

EQUAL OPPORTUNITY (MISCELLANEOUS) AMENDMENT BILL – 26th October, 2006

The Hon. M.J. ATKINSON (Attorney-General) obtained leave and introduced a bill for an act to amend the Equal Opportunity Act 1984 and to make related amendments to the Civil Liability Act 1936 and the Racial Vilification Act 1996. Read a first time.

The Hon. M.J. ATKINSON: I move:

That this bill be now read a second time.

The Equal Opportunity Act is now more than 20 years old and, by today's standards, its coverage is inadequate. The need to extend it has been apparent for years. It was more than 12 years ago that the Liberal government of the day commissioned Mr Brian Martin QC, as he then was, to review it. Mr Martin consulted extensively and made a report recommending many amendments. The government then consulted further on the report and, more than six years later, introduced an amending bill. That bill had not, however, passed even one house of parliament when the parliament was prorogued for the 2002 election. It was the election policy of the government at that election to modernise the Equal Opportunity Act to ensure comprehensive protection of South Australians against unjustified discrimination. That is the purpose of this bill.

The government published, in 2003, a framework paper outlining our intentions and posing questions for public comment. More than 1 000 people replied, including trade unions, representatives of business, disability advocacy groups, carers' groups, churches, government agencies, cultural associations, women's groups and others. It was hardly surprising to find a diversity of opinion about what the law should be. Interests compete and judgments vary. The government is grateful to everyone who took the trouble to contribute, and it has taken account of all submissions.

Equal opportunity law exists to allow all South Australians to take part equally in society. Everyone should have equal opportunity in the fields of work, education, qualifications, access to goods and services, lodging, landholding and membership of associations. No one should be excluded from taking part in society because of prejudices. No-one should be harassed or victimised in the exercise of these rights.

This government is pledged to these values and so proposes some important expansions of the present law. At the same time, the government is mindful that the law must set standards that are fair and reasonable. It must avoid imposing unjustifiable hardship on anyone. It must be mutual as between the parties to a complaint. It must provide proper exceptions where there is some overriding consideration, such as occupational health and safety or the protection of children. Both these points of view were expressed in the comments about the framework paper, and, in framing this bill, the government has tried to find a fair balance between them. The bill proposes many changes to our present act which will take some time to outline. I seek leave to have the balance of my remarks inserted into *Hansard* without my reading them.

Leave granted.

The Bill would expand the Act's present protection against disability discrimination. Martin recommended that our Act should mirror the definition of disability in the Commonwealth *Disability Discrimination Act*. This Bill follows that recommendation. Members will realise that the *Disability Discrimination Act* already applies in South Australia. South Australian employers, traders, schools and others are already obliged to avoid disability discrimination as it is defined in that Act. This amendment therefore adds no new obligations but will mean that there is now also a remedy in the South Australian Equal Opportunity Commission. As a result of the amendment, there will be a remedy with our Equal Opportunity Commission for some conditions not now covered by the Act. First, our Act will now cover discrimination on the ground of mental illness just as it has always covered physical illness. Mental illness is not the sufferer's fault, it is not shameful and there is no justification for treating sufferers unfavourably. To do so only adds to the burden on these people and their families.

The Act will also cover non-symptomatic physical conditions, such as being infected with a virus. The Act will, therefore, now protect people infected with the HIV virus, for example. A person should not be treated unfavourably because he or she is infected with a disease, even one that is greatly feared. At the same time, this law should not hamper the actions necessary to prevent the spread of any illness. As

is the case in Commonwealth law, therefore, the Bill creates a defence for reasonable measures to stop the spread of an infectious disease.

The Act will now also clearly cover learning disabilities, even where they are not traceable to intellectual disability, an important addition in the context of education.

The Bill also matches the effect of s. 23 of the Commonwealth *Disability Discrimination Act* about access for disabled people to premises. Once again, because of the *Disability Discrimination Act*, most South Australian offices, shops, restaurants and other premises open to the public must already be accessible to disabled people, unless to give such access would impose unjustifiable hardship. Much has been achieved in recent years towards making such access a matter of course. Again, because the provision in this Bill is similar in scope to the Commonwealth provision, this amendment will not add any new burden on South Australian employers or service providers but will give disabled South Australians a remedy in their own Equal Opportunity Commission, rather than having to look to the Sydney-based Human Rights and Equal Opportunity Commission.

