from a Tribunal decision that the Act does not apply to discrimination or sexual harassment which occurs outside Queensland territorial waters (Carter v Sercombe and Ors QADT 8 September 1998 unreported). This means that where a complaint relates to conduct on a ship a complainant may currently have to rely on federal legislation, such as the *Sex Discrimination Act*. This is considered unacceptable as, when Human Rights and Equal Opportunity Commission (HREOC) withdrew from Queensland, there was a community expectation that the Anti-Discrimination Commission Queensland (ADCQ) would fill the gap. It can also result in injustice in cases where the location of a ship at the time of an alleged contravention is initially not clear. This is because if an action is brought under the Act and subsequently discontinued, the Commonwealth legislation prohibits an action being subsequently brought under its provisions.

The second amendment results from a decision that the Act does not apply to discrimination by a principal against a worker when there is no direct contractual relationship between the principal and the worker (Box v Mount Isa Mines Limited, QADT, 21 August 1998, unreported). This gap in protection for certain categories of workers, such as subcontractors, is unacceptable as it means that presently it is open to a principal to set discriminatory workplace conditions with no liability attaching to the principal under the Act.

### **Administrative cost to Government of implementation**

The financial implications for Government are not significant.

### **Fundamental legislative principles**

The Bill raises one issue regarding consistency with fundamental legislative principles contained in section 4 of the *Legislative Standards Act 1992*. Section 4(2) requires that legislation has sufficient regard to, *inter alia*, the rights and liberties of individuals.

The Bill contains new racial and religious vilification provisions which will limit the right to freedom of speech.

The limitation is justifiable in that it serves a legitimate purpose in ensuring that people are able to live peaceful and dignified lives free from racial or religious vilification.

The right to freedom of speech is not absolute, but is limited by a number of existing laws such as defamation, censorship and sedition.

The limitation contained in the Bill is reasonable and proportionate in that:

- (a) it applies only to public, not private acts;
- (b) the new section 124A contains exemptions which strike a balance between freedom of expression and freedom from racial or religious vilification; and
- (c) the offence of serious racial or religious vilification requires proof to the criminal standard that the incitement was done knowingly or recklessly.

### **Consultation**

Consultation has occurred with the following:

- Anti-Discrimination Commission, Queensland (ADCQ)
- Department of the Premier and Cabinet
- Department of Employment and Training
- Department of Education
- Department of Industrial Relations
- Department of Families, Youth and Community Care

- Department of Transport
- Department of Emergency Services
- Office of Women's Policy
- Aboriginal and Torres Strait Islander Partnerships Agency
- Legal Aid Queensland
- Director of Public Prosecutions
- Office of the Adult Guardian
- Chief Justice
- Chief Judge of the District Court
- Chief Stipendiary Magistrate
- Queensland Council for Civil Liberties
- Queensland Law Society Inc
- Queensland Bar Association

### **Notes on provisions**

*Clause 1* sets out the short title of the Act.

*Clause 2* states that the Act amends the *Anti-Discrimination Act 1991*.

*Clause 3* inserts a new section 3A which expressly provides for the Act to have extra-territorial operation so that it will apply to conduct on ships connected with Queensland, whether or not the conduct occurs within Queensland territorial waters. The provision makes it clear that it is not intended to limit the laws of Queensland providing for the application of the criminal law to offences committed at sea.

*Clause 4* inserts a new phrase in the definition section - "public act" (which is cross-referenced to the new section 4A), and makes minor technical amendments to the definition of "educational institution" in response to the repeal of the *Commonwealth Training Guarantee (Administration) Act 1990* which is referred to in the existing definition.

*Clause 5* provides a new definition of "public act" for the purposes of the new racial and religious vilification provisions. The definition makes it clear that a "public act" will include communication in any form, including oral, written and semiotic communication by any means.

*Clause 6* inserts a new section 15A to expressly prohibit discrimination in work arrangements where there is no direct contractual relationship between a principal and a worker performing work for the principal under a contract between that principal and a third party.

*Clause 7* is a minor technical amendment necessary because *the Fire Services Act 1990* has been replaced by the *Fire and Rescue Authority Act 1990*.

*Clause 8* inserts a new Chapter 4 Part 4 which establishes a new ground of complaint of racial or religious vilification. The section makes unlawful a public act which incites hatred towards, serious contempt for or severe ridicule of a person or group of persons on the ground of the race or religion of the person or group. Consistent with the interpretation that has been accorded “incite” in other jurisdictions, the section will not require proof that anyone was actually incited to be satisfied. The test of whether incitement has occurred is an objective one based on a hypothetical listener or viewer. The section contains a range of exceptions which are designed to strike a balance between the right to freedom of expression and freedom from racial and religious vilification. If a complaint to the Anti-Discrimination Commission Queensland discloses a possible contravention of the new section 124A, it may be conciliated and enforced under the existing provisions of the Act.

*Clause 9* replaces the existing Chapter 5, Part 2 with a new Part 2 which creates a new offence of serious racial and religious vilification.

The new section 126 requires the additional element of threatening or inciting others to threaten physical harm towards a person or group of person or the property of the person or group on the ground of race or religion. Unlike the new section 124A, an element of the offence is that a person must either knowingly or recklessly incite the hatred towards, serious contempt for or severe ridicule of the person or group.

The new section 126A ensures that a complaint of racial or religious vilification to the Commission may be treated either as a complaint under section 124A and therefore amenable to civil remedies or a complaint under section 126 with criminal sanctions, or both.

*Clause 10* makes a minor technical amendment to section 193(3) by providing that when a person who has authorised a complaint gives written notice to the Tribunal that the person does not want to continue with the complaint, the obligation is on the Tribunal, not the Commissioner, to write to the respondent as soon as practicable to tell the respondent that the complaint has lapsed.

*Clause 11* inserts new sections 226A and 226B which will apply when there are court proceedings for a breach of a suppression order that the Tribunal has made pursuant to either section 191 or section 192. These new provisions will empower a court hearing an action for such a breach to make similar suppression orders as those originally made by the Tribunal. The amendments are necessary because the present limitations in the courts' powers to make such orders mean the re-agitation of the matters (which were the subject of the original orders) may result in the "suppressed matter" being published. This would frustrate the objective of the Tribunal in making the original order. The clause provides that a contravention of the court orders made under these new sections will constitute a contempt of court.