

South Australia

Equal Opportunity Bill 2005

A BILL FOR

An Act to prohibit discrimination and other specified conduct and to provide for the investigation and conciliation of, and inquiry into, complaints in relation to such discrimination and conduct; to repeal the *Equal Opportunity Act 1984*; and to amend the *Public Sector Management Act 1995*.

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The Parliament of South Australia enacts as follows:

Part 1—Preliminary

1—Short title

This Act may be cited as the *Equal Opportunity Act 2005*.

2—Commencement

- 5 This Act will come into operation 6 months after the day on which it is assented to by the Governor.

3—Interpretation

In this Act, unless the contrary intention appears—

accommodation includes—

- 10 (a) business premises; or
- (b) a house or flat; or
- (c) a hotel or motel; or

- (d) a boarding house or hostel; or
- (e) a caravan or caravan site; or
- (f) a mobile home or mobile home site; or
- (g) a camping site;

5 **adult** means a person of or above 18 years of age;

assistance dog means—

- (a) a dog that provides assistance to a visually or hearing impaired person; or
- (b) a dog of a class prescribed by regulation;

authorised person means a person authorised by the Commissioner;

10 **award** means an award made under the *Fair Work Act 1994*;

breastfeeding includes the act of expressing milk;

caring responsibilities means responsibilities to care for or support another, whether or not as a dependant, other than in the course of paid employment or other remunerative activity or in the course of doing community work organised by a

15 community organisation within the meaning of the *Volunteers Protection Act 2001*;
[A carer allowance or carer payment under the *Social Security Act 1991* of the Commonwealth does not constitute remunerative activity.]

child includes a natural child, adopted child, stepchild, foster child and an ex-nuptial child;

20 **club** means an association (whether incorporated or unincorporated) of persons associated together for social, literary, cultural, political, sporting, athletic, recreational, community service or other lawful purposes that provides and maintains its facilities, in whole or in part, from funds of the association;

commission means a body authorised by an Act to conduct inquiries;

25 **Commissioner** means the Equal Opportunity Commissioner appointed under section 5;

competitive sporting activity means a sporting activity that has a competitive element excluding—

- (a) coaching or umpiring; or
- 30 (b) administration of a sporting activity;

complaint means a complaint made in relation to discrimination or prohibited conduct;

conduct of a sexual nature includes—

- 35 (a) making an oral or written statement of a sexual nature to a person or in the presence of a person; and
- (b) displaying matter of a sexual nature that relates to a prescribed attribute;

detriment includes humiliation or denigration;

disability means any of the following that presently exists, previously existed but no longer exists, may exist in the future, whether or not arising from an illness, disease or injury or from a condition subsisting at birth:

- (a) a total or partial loss of the person's bodily or mental functions;
- 5 (b) total or partial loss of a part of the body;
- (c) the presence in the body of organisms causing or capable of causing disease or illness;
- (d) the malfunction, malformation or disfigurement of a part of a person's body;
- 10 (e) disorder, malformation, malfunction or disfigurement that results in the person learning differently from a person without the disorder, malformation, malfunction or disfigurement;
- (f) a disorder, illness or disease that affects a person's thought processes, perceptions of reality, emotions or judgment or that results in disturbed behaviour;
- 15 (g) reliance on an assistance dog, wheelchair or other remedial or therapeutic device;

discrimination means conduct referred to in sections 14 and 15;

educational institution means a school, college, university or other institution at which education or training is provided;

20 **employment** includes—

- (a) employment or occupation in any capacity, with or without remuneration; and
- (b) membership of partnerships; and
- (c) registration or recognition by, or membership of, professional and trade organisations; and
- 25 (d) registration or recognition by qualifying bodies; and
- (e) engagement of commission agents; and
- (f) registration or placement by employment agencies; and
- (g) engagement under a contract for services; and
- (h) employment by a person; and
- 30 (i) registration or enrolment by vocational training bodies;

enterprise agreement means an enterprise agreement within the meaning of the *Fair Work Act 1994*;

gender identity means the condition of being a person—

- 35 (a) who identifies on a genuine basis as a member of the opposite sex by assuming characteristics of the opposite sex (whether by means of medical intervention, style of dressing or otherwise) or by living, or seeking to live as a member of the opposite sex; or

- (b) who, as a person of indeterminate sex, identifies on a genuine basis as a member of a particular sex by assuming characteristics of the particular sex (whether by means of medical intervention, style of dressing or otherwise) or by living, or seeking to live, as a member of the particular sex;

5 ***industrial activity*** means—

- (a) being or not being a member of, or proposing or refusing to join, an industrial organisation; or
- (b) participating in, not participating in, or proposing or refusing to participate in, a lawful activity organised or promoted by an industrial organisation; or
- 10 (c) negotiating or signing, or refusing to negotiate or sign, an industrial agreement;

industrial agreement means—

- (a) an enterprise agreement in force under the *Fair Work Act 1994*; or
- 15 (b) a certified agreement or an Australian workplace agreement in force under the *Workplace Relations Act 1996* of the Commonwealth as amended from time to time;

industrial organisation means—

- (a) an organisation of employees; or
- (b) a trade union; or
- 20 (c) an organisation of employers; or
- (d) any other organisation established for the purposes of persons who carry on a particular industry, trade, profession or employment;

Industrial Relations Commission means the Industrial Relations Commission of South Australia;

25 ***inquiry*** means an inquiry held under Part 6 Division 4;

irrelevant criminal record, in relation to a person, means a record relating to arrest, interrogation or criminal proceedings where—

- (a) further action was not taken in relation to the arrest, interrogation or charge of the person; or
- 30 (b) a charge has not been laid; or
- (c) the charge was dismissed; or
- (d) the prosecution was withdrawn; or
- (e) the person was discharged, whether or not on conviction; or
- (f) the person was found not guilty; or
- 35 (g) the person's conviction was quashed or set aside; or
- (h) the person was granted a pardon; or
- (i) the circumstances relating to the offence for which the person was convicted are not directly relevant to the situation in which the discrimination arises; or

(j) the circumstances constituting the offence for which the person was convicted would not constitute an offence if those circumstances occurred at the time of the alleged discrimination; or

(k) the offence for which the person was convicted was punishable by imprisonment for less than 5 years and the person in the 10 years following that conviction (or 5 years if the person was under 18 years of age at the time of committing the offence) has not been convicted of any other offence;

judge includes a judge of a court in any jurisdiction;

organisation includes a council and a public sector agency;

parent includes a step-parent, adoptive parent and foster parent;

parental status means the status of being a parent or childless;

person includes an organisation;

physical features means the height, weight, size or other bodily characteristics of a person;

politics means—

(a) engaging in, not engaging in, or refusing to engage in, political activity; or

(b) holding or not holding a political belief or view;

pregnancy includes child-bearing capacity;

prescribed attribute means an attribute specified in section 16;

prohibited conduct means conduct referred to in Part 4 Division 2;

public act includes—

(a) communication to the public; and

(b) conduct observable by the public; and

(c) the distribution or dissemination of a matter to the public;

public sector agency has the same meaning as in the *Public Sector Management Act 1995*;

publish includes to authorise publication;

race includes—

(a) colour; and

(b) nationality; and

(c) ancestry or descent; and

(d) ethnic, ethno-religious or national origin; and

(e) status of being, or having been, an immigrant or refugee;

relationship status—see section 4;

religion means—

(a) engaging in, not engaging in, or refusing to engage in, religious activity; or

(b) holding or not holding a religious belief or view;

religious leader means a person who is ordained to perform religious rites and includes a minister of religion, priest, pastor, rabbi or imam;

representative complaint means a complaint referred to in section 82;

respondent means a person against whom a complaint is made;

5 **services** includes services—

- (a) relating to access to, and the use of, a place that members of the public are permitted to enter; and
- (b) relating to banking, insurance, superannuation or the provision of grants, loans, credit or finance; and
- 10 (c) relating to entertainment, refreshment or recreation; and
- (d) relating to transportation and travel; and
- (e) relating to a profession, trade or business; and
- (f) provided by a council or public sector agency; and
- 15 (g) relating to selling, buying, leasing, assigning or disposing of an interest in land;

sexual harassment means conduct referred to in section 17(2);

sexuality means—

- (a) heterosexuality; or
- (b) homosexuality (including lesbianism); or
- 20 (c) bisexuality;

social status includes homelessness, unemployment or other similar forms of social exclusion;

special need includes a need based on health or financial status;

spouse includes a former spouse;

25 **State program** means a program conducted by or on behalf of the State;

trade union means an association within the meaning of the *Fair Work Act 1994*;

Tribunal means the Tribunal constituted under section 12.