Members will notice that, throughout these provisions, the Bill proposes to change the language of the Act from 'impairment' to 'disability'. This is consistent with the language of the Commonwealth legislation and with modern usage.

The Bill would also extend the coverage of the Act to carers. It is, perhaps, only in recent years that society has woken to the immense contribution made by carers. There are the adults who take frail elderly parents into their homes and try to fit in the provision of care around the demands of work and of their own children. There is the husband or wife who becomes the main carer for a spouse who develops a debilitating disease. There are the grandparents who, at a time when they expected to be finally at leisure, find themselves caring for their grandchildren because the parents are unable to do so. Caring responsibilities can arise

for both sexes and at any time of life. Many of us will, at some time in our lives, be called upon to care for someone or, perhaps, be in need of care ourselves. That should not change our legal right to take part in society. The Bill, therefore, proposes that it should be unlawful to discriminate against a person on the ground of his or her caring responsibilities.

Members will see that the definition of 'caring responsibilities' is wide, and wider than the Commonwealth definition. It is not limited to family members or those who live in the same household although, in practice, that is where these obligations will most often arise. The definition is deliberately broader than that. We live in a multi-cultural society. It is important to recognise the obligations that can arise, for example, from Aboriginal kinship or from other extended family arrangements. It is important also to protect a genuine responsibility to provide care for another person, whatever the relationship, because the contribution of carers to our society is so important.

The Martin report acknowledged that the Act should cover caring responsibilities. Martin proposed, however, that coverage be limited, initially, to direct discrimination. That would arise where, for instance, an employer declines to hire or to promote a person because of a caring responsibility. In practice, however, such discrimination is unlikely. The real problem is indirect discrimination, that is, the setting of unreasonable requirements that are especially difficult for people with caring responsibilities to meet. The Bill proposes to cover both direct and indirect discrimination on the ground of caring responsibilities. In this respect it will be wider than the Commonwealth law.

As is usual in indirect discrimination provisions, however, the setting of a reasonable requirement will not break the law. If the requirement is reasonable, the respondent has done no wrong and the carer cannot complain. It is where the requirement is unreasonable that the complaint is well-founded and a remedy is appropriate. For this reason, the Government does not believe business has anything to fear from this amendment. The Bill does not entitle carers to

special treatment. It does not mean that employers cannot require shift work or weekend work or travel away from home. It does not mean that carers must be allowed to leave work early to collect children from school or that they are entitled to take leave at school holiday times. It simply means that employers must have sensible reasons for the requirements they set. An employer can comply with this law, then, by acting reasonably.

In conjunction with the coverage of caring responsibilities, the Bill also improves protection for nursing mothers. It proposes that it should be unlawful to discriminate in the provision of education services against a breastfeeding mother. It further proposes that it should be unlawful to discriminate against a person in the field of providing goods and services on the ground that he or she is associated with a child, that is breast feeding or bottle feeding an infant or accompanied by a child

For indirect discrimination in general, the Bill proposes to change the burden of proof. At present, the complainant bears the burden of proving that the requirement was unreasonable. Instead, the respondent will need to prove that it was reasonable. Martin was inclined to think that this should be done, subject to consultation. As explained earlier, consultation has taken place in the form of the framework paper process. The Government does not believe that this change will unfairly burden employers or other respondents. Since the respondent has imposed the requirement, he or she must know the reason for. It is not onerous to disclose that reason.

The Bill also proposes to create equal-opportunity remedies for racial victimisation. Racial victimisation means a public act that incites hatred, serious contempt or severe ridicule for a person or group on the ground of race. At the moment, the remedy is either to apply for damages when a defendant is convicted of the crime of racial vilification or to sue the person for damages under the *Civil Liability Act*. The Bill would provide another option by way of complaint under this Act. That leads the parties to conciliation. Experience shows that most equal-opportunity complaints are resolved

that way. Not only does this settle the dispute but it also educates the parties about their rights and duties. It can produce helpful changes in systems and procedures. Moreover, the remedies available in this jurisdiction are not limited to punishments and monetary payments. The parties can agree upon, or the Tribunal can order, any remedy that will redress the loss or damage. This might be an apology. It might be a service. It might be a change in the respondent's policies or practices. The Government thinks that the law should offer this remedy as an alternative to the legal actions now available. Needless to say, the complainant will need to elect between the equal-opportunity and the civil remedy. The election will take place after the conciliation process is complete, if that has not resolved the matter.

In the case of racial victimisation, this is simply an alternative. It may be, to some people, less intimidating than the court process. It might also be less expensive. If, however, a person or group prefers to use the existing remedies, they remain available.

The Bill would also create an equal-opportunity remedy for victimisation on all other grounds covered by the Act. This will include, for instance, victimisation on the ground of sexuality or disability. Fomenting public hatred against anyone, or any group of people, on the ground of race, age, sexuality or disability is wrong and should be unlawful. The definition of victimisation, here also, is drawn from the *Civil Liability Act*. It requires a public act. The act must, objectively, incite hatred, serious contempt, or severe ridicule. Defences are provided for privileged material, publication of fair reports and reasonable acts in good faith in the public interest. Thus, the provisions seek to strike a fair balance between the public interest in free speech and the public interest in protecting vulnerable minorities.

As recommended by Martin, the Bill would also extend the Act to cover discrimination against independent contractors. Changes in the workplace have meant that many people are now engaged under contracts for services rather than contracts of employment. There is no justification for discrimination against these contractors

where it would be unlawful to discriminate against an employee. The Bill therefore extends the coverage of the Act so that, in hiring an independent contractor, discrimination on the grounds of sex, race, age, disability and so on will be unlawful.

The present law exempts the case where a person is employed in a private household. For instance, one can discriminate in hiring a nanny for one's children. In the Bill, this exemption is reflected in an exemption where a person is employed or engaged for purposes not connected with the employer's or principal's business. That will cover employing staff or engaging independent contractors in one's home, for example, engaging a music tutor or a babysitter, for non-business purposes. It will also cover employment or engagement outside the home, as long as it is not for a business purpose. An example might be engaging a person to teach one to play tennis. The Bill does not, however, permit discrimination when engaging the services of contract workers through an intermediary. This is because the intermediary, as an employer or principal, may not discriminate in hiring its staff, even if they are to provide services in a person's home. Likewise, the Bill would mean that if a person runs a business from his or her home, so that he or she employs staff of the business at the home premises, there can be no discrimination in that employment.

The Bill also proposes to add to the Act new grounds of discrimination. Only one of these derives from the Martin report. This is the ground of identity of spouse. The Government thinks it unfair that anyone should be treated unfavourably by others because of the identity of that person's spouse. For example, it would be wrong if the husband or wife of any Member here were to be refused service in a shop because the shopkeeper disliked the Member. Martin said that 'in principle, it is generally unfair to discriminate against a person because of the identity of that person's previous or current spouse'. In general, the identity of a person's spouse is irrelevant to that person's participation in society, for example, their suitability for a particular job or their eligibility to enter a particular course

of study. There are, however, exceptions. Martin said that 'there may be circumstances, however, where that discrimination is not unreasonable because of the occupation of the spouse.' The Bill would therefore permit such discrimination where it is reasonably necessary to protect confidentiality, to avoid a conflict of interest or nepotism or for the health or safety of any person. As an example, a woman should not, in general, be treated unfavourably because she is the wife of a convicted pederast. If, however, she were to apply for approval to run family day-care in her home, the risk posed to children by the presence of the husband could be lawfully taken into account.

Another new ground is discrimination based on a person's profession, trade or other lawful occupation. It will apply to access to education, goods, services, land and lodging. Although this is a new ground and does not arise out of the Martin recommendations, the Government believes it makes sense. One should not be denied equal participation in society just because one has an unpopular job. Many lawful and necessary jobs attract hostility from some quarters and carry an increased risk of unfavourable treatment. The work of police, corrections officers, store detectives, debt collectors and government or council inspectors might be examples. A person should not be treated unfavourably in areas such as lodging, access to goods and services, or education, just because the person has, or once had, such an occupation. The Bill would extend the Act to make such discrimination unlawful. Needless to say, this proposed new ground is limited to lawful occupations. It will not, for example, assist a person who makes his living as a drug dealer.

The Bill also proposes to cover discrimination on the ground of area of residence. That is, a person should not be treated unfavourably because he comes from a particular town, suburb or region. This new ground is limited to the field of work. It means that an employer cannot refuse to hire a worker, or subject him to any detriment, because of where he lives or has lived. This is to give equal opportunity to candidates for a job, even if they come from suburbs or regions that some people look down on. It is all too easy to

label people and to write them off because they come from a poorer area or an area that has a reputation for social problems. Those who think this type of discrimination trivial have obviously not encountered it. No-one should be judged, either favourably or unfavourably, on his address or his local origin. The person is entitled to be assessed on merit. This does not, of course, excuse a worker from the ordinary requirements of the job, such as being on time, nor does it entitle a worker to any special treatment, such as an early minute. As long as the worker is treated the same as other workers, there is no discrimination.