4—Meaning of *relationship status*

- 30 (1) For the purposes of this Act, **relationship status** means the status of being or having been—
 - (a) single; or
 - (b) married; or
 - (c) married but living separately and apart from one's spouse; or
 - (d) married to a particular person; or
 - 35 (e) in a significant relationship; or
 - (f) in a significant relationship with a particular person; or

- (g) divorced; or
 - (h) widowed.
- (2) For the purposes of this Act, a *significant relationship* is a relationship between 2 adult persons, whether of the same or opposite sex, who—
- (a) have a relationship as a couple (for example, as putative spouses, de facto partners or same sex partners); and
 - (b) are not married to one another or related by family.
- (3) In determining whether 2 persons are in a significant relationship, all the circumstances of the relationship are to be taken into account, including such of the following matters as may be relevant in a particular case:
- (a) the duration of the relationship;
 - (b) the nature and extent of common residence;
 - (c) whether or not a sexual relationship exists;
 - (d) the degree of financial dependence or interdependence, and any arrangements for financial support, between the parties;
 - (e) the ownership, use and acquisition of property;
 - (f) the degree of mutual commitment to a shared life;
 - (g) the care and support of children;
 - (h) the performance of household duties;
 - (i) the reputation and public aspects of the relationship.
- (4) No finding in respect of any of the matters mentioned in subsection (3), or in respect of any combination of them, is to be regarded as necessary for the existence of a significant relationship, and a court determining whether such a relationship exists is entitled to have regard to such matters, and to attach such weight to any matter, as may seem appropriate to the court in the circumstances of the case.

Part 2—Equal Opportunity Commissioner

5—The Commissioner

- (1) There will be a Commissioner for Equal Opportunity.
- (2) The Commissioner will be appointed for a term of 5 years and will, at the expiration of a term of appointment, be eligible for reappointment.
- (3) The Commissioner is not a Public Service employee.
- (4) The terms and conditions of the Commissioner's appointment will be fixed by the Governor on the recommendation of the Commissioner for Public Employment.
- (5) A Public Service employee may be appointed to act temporarily as the Commissioner.

6—Staff

- (1) The Commissioner will have such staff as is necessary for the administration of this Act.

- (2) The Commissioner's staff will consist of Public Service employees.

7—Administration of this Act

The Commissioner is responsible to the Minister for the general administration of this Act and, in carrying out that function, is subject to the general control and direction of the Minister.

8—Functions of Commissioner

The Commissioner has the following functions:

- (a) to advise and make recommendations to the Minister on matters relating to discrimination and prohibited conduct;
- (b) to promote the recognition and approval of acceptable attitudes, acts and practices relating to discrimination and prohibited conduct;
- (c) to consult and inquire into discrimination and prohibited conduct and the effects of discrimination and prohibited conduct;
- (d) to disseminate information about discrimination and prohibited conduct and the effects of discrimination and prohibited conduct;
- (e) to undertake research and educational programs to promote attitudes, acts and practices against discrimination and prohibited conduct;
- (f) to prepare and publish guidelines for the avoidance of attitudes, acts and practices relating to discrimination and prohibited conduct;
- (g) to examine legislation and report to the Minister as to whether it is discriminatory or not;
- (h) to investigate and seek to conciliate complaints;
- (i) to collect and analyse data relating to complaints;
- (j) any other prescribed functions.

9—Powers of Commissioner

The Commissioner has the following powers:

- (a) to determine the procedures to be followed in an investigation or conciliation;
- (b) to intervene, with the leave of a court or tribunal, in proceedings before the court or tribunal that involve issues relating to acts of discrimination or prohibited conduct;
- (c) to grant an exemption from the application of this Act in respect of an act of discrimination or prohibited conduct;
- (d) to do anything necessary or convenient to perform the functions of the Commissioner.

10—Delegation

- (1) The Commissioner may delegate any of the functions or powers of the Commissioner other than this power of delegation.

- (2) A delegation under this section—
- (a) must be by instrument in writing; and
 - (b) may be absolute or conditional; and
 - (c) does not derogate from the power of the Commissioner to act in any matter; and
 - (d) is revocable at will.

11—Annual report

- (1) The Commissioner must, not later than 31 December in each year, report to the Minister on—
- (a) the operation and administration of this Act; and
 - (b) the work undertaken by the Commissioner under section 8, during the previous financial year.
- (2) The Minister must cause a copy of a report furnished under subsection (1) to be laid before each House of Parliament within 14 sitting days of receipt of the report if Parliament is then in session, but if Parliament is not then in session, within 14 days of the commencement of the next session of Parliament.

Part 3—Tribunal

12—Tribunal

- (1) The Minister may—
- (a) establish a Tribunal; and
 - (b) appoint a person or persons as member or members of the Tribunal; and
 - (c) appoint a person as chairperson of the Tribunal who is a legal practitioner of not less than 7 years' standing, a magistrate or former judge.
- (2) If the Tribunal consists of 1 member, that member must be a legal practitioner of not less than 7 years' standing, magistrate or former judge.
- (3) If the Tribunal consists of 2 or more members—
- (a) at least 1 of those members must be a legal practitioner of not less than 7 years' standing, magistrate or former judge; and
 - (b) the other member or members must be a person or persons with the experience and expertise relevant to the inquiry before the Tribunal.
- (4) The chairperson may determine—
- (a) which member or members of the Tribunal constitute the Tribunal in a particular inquiry or review; and
 - (b) which member is to be the presiding member of the Tribunal in that inquiry or review.

13—Functions of Tribunal

The functions of a Tribunal are—

- (a) to conduct an inquiry into a complaint; and
- (b) to review a decision of the Commissioner relating to exemptions, withdrawals, rejections or dismissals of complaints.

Part 4—Discrimination and prohibited conduct

Division 1—Discrimination

14—Direct discrimination

- (1) Discrimination to which this Act applies is direct or indirect discrimination on the grounds of a prescribed attribute.
- (2) Direct discrimination takes place if a person treats another person on the basis of a prescribed attribute, imputed prescribed attribute or a characteristic imputed to that attribute less favourably than a person without that attribute or characteristic.
- (3) For direct discrimination to take place, it is not necessary—
 - (a) that the prescribed attribute be the sole or dominant ground for the unfavourable treatment; or
 - (b) that the person who discriminates regards the treatment as unfavourable; or
 - (c) that the person who discriminates has any particular motive in discriminating.