The Bill also proposes to cover discrimination on the ground that a person, for religious reasons, wears particular dress or adornments or presents a particular appearance. Examples include the hijab worn by Muslim women, the turban worn by Sikh men or the cross worn by some Christians. It could include any kind of dress, adornment or other features of a person's appearance that are required by or symbolic of the religion. The Bill proposes that it should be unlawful to discriminate against a person on this ground in the fields of employment and education. Exceptions are made, naturally enough, for genuine safety reasons or inability to perform the inherent requirements of the job. This is not to introduce the ground of religious discrimination in general. The Government in 2002 consulted on this idea and learned that many South Australians strenuously oppose it. We decided not to do it. The purpose of the present amendment is simply to ensure that people who dress or present themselves in a particular way for religious reasons are not debarred from participating in school or work activities. We pride ourselves on being a multi-cultural society. We do not expect people to give up their cultural or religious identity to become South Australians.

The Bill also proposes to extend the Act to cover discrimination on the ground of past and presumed characteristics, as recommended by Martin. Wherever the Act makes it unlawful to discriminate on the ground of a characteristic that the person now has, the Bill proposes that it should also be unlawful to discriminate because the

person had that characteristic in the past, or because the person is mistakenly thought to have the characteristic. Future characteristics are also covered where applicable. For example, discrimination on the ground of a disability that may exist in the future is covered, as it is in Commonwealth law.

The Bill would also extend the Act to cover discrimination against a person based on the characteristics of his or her associates. This refers to characteristics covered by the Act, such as age, disability and so on. If it is unlawful to discriminate against a person because of his disability, it should also be unlawful to discriminate against a person because he is accompanied by, or associates with, someone who has a disability. Otherwise, the Act can be circumvented. The Act already covers such discrimination when it occurs on the ground of race, and it makes sense, as Martin argued, that it should cover other grounds.

This does not mean that *no* characteristics of an associate can be considered. There are many Acts, for example, where the character of a person's associates will be taken into account in assessing the person's suitability to hold a licence or some other privilege. These amendments do not affect such provisions. They refer to characteristics covered by the *Equal Opportunity Act*. Again, this was recommended by Martin and is, in the Government's view, only common sense.

The Bill would change the sex-discrimination provisions of the Act in three ways. First, the Bill would delete references to 'transsexuality' and refer instead to 'chosen gender. In the case of a transgender person, this refers to his or her self-identification as a member of the sex opposite to his or her biological sex. 'Chosen gender identity' also covers people with intersex conditions. These are medical conditions in which a person is born with a physical or chromosomal makeup that does not exactly fit either the usual male or female pattern. In that case, the person's chosen gender is his or her self-identification as a member of one or the other sex. In either case, the effect of the Bill is that a person must not be treated unfavourably in the fields to which the Act

applies because of the person's gender, even if that gender might not appear to others to match the person's sex. This was thought clearer than the present Act, which speaks of 'transsexuality', that is, assuming characteristics of the other sex. It also removes any doubt about whether the Act covers intersex conditions.

Second, the Bill extends the coverage of the Act to 'potential pregnancy', that is, the possibility that a woman might become pregnant. It can be argued that this is already covered because it is a characteristic of women in general, but express reference avoids doubt. The provision is similar in substance to the Commonwealth law.

Third, the Bill removes discrimination on the ground of marital status from the sex-discrimination provisions and covers it later, in Part 5B, where other matters such as identity of spouse and caring responsibilities are covered. This is a rearrangement, without change to the substance of the protection.

On the topic of sexuality discrimination, I point out that the Bill would change the present law about the rights of religious institutions to discriminate on the ground of sexuality. By section 50(2), the present law provides an exemption for an institution that is run in accordance with the precepts of a religion. Such an institution can discriminate in its administration on the ground of sexuality, if the discrimination is founded on the precepts of the religion.