15—Indirect discrimination

- (1) Indirect discrimination takes place if a person imposes a condition, requirement or practice which is unreasonable in the circumstances and has the effect of disadvantaging a member of a group of people who—
 - (a) share, or are believed to share, a prescribed attribute; or
 - (b) share, or are believed to share, any of the characteristics imputed to that attribute,more than a person who is not a member of that group.
- (2) For indirect discrimination to take place, it is not necessary that the person who discriminates is aware that the condition, requirement or practice disadvantages the group of people.

16—Discrimination on ground of attribute

A person must not discriminate against another person on the ground of any of the following attributes:

- (a) age;
- (b) breastfeeding;
- (c) caring responsibilities;
- (d) disability;

- (e) gender;
- (f) gender identity;
- (g) industrial activity;
- (h) irrelevant criminal record;
- 5 (i) irrelevant medical record;
- (j) parental status;
- (k) physical features;
- (l) politics;
- (m) pregnancy;
- 10 (n) race;
- (o) relationship status;
- (p) religion;
- (q) sexuality;
- (r) social status;
- 15 (s) association with a person who has, or is believed to have, any of these attributes.

Division 2—Prohibited conduct

17—Prohibition of sexual harassment

- (1) A person must not sexually harass another person.
- 20 (2) Sexual harassment takes place if a person—
 - (a) subjects another person to an unsolicited act of physical contact of a sexual nature; or
 - (b) makes an unwelcome sexual advance or an unwelcome request for sexual favours to another person; or
 - 25 (c) makes an unwelcome remark or statement with sexual connotations to another person or about another person in that person's presence; or
 - (d) makes an unwelcome gesture, action or comment of a sexual nature; or
 - (e) engages in conduct of a sexual nature in relation to another person that is offensive to that person,
 - 30 in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated, intimidated, insulted or ridiculed.

18—Prohibition of victimisation

- (1) A person must not victimise another person because that other person—
 - 35 (a) made, or intends to make, a complaint under this Act; or

- (b) gave, or intends to give, evidence or information in connection with any proceedings under this Act; or
- (c) alleged, or intends to allege, that a person has committed an act which would amount to a contravention of this Act; or
- 5 (d) refused or intends to refuse to do anything that would amount to a contravention of this Act; or
- (e) has done anything in relation to a person under or by reference to this Act.

- (2) Victimization takes place if a person subjects, or threatens to subject, another person or an associate of that other person to detriment.

10 **19—Inciting hatred**

A person, by a public act, must not incite hatred towards, serious contempt for, or severe ridicule of, a person or a group of persons on the ground of—

- (a) the race of the person or a member of the group; or
- (b) a disability of the person or a member of the group; or
- 15 (c) the sexuality or gender identity of the person or a member of the group; or
- (d) the religion of the person or a member of the group.

20—Promoting discrimination and prohibited conduct

- (1) A person must not publish or display, or cause or permit to be published or displayed, a sign, notice or advertising matter that promotes, expresses or depicts discrimination or prohibited conduct.
- 20 (2) Subsection (1) does not apply to anything that is used for the purpose of discouraging discrimination or prohibited conduct.

21—Prohibition of aiding contravention of this Act

- (1) A person must not knowingly—
 - 25 (a) cause another person to contravene this Act; or
 - (b) induce another person to contravene this Act; or
 - (c) aid another person to contravene this Act.
- (2) All persons referred to in subsection (1) are jointly and severally liable for any contravention under this Act.

30 **Division 3—Application of Act to certain areas of activity**

22—Areas of activity

- (1) Subject to the exceptions and exemptions specified in Part 5, this Act applies to discrimination and prohibited conduct, other than inciting hatred, by or against a person engaged in, or undertaking any, activity in connection with any of the following:
 - 35 (a) employment;
 - (b) education and training;

- (c) provision of facilities, goods and services;
- (d) accommodation;
- (e) membership and activities of clubs;
- (f) administration of any law of the State or any State program;
- (g) awards or enterprise agreements.

(2) This Act applies to inciting hatred—

- (a) in connection with anything referred to in subsection (1); and
- (b) in any other area or in connection with any other activity.

Part 5—Exceptions and exemptions

Division 1—General exceptions

23—Charities

A person may—

- (a) include a discriminatory provision in a document or instrument that provides exclusively for charitable benefits wholly or partly for persons with a prescribed attribute; and
- (b) do any act that is required to give effect to that provision.

24—Actions required by law

A person may discriminate against another person if it is reasonably necessary to comply with—

- (a) a law of this State or the Commonwealth; or
- (b) an order of a commission, court or tribunal.

25—Disadvantaged groups and special needs

A person may discriminate against another person in any area if it is for the purpose of carrying out a scheme for the benefit of a group which is disadvantaged or has a special need because of a prescribed attribute.

26—Equal opportunities

A person may discriminate against another person in a program, plan or arrangement designed to promote equal opportunity for a group of people who are disadvantaged or have a special need because of a prescribed attribute.

Division 2—Exceptions relating to certain attributes

27—Gender

(1) A person may discriminate against another person on the ground of gender—

- (a) in education, if it is for the purpose of enrolment in 1 gender schools or hostels; or

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Part 5—Exceptions and exemptions

Division 2—Exceptions relating to certain attributes

(b) in employment, if it is based on a genuine occupational qualification or requirement in relation to a particular position; or

(c) in accommodation, if it is shared accommodation for less than 5 adult persons; or

5 (d) in the provision or use of facilities, if those facilities are reasonably required for use by persons of 1 gender only.

(2) A person may discriminate against another person on the ground of gender in respect of the use of a benefit provided by a club if—

10 (a) it is not practicable for the benefit to be used simultaneously or to the same extent by both men and women; and

(b) the benefit is provided—

(i) for the use of men and women separately from each other; or

(ii) to men and women in a fair and reasonable proportion.

15 (3) A person may discriminate against another person on the ground of gender in respect of membership of a club if the membership of the club is available only to persons of 1 gender.

28—Caring responsibilities and other attributes

20 A person may discriminate against another person on the ground of caring responsibilities, parental status, pregnancy, breastfeeding or relationship status if that other person requires special services and facilities the supply of which would impose unjustifiable hardship.

29—Sport

A person may discriminate against another person in a competitive sporting activity by restricting participation to persons of 1 gender of 12 years of age or more.

25 30—Insurance and superannuation

(1) A person may discriminate against another person on the ground of gender or relationship status in the provision of services relating to insurance or superannuation if—

30 (a) the discrimination arises because of the application of prescribed standards under the *Superannuation Industry Supervision Act 1993* of the Commonwealth; or

(b) the discrimination—

(i) is based on actuarial, statistical or other data from a reliable source; and

35 (ii) is reasonable having regard to such data and other relevant factors.

(2) Subsection (1) only applies if a person discloses to the Commissioner, when required to do so—

(a) the sources on which the data are based; or

(b) the relevant factors on which the discrimination is based.

Division 3—Exceptions relating to age

31—Sporting activity of particular age group

5 A person may discriminate against another person on the ground of age in relation to a competitive sporting activity by restricting participation to persons of a particular age group.

32—Clubs for particular age groups

A person may discriminate against another person on the ground of age in respect of membership of a club if the membership of the club is available only to persons of a particular age group.

33—Superannuation for persons of particular age group

- 10 (1) A person may discriminate against another person on the ground of age in the provision of services relating to superannuation if—
- 15 (a) the discrimination arises because of the application of prescribed standards under the *Superannuation Industry (Supervision) Act 1993* of the Commonwealth; or
- (b) the discrimination—
- (i) is based on actuarial, statistical or other data from a reliable source; and
- (ii) is reasonable having regard to other relevant factors.
- 20 (2) Subsection (1)(b) only applies if a person discloses to the Commissioner, when required to do so—
- (a) the sources on which the data are based; and
- (b) the relevant factors on which the discrimination is based.