At present, this exemption is used chiefly by religious schools to avoid hiring homosexual staff. Indeed, the Government's consultation on the Bill did not disclose any other use of this exemption. The wording of the exemption, however, appears broad enough to allow many other uses. For instance, it could allow a religious school to expel a homosexual student or to restrict that student's participation in school activities. A church-run hospital could use it to refuse to employ a homosexual doctor or nurse. An aged-care home associated with a church could use it to refuse places to homosexual applicants for lodging. The Government has

seen no evidence that any such institutions use or wish to use the exemption in these ways. It is clearly wanted for one thing only: to stop homosexuals teaching in religious schools.

The Government gave much thought to whether such an exemption should be allowed to continue. Our law says that discrimination on the ground of sexuality is wrong. Moreover, religious schools receive public funding. An argument can be made that those who accept public funding should comply with the standards set by the public through legislation. At the same time, the Government acknowledges that independent schools make a great contribution to the education and pastoral care of South Australia's children. This contribution is possible, in part, because of the commitment of the school community to its faith. The Government accepts that some South Australians are taught by their religion, and sincerely believe, that homosexuals should not teach in schools. In general, the State ought not to interfere in the practice of religion and ought not to compel any person to act against his conscience.

Consequently, the Bill proposes to limit this exception to the only thing for which it is known to be used. It would not be available to all institutions run on religious principles, but would be limited to schools. It would not apply to the treatment of students but only the hiring of staff. Further, the Bill proposes that these schools should publicly disclose this policy. That way, both parents and prospective staff will know where the school stands. The Bill would require the school to lodge a copy of its policy with the Equal Opportunity Commissioner, who would make it available for public inspection.

We are doing this out of respect for religious freedom. I wish to emphasize that the Government does not believe that homosexual people pose any greater threat to children than do heterosexual people. The threat to children comes from pederasts.

The Bill would also abolish the present exemption that allows associations (other than trade unions and employer

groups) to discriminate on the ground of sexuality. Associations include charities, service clubs, sports clubs, cultural groups, environmental organizations, political parties and others. This exemption, then, has the potential to exclude homosexual people from participation in many aspects of public life. In general, there is no justification for such a rule. It is a baseless restriction on the rights of homosexual people.

Some commentators, however, expressed special concern for religious associations. It was argued that these should be able to exclude people in accordance with the tenets of the religion. Accordingly, the Bill would make a limited exception for associations administered in accordance with the precepts of a religion.

The Bill also reduces two other current exceptions relating to sexuality. The Act at present provides, by s. 33(2), that a partnership of five people, or fewer, can refuse a person partnership on the ground of sexuality. This will apply to many small firms, such as law firms or accounting practices, that trade as partnerships rather than companies. The Government sees no reason why a person, who could not be refused employment at the firm on the ground of sexuality, should be precluded from partnership on that ground.

The other example concerns lodging. The Act presently provides, by s. 40(3), that a person can discriminate on the grounds of sex, sexuality, pregnancy and marital status in the provision of lodging, if it is lodging where the provider or his family reside and no more than six other persons are given lodging on the premises. The Government thinks this exception too wide. Doubtless, people should be free to decide who they will take in as guests in their own homes. It is another thing to say that they can exclude people from commercial lodging, on the ground of sex, sexuality or pregnancy. The Bill would amend this section to make clear that it is only lodging in one's own home that is intended.

The Bill makes some changes to the law about sexual harassment. First, it proposes to adopt the Commonwealth

definition in s. 28A of the *Sex Discrimination Act*. Comment on the framework paper suggested that it would be helpful to employers if the State and Commonwealth laws matched on this point. It is clear that they are both aimed at the same conduct. It is therefore helpful if they use the same words, so that employers do not have to try to conform to two different rules at once. Second, the Bill extends the coverage of the Act to the various relationships listed by Martin as requiring coverage. In particular, it extends the Act to harassment of the providers of goods, services and lodging, just as it now covers harassment by those providers.

Third, the Bill changes the present rules about vicarious liability for sexual harassment. At present, although in Commonwealth law, employers are vicariously liable, they are not so in State law. An employer can only be vicariously liable for sexual harassment if the employer authorised, instructed or connived at the harassment. Needless to say, that almost never happens. As Martin observed, this exclusion 'cuts a huge swathe through the number of cases for which an employer could be found vicariously liable'. Martin said that it was important to provide an incentive for employers to create an environment free of sexual harassment. It may be true to say that an employer ought not, automatically, to be held responsible for sexual harassment in which he had no part. It is equally true, nevertheless, that a workplace will be what the employer allows it to be. The law can reasonably expect employers to create workplaces in which men and women can work together without fear of harassment of this kind.

That is already the effect of the Commonwealth law. The *Sex Discrimination Act* applies to private-sector employers in South Australia. It creates vicarious liability for sexual harassment, subject to a defence. There is no liability if the employer shows that he or she took all reasonable steps to prevent the employee from doing the acts complained of. Martin recommended a similar approach in State law.

The Bill, therefore, creates vicarious liability unless the employer has taken reasonable steps to prevent the harassment. The employer is free to decide what those steps

should be. As long as they are reasonable, there is no vicarious liability. The Bill goes further, however, and provides one certain way of establishing the defence. The employer must have in force an appropriate policy and must take reasonable steps to carry it out. That includes reasonable steps to make it known to the staff and prompt action if a complaint is made. As long as the employer does these things, he avoids vicarious liability. He may, however, avoid it by other reasonable steps. Once again, this should not add appreciably to the obligations that now fall on South Australian employers under Commonwealth law.

Further, the Bill covers sexual harassment in schools. Martin thought that senior students, those aged 16 and over, should be liable for sexual harassment of their fellow-students or the staff. The Bill goes further and would apply this rule to *all* secondary students. Members will recall that the age of criminal responsibility is 10 years. The Government thinks that by the time a child reaches secondary school, usually about age 12 or 13, he or she is old enough to understand what sexual harassment is. It is, then, fair to hold him or her responsible for such an act.

The Bill thus provides that a high-school student who is sexually harassed by another can complain to the Equal Opportunity Commission. There is, however, a requirement that the student first use whatever conciliation process may be provided by the school. It may well be that the matter can be sorted out in the school without recourse to the Equal Opportunity Commission. So much the better for everyone.

If, however, the school conciliation process does not succeed, or the complainant can demonstrate to the Commissioner that the school process should not be used, a complaint can be made to the Equal Opportunity Commission. This will lead to a conciliation process run by the Commissioner and, if that fails, to the matter's being heard by the Tribunal. This shows that the law regards this conduct, even by children, as serious. Sexual harassment in school can make life miserable for the victim. It can disrupt his or her studies or even force him or her out of the school. The harm it does is at least as serious in its way as some of

the offending that brings young people before the Youth Court. It is not an over-reaction to take these matters to the Commission and the Tribunal. It is an appropriate response to the gravity of the behaviour.

That is not to say that the full force of the Act should be visited on children as it is on adults. Martin made clear that children, even those who may have breached the Act, need special protection. He recommended that the parties' names should be protected from publication and that the Tribunal not be able to order a child to pay monetary compensation. The Bill adopts that recommendation.

The Bill also covers harassment of teachers by students. This is treated similarly, except that there is no requirement to use the conciliation process offered by the school in that case. The school could not be neutral in a matter involving its employee.

The Bill does not go so far as to hold the school responsible for the behaviour of its students, nor does it propose a remedy against the school because sexual harassment has occurred. It does, however, require that a school adopt a policy against sexual harassment. The Commissioner for Equal Opportunity plans to work with schools to help them meet that obligation.

The Bill also provides for representative complaints by persons who are not, themselves, aggrieved. At present, the law allows representative complaints to be made only by one aggrieved person on behalf of others or by a person on behalf of an intellectually-disabled person. Martin thought that the weight of argument supported the introduction of representative complaints. Under the Bill, an entity such as a trade union or other association would be able to make a complaint on behalf of a group of aggrieved persons, for example, the members of the association or the employees in a particular workplace. This will enable a complaint to be made, for example, where no individual is prepared to take on the company but the union will do so. A person cannot, however, be represented without his or her consent and whoever consents to be represented is bound by the result.

The present time limit of six months to lodge a complaint is extended by the Bill to 12 months. This is similar to other Australian jurisdictions and is as recommended by Martin. The Bill goes beyond what Martin recommended, however, in that it also allows extensions beyond the usual 12-month limit. The Commissioner can grant the extension. He or she must be satisfied that there is good reason why the complaint was not made in time and that an extension would be just and equitable in all the circumstances. Any prejudice to the respondent can therefore be taken into account. If an extension is refused, the Tribunal can review that decision.