34—Insurance and financial services for particular age group

- 25 (1) A person may discriminate against another person on the ground of age in the provision of services relating to an annuity, insurance, loans, credit or finance if the discrimination—
- (a) is based on actuarial, statistical or other data from a reliable source; and
- (b) is reasonable having regard to that data and any other relevant factors.
- 30 (2) Subsection (1) only applies if a person discloses to the Commissioner, when required to do so—
- (a) the sources on which the data are based; and
- (b) the relevant factors on which the discrimination is based.

35—Employment based on age

A person may discriminate against another person on the ground of age in relation to employment if the discrimination is based—

- (a) on a genuine occupational qualification or requirement in relation to a particular position; or
- (b) on a decision to offer employment only to a young person, or the employment of a young person, if the rate of pay for that employment is a rate less than that applicable to an adult, fixed by or in accordance with the provisions of an industrial or enterprise award, determination or agreement made, approved or certified under the *Fair Work Act 1994* or the *Workplace Relations Act 1996* of the Commonwealth.

36—Education for persons of particular age group

A person may discriminate against another person on the ground of age in relation to the provision of educational programs for persons of a particular age group.

37—Benefits and concessions

A person may discriminate against another person on the ground of age in relation to the provision of benefits and concessions provided to persons of a particular age group.

38—Accompanied by adult

A person may discriminate against a child on the ground of age if the discrimination requires the child to be accompanied by an adult in circumstances where there is a reasonable risk that the child may—

- (a) cause a disruption if not accompanied by an adult; or
- (b) endanger himself or herself or any other person if not accompanied by an adult.

Division 4—Exceptions relating to race

39—Clubs for persons of certain races

A person may discriminate against another person on the ground of race in relation to the use of a benefit provided by a club—

- (a) to preserve a minority culture; or
- (b) to prevent or reduce any disadvantage that may be suffered by a member of that race.

40—Employment based on race

A person may discriminate against another person on the ground of race in relation to employment if the discrimination is based on a genuine occupational qualification or requirement in relation to a particular position.

Division 5—Exceptions relating to disability

41—Sporting activity for persons with disabilities

A person may discriminate against another person on the ground of disability in relation to any competitive sporting activity by—

- 5
- (a) restricting participation to that person; or
 - (b) excluding that person from participating if the person is not reasonably capable of performing any action reasonably required in relation to that activity.

42—Insurance and superannuation for persons with disabilities

- 10
- (1) A person may discriminate against another person on the ground of disability in the provision of services relating to any annuity or insurance or superannuation if the discrimination—
- (a) is based on actuarial, statistical or other data from a reliable source; and
 - (b) is reasonable having regard to that data and any other relevant factors.
- 15
- (2) Subsection (1) only applies if a person discloses to the Commissioner, when required to do so—
- (a) the sources on which the data are based; or
 - (b) the relevant factors on which the discrimination is based.

43—Employment based on disability

20

A person may discriminate against another person on the ground of disability in relation to employment if—

- (a) the other person—
 - (i) is unable to carry out the inherent requirements of the employment; or
 - 25 (ii) in order to carry out those inherent requirements would require services or facilities not reasonably required by a person without a disability, the provision of which would impose unjustifiable hardship on the person so discriminating; or
- (b) the employment involves—
 - 30 (i) participation in a dramatic performance or other entertainment in a capacity for which a person with a particular disability is required for reasons of authenticity; or
 - (ii) participation as an artist's or photographic model in the production of a work of art, visual image or sequence of visual images for which a person with a particular disability is required for reasons of authenticity; or
 - 35 (iii) providing persons with a particular disability with services for the purpose of promoting their welfare if those services are most effectively provided by a person with the same disability.

44—Education for persons with disabilities

A person may discriminate against another person on the ground of disability in relation to the provision of special educational facilities for the use of persons with disabilities.

5 45—Infectious disease

A person may discriminate against another person on the ground of disability if—

- (a) the disability of the person is an infectious disease; and
- (b) it is reasonably necessary to do so in order to protect public health.

46—Access and provision of services

10 A person may discriminate against another person on the ground of disability—

- (a) in access to public places, if the provision of access would cause unjustifiable hardship; or
- (b) in the provision of goods and services, if that would cause unjustifiable hardship.

15 Division 6—Exceptions relating to physical features

47—Employment based on physical features

A person may discriminate against another person on the ground of physical features in relation to employment if it is based on a genuine occupational requirement in relation to a particular position.

20 Division 7—Exceptions relating to industrial activity

48—Employment based on industrial activity

A person may discriminate against another person on the ground of industrial activity in relation to employment if it is based on a genuine occupational qualification in relation to a particular position.

25 Division 8—Exceptions relating to irrelevant criminal record

49—Dealing with vulnerable people

30 A person may discriminate against another person on the ground of irrelevant criminal record in relation to the education, training or care of a child or other vulnerable person if it is reasonably necessary to do so in order to protect the physical, psychological or emotional well-being of a child or other vulnerable person having regard to the relevant circumstances.

Division 9—Exceptions relating to religion

50—Employment based on religion

35 A person may discriminate against another person on the ground of religion in relation to employment if the discrimination is based on a genuine occupational qualification or requirement in relation to a particular position.

51—Participation in religious observance

A person may discriminate against another person on the ground of religion in relation to—

- (a) the ordination or appointment of a religious leader; or
- 5 (b) the training and education of a person seeking ordination or appointment as a religious leader; or
- (c) the selection or appointment of a person to participate in a religious observance or practice; or
- (d) any other act that—
 - 10 (i) is carried out in accordance with the doctrine of a particular religion; and
 - (ii) is necessary to avoid offending the religious sensitivities of a person of that religion.

Division 10—Exceptions relating to politics

52—Employment

A person may discriminate against another person on the ground of a person's politics in the employment of a person—

- (a) as an adviser to a Minister; or
- (b) as a member of staff of a political party; or
- 20 (c) as a member of the electorate staff of a person; or
- (d) in any other similar position.

Division 11—Exceptions relating to other issues

53—Legal incapacity

25 A person may discriminate against another person on the ground of age or disability in relation to legal incapacity if the incapacity is relevant to the area of activity in respect of which the discrimination is made.

54—Public purpose

The provisions of section 19 do not apply if the person's conduct is—

- (a) a fair report of a public act; or
- 30 (b) a communication or dissemination of a matter that is subject to a defence of absolute privilege in proceedings for defamation; or
- (c) a public act done in good faith for—
 - (i) academic, artistic, scientific or research purposes; or
 - (ii) a purpose in the public interest.

55—Standards of dress, appearance and behaviour

An employer or educational institution may set and enforce standards of dress, appearance and behaviour that are reasonable having regard to the circumstances in which they apply (but such a standard will not be reasonable if it would result in unlawful discrimination).

Division 12—Exemptions

56—Application for exemption

- (1) A person may apply to the Commissioner to exempt from the provisions of this Act conduct or activity which would otherwise contravene this Act.
- (2) In considering an application, the Commissioner may have regard to—
 - (a) the desirability of certain actions being permitted to redress the effect of past discrimination or prohibited conduct; and
 - (b) other factors that the Commissioner considers relevant.
- (3) On application from a person applying for an exemption, the Commissioner may permit that person to carry out specified action or engage in specified conduct pending consideration of the application for the exemption.

57—Grant and renewal of exemption

- (1) After considering an application for exemption, the Commissioner may—
 - (a) grant an exemption for specified conduct from the provisions of this Act; or
 - (b) refuse to grant such an exemption.
- (2) The Commissioner may—
 - (a) grant an exemption unconditionally or on conditions for a period not exceeding 3 years; or
 - (b) revoke an exemption if a condition of the exemption is contravened; or
 - (c) vary a condition or impose a condition during the period of the exemption.
- (3) The Commissioner may—
 - (a) renew an exemption for a further period not exceeding 3 years; or
 - (b) refuse to renew an exemption.
- (4) If the Commissioner refuses to grant or renew an exemption, the Commissioner is to—
 - (a) provide the person applying for the exemption with a written statement of the reasons for the refusal; and
 - (b) inform the person that he or she may apply to the Tribunal for a review.
- (5) If the Commissioner varies or imposes a condition during the period of an exemption, the Commissioner is to—
 - (a) provide the person who applied for the exemption with a written statement of the reasons; and

- (b) inform the person that he or she may apply to the Tribunal for a review.

58—Notification relating to exemption

- (1) The Commissioner is to publish notice of a grant, renewal or revocation of an exemption in the Gazette.
- 5 (2) A notice of the grant or renewal of an exemption is to state—
- (a) the period for which it has been granted or renewed; and
- (b) the conditions to which the exemption is subject.

59—Review of exemptions

- 10 (1) A person may apply to the Tribunal for a review of a decision of the Commissioner under section 57 to—
- (a) grant an exemption; or
- (b) renew an exemption; or
- (c) refuse to grant an exemption; or
- (d) refuse to renew an exemption; or
- 15 (e) impose or vary a condition.
- (2) An application under subsection (1)(a) or (b) is to be—
- (a) in writing; and
- (b) made within 28 days after publication of the notice under section 58(1).
- (3) An application under subsection (1)(c) or (d) is to be—
- 20 (a) in writing; and
- (b) made within 28 days after receipt of the statement referred to in section 57(4).
- (4) An application under subsection (1)(e) is to be—
- (a) in writing; and
- (b) made within 28 days after the condition is imposed or varied.
- 25 (5) On receipt of an application, the Tribunal may review the decision of the Commissioner and—
- (a) confirm that decision; or
- (b) quash the decision and direct the Commissioner to take such action as the Tribunal considers appropriate.

Part 6—Dispute resolution

Division 1—Complaints

60—Who may complain

- 5 (1) A complaint may be made to the Commissioner about discrimination or prohibited conduct by—
- (a) a person against whom the alleged discrimination or prohibited conduct was directed; or
 - 10 (b) a person who represents a class of persons against whom alleged similar discrimination or prohibited conduct was directed (whether or not the person is a member of the class) if the Commissioner is satisfied that a majority of those persons are likely to consent; or
 - (c) a trade union that represents—
 - 15 (i) a member of that union against whom the alleged discrimination or prohibited conduct was directed; or
 - (ii) a class of members of that union against whom the alleged discrimination or prohibited conduct was directed, if the Commissioner is satisfied that a majority of those members are likely to consent; or
 - 20 (d) an organisation against which the alleged discrimination or prohibited conduct was directed, if the Commissioner is satisfied that a majority of members of that organisation are likely to consent; or
 - (e) an agent of a person referred to in this section; or
 - (f) a person on behalf of the person against whom the alleged discrimination or prohibited conduct was directed.
- 25 (2) The Commissioner may investigate discrimination or prohibited conduct without the lodgment of a complaint if satisfied that there are reasonable grounds for doing so.

61—Acting on behalf of complainant

- (1) The Commissioner may authorise a person—
- 30 (a) nominated by a complainant to act on behalf of the complainant; or
 - (b) nominated by a respondent to act on behalf of the respondent.
- (2) The Commissioner may withdraw an authorisation if the Commissioner considers it appropriate to do so.

62—Form of complaint

- (1) A complaint is to—
- 35 (a) be made in writing and signed by the complainant; and
 - (b) identify the person, class of persons or organisation against whom the alleged discrimination or prohibited conduct was directed and against whom the complaint is made; and

- (c) set out details of the alleged discrimination or prohibited conduct; and
- (d) be lodged with the Commissioner—
 - (i) in person; or
 - (ii) by post; or
 - (iii) by any other means the Commissioner allows.

- (2) The Commissioner may provide procedural advice and assistance to a person who requires assistance to make a complaint.

63—Time limit on complaints

- (1) A complaint is to be made within 12 months after the alleged discrimination or prohibited conduct took place.
- (2) The Commissioner may accept a complaint made after the 12 month time limitation has expired if satisfied that it is reasonable to do so.

64—Rejection of complaints

- (1) The Commissioner may reject a complaint if—
 - (a) in the opinion of the Commissioner, it is trivial, vexatious, misconceived or lacking in substance; or
 - (b) the complaint does not relate to discrimination or prohibited conduct; or
 - (c) the complainant has commenced proceedings in a commission, court or tribunal in relation to the same events, and that commission, court or tribunal may order remedies similar to those available under this Act; or
 - (d) a person other than the complainant has commenced proceedings in a commission, court or tribunal in relation to the same subject matter of the complaint and the Commissioner is satisfied that the subject matter may be adequately dealt with by that commission, court or tribunal; or
 - (e) in the opinion of the Commissioner, there is a more appropriate remedy that is reasonably available; or
 - (f) the subject matter of the complaint has already been adequately dealt with by the Commissioner or a council, public sector agency or Commonwealth statutory authority; or
 - (g) in the opinion of the Commissioner, the subject matter of the complaint may be more effectively or conveniently dealt with by a council, public sector agency or Commonwealth statutory authority.
- (2) The Commissioner is to decide whether to accept or reject a complaint within 42 days after its receipt.
- (3) The Commissioner is to notify the complainant of the decision to accept or reject the complaint as soon as practicable.

65—Review of rejected complaints

- (1) The Commissioner is to—
- (a) provide a written statement of the reasons for the rejection of a complaint to the complainant; and
 - (b) inform the complainant that the rejection may be reviewed by the Tribunal.
- (2) A person whose complaint was rejected by the Commissioner may apply to the Tribunal for the rejection to be reviewed.
- (3) An application is to be—
- (a) in writing; and
 - (b) made within 28 days after receipt of notification of the statement.
- (4) If a person does not make an application in relation to a rejected complaint within the period specified in subsection (3), the complaint lapses at the end of that period.

66—Agreements not to complain

- (1) The Commissioner may accept a complaint from a person who had previously agreed with another person not to complain if the Commissioner reasonably believes that it is fair to do so.
- (2) In assessing whether it is fair to accept a complaint, the Commissioner is to consider the following:
- (a) the knowledge of the parties to the agreement;
 - (b) any benefit gained by the person making the complaint in return for the agreement;
 - (c) whether the terms of the agreement were reasonable in the circumstances;
 - (d) the degree of good faith shown by the parties in implementing the agreement;
 - (e) other relevant circumstances.

67—Notification of acceptance of complaints

If the Commissioner accepts a complaint, the Commissioner, within 10 days of accepting it, is to—

- (a) notify the respondent of that acceptance; and
- (b) provide the respondent with reasons for accepting the complaint; and
- (c) give the respondent—
 - (i) a summary of the complaint; or
 - (ii) with the consent of the complainant, a copy of the complaint.

68—Withdrawal of complaints

- (1) A complainant may apply to the Commissioner to withdraw a complaint.
- (2) An application to withdraw a complaint is to include a statement of the reasons for the withdrawal.

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- (3) The Commissioner, on receipt of an application to withdraw a complaint, may investigate the circumstances relating to the application.
- (4) If the Commissioner is satisfied that an application to withdraw a complaint is made voluntarily, the Commissioner is to—
- 5 (a) grant the withdrawal; and
- (b) record the terms of any agreement reached between the complainant and the respondent; and
- (c) refer any application for costs to the Tribunal for an order under section 101.
- (5) The withdrawal of a complaint does not prevent—
- 10 (a) the Commissioner or an authorised person from investigating the complaint under section 69 if satisfied that—
- (i) the complaint was not withdrawn voluntarily; or
- (ii) it is in the public interest to do so; or
- (b) the Minister from referring the complaint to the Tribunal.
- 15 (6) A complainant who withdraws a complaint under this section is not entitled to make another complaint in relation to the same matter without the permission of the Commissioner.

Division 2—Investigation

69—Investigation of complaints

- 20 (1) The Commissioner or an authorised person may investigate a complaint in a manner that is appropriate to the circumstances.
- (2) In investigating a complaint, the Commissioner or an authorised person is to have regard to the desirability of maintaining the confidentiality of all persons involved in the investigation.

70—Referral by Minister

- 25 (1) The Minister may refer a matter as a complaint for investigation by the Commissioner or an authorised person.
- (2) The Minister may withdraw a referred matter from an investigation.
- 30 (3) After investigating a referred matter, the Commissioner or authorised person is to submit a report to the Minister on the matter together with any recommendations.

71—Completion of investigation

- (1) The Commissioner or an authorised person, on the completion of an investigation of a complaint, is to determine that the complaint—
- 35 (a) is dismissed on a ground referred to in section 64(1)(a), (b), (c), (d) or (f); or
- (b) is to proceed to conciliation; or
- (c) is to proceed to an inquiry.

- (2) The Commissioner or authorised person, as soon as practicable—
- (a) is to notify the determination to the complainant and the respondent; and
 - (b) provide a written statement of the reasons for the dismissal of a complaint.
- (3) A complainant whose complaint is dismissed may apply to the Tribunal for the dismissal to be reviewed.
- (4) An application is to be made within 28 days after receipt of the statement.
- (5) If a complainant does not make an application within the period specified in subsection (4), the complaint lapses.

72—Review of rejection or dismissal

- (1) If, on reviewing the rejection or dismissal of a complaint, the Tribunal is satisfied that the Commissioner made a correct decision in rejecting or dismissing the complaint, the complaint lapses.
- (2) If, on reviewing the rejection of a complaint, the Tribunal is not satisfied that the Commissioner made a correct decision in rejecting the complaint, the Tribunal is to refer the complaint back to the Commissioner for investigation.
- (3) If, on reviewing the dismissal of a complaint, the Tribunal is not satisfied that the Commissioner made a correct decision in dismissing the complaint, the Tribunal is to deal with the complaint as if it were an inquiry under Division 4.

73—Lapsed complaints

A complainant whose complaint lapses under section 65(4), section 71(5) or section 72(1) is not entitled to make another complaint in relation to the same matter.

Division 3—Conciliation

74—Conciliation of complaints

The Commissioner or an authorised person is to attempt to resolve by conciliation a complaint that the Commissioner or authorised person believes may be resolved in that way.

75—Conciliation conference

- (1) The Commissioner or an authorised person, by written notice, may direct a person to take part in a conciliation conference at a specified time and place.
- (2) A person, without reasonable excuse, must not fail to comply with a direction given under subsection (1).
Maximum penalty: \$2 500.
- (3) A person may be represented or accompanied by another person at a conciliation conference only with the permission of the Commissioner or authorised person.
- (4) If the Commissioner gives permission to 1 person to be accompanied or represented by another person at a conciliation conference—
- (a) the Commissioner must notify any other person taking part in the conference of that permission at least 5 days before the conference; and
 - (b) that person may also be accompanied or represented by another person.

- (5) A conciliation conference is to be held in private.
- (6) A person may use an interpreter at a conciliation conference.

76—Conciliated complaint

- (1) The Commissioner or an authorised person is to record the terms of an agreement reached to resolve a complaint.
- (2) The record made by the Commissioner or authorised person is to be signed by each party.
- (3) The Commissioner or authorised person is to—
 - (a) provide a copy of the record to each party; and
 - (b) hold the original record on file.
- (4) An agreement is enforceable as if it were an order made by the Tribunal under section 90(1).

77—Conciliation proceedings not admissible

Anything said, written or done in the course of conciliation proceedings is not to be taken into account in subsequent proceedings held in relation to a complaint.

Division 4—Inquiry

78—Referral for inquiry

- (1) The Commissioner or an authorised person is to refer a complaint for inquiry if the Commissioner or authorised person—
 - (a) believes the complaint cannot be resolved by conciliation; or
 - (b) has attempted to resolve the complaint by conciliation but has not been successful; or
 - (c) believes that the nature of the complaint is such that it should be referred for inquiry.
- (2) The Commissioner or an authorised person is to refer a complaint within 6 months after notification under section 67 or within a further period agreed with the complainant, regardless of whether the investigation of the complaint has been completed.
- (3) The Commissioner or an authorised person is to notify the respondent of a further period agreed under subsection (2).

79—Referral report

- (1) The Commissioner or an authorised person is to provide the Tribunal with a report relating to a complaint referred to the Tribunal.
- (2) A referral report relating to a complaint is to be provided within 48 days after the complaint is referred to the Tribunal.
- (3) The following matters are to be addressed in a referral report:
 - (a) issues raised in the complaint that remain unresolved;

- (b) application of exemptions and exceptions under Part 5;
- (c) admitted facts;
- (d) facts to be established;
- (e) witnesses to be called;
- (f) documents to be provided.

- (4) A report is not to set out or describe anything said or done in the course of conciliation proceedings under Division 3.
- (5) The Commissioner or an authorised person is to give a copy of the report to the complainant and the respondent.

80—Directions conference

- (1) Before an inquiry into a complaint is held, the Tribunal is to arrange for a directions conference to be conducted in relation to the complaint.
- (2) The Tribunal, by written notice, may require a person to—
 - (a) attend a directions conference; and
 - (b) provide and produce specified information and documents to a directions conference.
- (3) A person, without reasonable excuse, must not fail to comply with a requirement notified under subsection (2).
Maximum penalty: \$2 500.
- (4) The Tribunal, if the complainant does not comply with a requirement to attend a directions conference in respect of that complaint, may—
 - (a) dismiss the complaint; and
 - (b) order the complainant to pay costs to the respondent.
- (5) A directions conference is to be held in private.
- (6) The Tribunal may give any directions it considers necessary to ensure that the inquiry is conducted fairly and expeditiously.

81—Proceedings relating to inquiry

- (1) The Tribunal may hold a single inquiry in relation to 2 or more complaints if they arise out of substantially the same events.
- (2) The Tribunal on its own motion or by application of a person may join a person as a party to the inquiry by giving that person reasonable notice in writing.

82—Representative complaints

The Tribunal may deal with a complaint as a representative complaint if satisfied that the complaint was made by a person or an agent of a person who is a member of a class of persons against whom the alleged similar discrimination or prohibited conduct was directed on behalf of that class.

83—Ordinary complaint not precluded

The making of a representative complaint by a person does not preclude the making of any other complaint by any other person in respect of the same discrimination or prohibited conduct.

5 84—Amendment of complaints

- (1) The Tribunal may amend a complaint—
 - (a) that is made on behalf of a class of persons so that it can be dealt with as a representative complaint under section 82; or
 - (b) if it considers it just to do so in the circumstances.
- 10 (2) If a complaint is amended, the Tribunal may make any order for costs it considers appropriate.

85—Hearing of inquiry

- (1) An inquiry is to be held in public unless the Tribunal directs that it be held in private.
- 15 (2) A person may be represented or accompanied by another person at an inquiry only with the permission of the Tribunal.
- (3) If the Tribunal gives permission for 1 person to be accompanied or represented by another person at the hearing of an inquiry, any other person taking part in the hearing may also be accompanied or represented by another person.
- (4) A person may act as an interpreter at an inquiry.

20 86—Conduct of inquiry

- (1) The Tribunal is to conduct an inquiry with as little formality and as expeditiously as the requirements of this Act and a proper consideration of the matters before the Tribunal permit.
- 25 (2) The Tribunal may require a person to attend a preliminary hearing before holding an inquiry.
- (3) The Tribunal may start or continue an inquiry in the absence of the complainant or any other relevant person.
- (4) A question of law or procedure is to be determined by—
 - 30 (a) members presiding at an inquiry, if the Tribunal consists of more than 1 person; or
 - (b) the member constituting the Tribunal, if the Tribunal consists of only 1 person.

87—Security for costs

- 35 (1) On the application of a party to an inquiry or review, the Tribunal may at any time order—
 - (a) that another party to the inquiry or review give security for the applicant's costs within the time specified in the order; and
 - (b) if the Tribunal thinks fit, that proceedings in the inquiry or review be stayed until the security is given.

- (2) If the security for the applicant's costs is not given within the time specified in the order, the Tribunal may make an order dismissing the complaint as against the applicant.

88—Evidence

- 5 (1) The Tribunal may take evidence on oath or affirmation and for that purpose may administer an oath or affirmation.
- (2) The Tribunal, by written notice, may require a person to appear before it to give evidence.
- 10 (3) A person, without reasonable excuse, must not fail to comply with a requirement of the Tribunal under subsection (2).
Maximum penalty: \$2 500.
- (4) The Tribunal—
- (a) is not bound by the rules of evidence but is to observe the rules of natural justice; and
- 15 (b) may inform itself on any matter as it thinks fit.
- (5) The Tribunal may—
- (a) receive in evidence the transcript of evidence in a proceeding before a court or tribunal and draw a conclusion of fact from that transcript; and
- (b) adopt a finding or decision of a court or tribunal; and
- 20 (c) receive in evidence a report of the Commissioner.

89—Publication of evidence

- (1) The Tribunal may order that—
- (a) oral evidence given before it is not to be published; and
- (b) documentary evidence produced to it is not to be published; and
- 25 (c) information that might enable a party or witness to be identified is not to be published.
- (2) The Tribunal may make an order subject to any conditions it thinks fit.
- (3) A person must not publish evidence or information contrary to an order made by the Tribunal.
- 30 Maximum penalty: \$2 500.
- (4) A person must not publish information contained in a document that is an exempt document under the *Freedom of Information Act 1991*.
Maximum penalty: \$2 500.

90—Orders

- 35 (1) If the Tribunal finds after an inquiry that a complaint is substantiated, it may make 1 or more of the following orders:
- (a) an order that the respondent must not repeat or continue the discrimination or prohibited conduct;

- (b) an order that the respondent must redress any loss, injury or humiliation suffered by the complainant and caused by the respondent's discrimination or prohibited conduct;
- (c) an order that the respondent must re-employ the complainant;
- 5 (d) an order that the respondent must pay to the complainant, within a specified period, an amount the Tribunal thinks appropriate as compensation for any loss or injury suffered by the complainant and caused by the respondent's discrimination or prohibited conduct;
- (e) an order that the respondent must pay a specified fine not exceeding \$5 000;
- 10 (f) an order that a contract or agreement is to be varied or declared void in whole or in part;
- (g) an order that it is inappropriate for further action to be taken in the matter;
- (h) any other order it thinks appropriate.
- (2) If the Tribunal finds after an inquiry that a complaint against a Public Service employee is substantiated, it may order the Chief Executive to whom the employee is responsible to take disciplinary action against the employee under the *Public Sector Management Act 1995*.
- 15 (3) The Tribunal, on completion of an inquiry, may order the respondent to—
- (a) make reasonable efforts to identify persons entitled to benefit from an order made by the Tribunal if such persons were not personally identified at the inquiry; and
- 20 (b) pay a specified sum to an organisation or fund that is acceptable to the Tribunal if the persons referred to in paragraph (a) cannot be personally identified.

25 **91—Enforcement of orders**

- (1) A person, or the Commissioner at the request of a person, may enforce an order made under section 90(1) or an agreement to resolve a complaint by filing the following documents, free of charge, in the Supreme Court:
- (a) in the case of an order, a copy of the order certified by—
- 30 (i) the member who presided over the inquiry, if the Tribunal consisted of more than 1 person; or
- (ii) the member who constituted the Tribunal, if the Tribunal only consisted of 1 person;
- (b) in the case of an agreement, a copy of the record made under section 76 and certified by the Commissioner or an authorised person;
- 35 (c) an affidavit stating the extent to which the order or agreement has not been complied with.
- (2) If the documents are filed in accordance with this section, the order made by the Tribunal or agreement is enforceable as if it were an order of the Supreme Court.

92—Referral of substantiated claims to Industrial Relations Commission

- (1) If, after an inquiry, the Tribunal finds that a complaint relating to an award or enterprise agreement is substantiated, it is to refer the award or agreement to the Industrial Relations Commission together with a report on its findings.
- 5 (2) The Industrial Relations Commission is to set aside or vary the terms of the award or enterprise agreement that gave rise to the complaint, unless it is in the public interest not to do so.

93—Apologies and retractions

- (1) In respect of a substantiated complaint, the Tribunal may require the respondent to—
 - 10 (a) apologise to the complainant; and
 - (b) make any retractions the Tribunal considers appropriate.
- (2) If the complaint related to discrimination or prohibited conduct carried out in public, the respondent is to cause to be published an apology or retraction in a manner directed by the Tribunal.
- 15 (3) If the complaint related to discrimination or prohibited conduct carried out in private, an apology or retraction is to be made as directed by the Tribunal.
- (4) A person must not fail to comply with a requirement or direction made by the Tribunal under this section.
Maximum penalty: \$2 500.

94—Reasons for orders

- (1) The Tribunal, if requested by a complainant or respondent, is to give reasons in writing for an order made under section 90.
- (2) A request is to be—
 - 25 (a) in writing; and
 - (b) made within 28 days after the date of the determination.

95—Conciliation and agreement

- (1) If the Tribunal believes that a complaint may be resolved by conciliation, it may, during an inquiry, refer the matter to a conciliation conference under section 75.
- 30 (2) If the parties to a complaint agree to resolve the complaint whilst it is before the Tribunal for inquiry, the Tribunal is to record the terms of the agreement.
- (3) The record of agreement is to be signed by the parties.
- (4) An agreement is enforceable as if it were an order of the Tribunal under section 90(1).

96—Costs

Subject to section 101, each party to an inquiry is to pay his or her own costs.

97—Matters taken into account

In an order made under section 90 or 101, the Tribunal, in addition to other matters, may take into account any or all of the following matters:

- (a) that the respondent made a written request to the Commissioner about the requirements of the Act in relation to a specific situation;
- (b) that the respondent provided the Commissioner with all the material facts;
- (c) that the respondent acted in accordance with written advice provided by the Commissioner in response to the request.

Division 5—Miscellaneous**98—Information and documents**

- (1) The Tribunal, Commissioner or an authorised person may require a person to provide specified information or produce specified documents that the Tribunal, Commissioner or authorised person believes may be relevant to the complaint.
- (2) A requirement is to be—
 - (a) in writing; and
 - (b) served on the relevant person.
- (3) The Tribunal, Commissioner or authorised person may take and retain possession, or take copies, of a document produced under subsection (1).
- (4) A person, without reasonable excuse, must not fail to provide information or produce a document required under subsection (1).
Maximum penalty: \$2 500.
- (5) If a person fails to provide information or produce a document required under subsection (1), the Commissioner is to submit a report on the matter to the Tribunal.
- (6) A person who produces a document under this section is to be given reasonable access to that document.
- (7) After considering the report, the Tribunal may make an order requiring a person to provide the specified information or produce the specified documents.
- (8) An order made under subsection (7) may be filed in the Supreme Court and is enforceable as if it were an order of the Supreme Court.

99—Interim orders

- (1) The Tribunal, Commissioner or an authorised person, at any stage of an inquiry, investigation or a conciliation of a complaint, may make an interim order pending the completion of that inquiry, investigation or conciliation.
- (2) An interim order may also be made on the application of the complainant or the respondent.
- (3) An interim order prohibits a person from doing an act that may prejudice—
 - (a) the investigation of the complaint; or
 - (b) the conciliation of the complaint; or

(c) an inquiry or order the Tribunal may make on completion of an inquiry.

(4) A person must not fail to comply with an interim order.

Maximum penalty: \$2 500.

100—Dismissal of complaint

5 (1) The Tribunal may dismiss a complaint if it finds after an inquiry that the complaint is unsubstantiated.

(2) The Tribunal may dismiss a complaint at any time if it is satisfied that—

(a) the complaint is trivial, vexatious, misconceived or lacking in substance; or

10 (b) dismissing the complaint would, for some other reason, be just and appropriate.

(3) If the Tribunal dismisses a complaint on the ground that it is vexatious, it may order the complainant to pay a specified fine not exceeding \$2 500.

101—Order for costs

15 The Tribunal may make an order as to costs in relation to any inquiry or review before it if the Tribunal considers circumstances justify the order.

102—Appeals

(1) A person may appeal to the Supreme Court on a question of law or fact against an order made under section 90(1) or (2) or section 101 within 28 days after the order was made.

20 (2) A person may appeal to the Supreme Court against a dismissal under section 100 within 28 days after the dismissal was made.

(3) A person may appeal to the Supreme Court against a determination on a question of law under section 86(4) within 28 days after the determination was made.

103—Proof of exceptions or exemptions

25 A person who relies on an exception or exemption referred to in Part 5 as a defence to a complaint is to prove that exception or exemption on the balance of probabilities.

Part 7—Miscellaneous

104—Immunity for complainants and witnesses

30 A person is not liable to any action, claim or demand in respect of any loss, damage or injury suffered by another person by reason only that the person—

(a) lodged a complaint with the Commissioner; or

(b) provided information or evidence to the Commissioner or Tribunal.

105—Immunities

35 (1) The Commissioner and the chairperson and members of the Tribunal have, in exercising a power or performing a function of their respective offices, the same immunity as a judge of the Supreme Court.

- (2) A person acting for or at the direction of the Commissioner or the chairperson or a member of the Tribunal is not personally liable for an honest act or omission done or made in the exercise or purported exercise of a power, or in the performance or purported performance of a function, under this Act.

5 **106—Commissioner and Tribunal members not required to give evidence in certain cases**

The Commissioner and the chairperson and members of the Tribunal are not compellable witnesses before a court or tribunal, or in any judicial or other proceedings, in respect of anything that came to their knowledge in exercising and performing their respective powers and functions under this Act.

10 **107—Obligation of organisations**

- (1) An organisation is to ensure that—
- 15 (a) its members, officers, employees and agents are made aware of the discrimination and prohibited conduct to which this Act relates; and
 - (b) the terms of an order made under section 90 relating to that organisation are brought to the notice of those of its members, officers, employees and agents whose duties are such that they may engage in conduct of the kind to which the order relates; and
 - 20 (c) no member, officer, employee or agent of the organisation engages in, repeats or continues such conduct.
- (2) An organisation is to take reasonable steps to ensure that no member, officer, employee or agent of the organisation engages in discrimination or prohibited conduct.
- (3) An organisation that does not comply with this section is liable for a contravention of this Act committed by its members, officers, employees or agents.

25 **108—False and misleading statements**

A person, in connection with a matter referred to in this Act, must not—

- 30 (a) make a statement knowing it to be false or misleading; or
- (b) omit any matter from a statement knowing that without that matter the statement is misleading.

Maximum penalty: \$2 500.

109—Offences in respect of proceedings

A person must not—

- 35 (a) hinder any proceedings under this Act; or
- (b) use insulting language towards a person exercising a power or performing a function under this Act; or
- (c) create or take part in a disturbance in or near a place where proceedings under this Act are being conducted.

Maximum penalty: \$2 500.

110—Continuing offence

- (1) A person convicted of an offence against a provision of this Act in respect of a continuing act or omission—
- 5 (a) is liable, in addition to the penalty otherwise applicable to the offence, to a penalty for each day during which the act or omission continued of not more than one-tenth of the maximum penalty prescribed for that offence; and
- 10 (b) is, if the act or omission continues after the conviction, guilty of a further offence against the provision and liable, in addition to the penalty otherwise applicable to the further offence, to a penalty for each day during which the act or omission continued after the conviction of not more than one-tenth of the maximum penalty prescribed for the offence.
- (2) If an offence consists of an omission to do something that is required to be done, the omission will be taken to continue for as long as the thing required to be done remains undone after the end of the period for compliance with the requirement.

111—Admissibility in other proceedings

15 Except for the purposes of this Act, anything said, written or done in relation to any proceedings under this Act is not admissible in any other proceedings.

112—Application of Act

20 This Act does not apply to discrimination or prohibited conduct that took place and concluded before the commencement of this Act.

113—Regulations

- (1) The Governor may make such regulations as are contemplated by, or necessary or expedient for the purposes of, this Act.
- 25 (2) Without limiting the generality of subsection (1), those regulations may make provision for or relating to—
- (a) fines, not exceeding \$1 250, for offences against the regulations; and
- (b) facilitation of proof of the commission of offences against the regulations.
- (3) The regulations may—
- 30 (a) be of general application or vary in their application according to prescribed factors;
- (b) provide that a matter or thing in respect of which regulations may be made is to be determined according to the discretion of the Commissioner or the Minister.
- (4) The regulations may contain provisions of a savings or transitional nature consequent
- 35 on the enactment of this Act.
- (5) A provision referred to in subsection (4) may take effect on and from the day on which this Act commences or a later day.

Schedule 1—Amendments and repeals

Part 1—Preliminary

1—Amendment provisions

5 In this Act, a provision under a heading referring to the amendment of a specified Act amends the Act so specified.

Part 2—Amendment of *Public Sector Management Act 1995*

2—Amendment of section 5—Personnel management standards

10 (1) Section 5(c)—delete "unlawful discrimination against employees or persons seeking employment in the public sector on the ground of sex, sexuality, marital status, pregnancy, race, physical impairment or any other ground" and substitute:

discrimination against employees or persons seeking employment in the public sector that would be unlawful under the *Equal Opportunity Act 2005*

(2) Section 5—after paragraph (c) insert:

15 (ca) have due regard to the need for programs, plans or arrangements designed to promote equal opportunity for a group of people who are disadvantaged or have a special need because of a prescribed attribute within the meaning of the *Equal Opportunity Act 2005*; and

Part 3—Repeal

3—Repeal of *Equal Opportunity Act 1984*

20 The *Equal Opportunity Act 1984* is repealed.