The Bill also changes the role of the Commissioner in some important respects. Martin observed that the present law gives rise to a conflict in the Commissioner's role. On the one hand, she is to conciliate between the complainant and the respondent. Conciliation requires neutrality. The conciliator cannot take either party's side. On the other hand, if conciliation fails, then, unless the complaint is declined, the Commissioner must act as advocate for the complainant before the Tribunal. Martin said that this 'clearly creates both a significant conflict of interest and the perception of conflict between the role of the Commissioner as an impartial investigator and conciliator and the subsequent role of assisting one party if conciliation fails'. Martin said that there were 'powerful reasons of principle and practicality for repealing s. 95(8)(a)'. This Bill would do that.

Martin also said, however, that this should not result in any disadvantage to complainants who might not be able to represent themselves, or to afford legal representation, before the Tribunal. He thought that similar assistance should be provided by other means. The Government agrees. For this reason, the Bill would amend the Act so that a duty falls on the Minister to see that legal representation is provided to the complainant. The Government proposes to fund the Legal Services Commission to deliver this representation. The Commission is experienced in providing legal representation to South Australians in a wide range of matters and has offered to take on this new responsibility, if funded to do so, at least for a trial period of 12 months. It has agreed that the

means test will not apply in these cases. The Government hopes that this will provide an avenue of representation for complainants in future.

Further, in the interests of neutrality, Martin thought that the Commissioner's power of investigating a complaint should be limited by law. The Bill would limit this power to investigating for the purpose deciding whether the complaint should be accepted and, if so, conciliating it. There is no need for it to be a wider investigation because, once conciliation is completed, the Commissioner's role is at an end. If the parties cannot agree, the task of fact-finding falls to the Tribunal, not the Commissioner. Within these limits, however, the Bill would permit the Commissioner to require documents from any person, not just the respondent. After all, the complainant or a third party may hold relevant papers. The Bill would, however, protect records of counselling or therapy and also notes of a party's advocate. The privilege against self-incrimination and legal-professional privilege are also preserved. Once a document is produced, unless it is confidential, the Commissioner can, in her discretion, show it to the parties in the conciliation.

The Bill also proposes to expand the Commissioner's powers to decline a complaint. In addition to the present power to decline complaints that are frivolous, vexatious or lacking in substance, the Commissioner will also be able to decline a complaint if contact with the complainant is lost. A complaint can also be declined if the complainant ceases to pursue it. This amendment will enable the Commissioner to close the file. If, however, the complainant, within 12 months of lodgement, asks the Commissioner to reinstate the complaint, the Commissioner may do so.

Further, the Commissioner will be able to decline a complaint before it reaches the Tribunal, on the ground that representation should not be provided at public expense, either because there is no reasonable prospect of an order in the complainant's favour or because the complainant has no reasonable prospect of bettering an offer already made in conciliation. This will not prevent the complainant taking the matter to the Tribunal. That is his or her right. It will mean,

however, that representation is not provided at public expense. Public money should not be used to fund complaints that cannot succeed or to pursue remedies that will not be granted.

The conciliation powers are elaborated to make clear that the Commissioner can conciliate without bringing the parties into direct contact, an authority that might be useful when emotions run high. The Commissioner can also, where different complaints against the one respondent raise similar questions of fact or law, arrange to conciliate them jointly. Also, the Commissioner will be able to compel the complainant, as well as the respondent, to attend conciliation.

For matters that do not resolve by conciliation, the Bill also proposes that the Commissioner should be able, with the leave of the Tribunal, to appear before the Tribunal to assist it in appropriate cases. As the Commissioner will not be representing complainants, the way is open for her to make submissions to the Tribunal on the application of the Act. It is not intended that the Commissioner should act as advocate for either party and this will not be the representation of the complainant by the back door. Rather, it will be a help to the Tribunal, for example, where there is legal argument about the interpretation of the Act. It is not an authority one would expect to see used often, but there will be some cases where it is valuable.

The Bill also amends section 10 of the Act to reinforce the independence of the Commissioner. On the one hand, the Commissioner is, and should be, responsible to the Minister for the general administration of the Act and, in that sense, is under the general direction and control of the Minister. Sub-section (2) is reworded, however, to make clear that this does not entitle the Minister to direct how a particular complaint is to be handled, nor to require the Commissioner to disclose information identifying a party to proceedings.

The Bill would give the Commissioner an important new authority. It proposes that the Commissioner should be able to investigate suspected unlawful conduct, even if there is no

complaint. Under the Act at present, the Commissioner can start an investigation only with the approval of the Minister and a reference from the Tribunal. In practice, no such investigation has ever occurred. The Bill proposes that if the Commissioner thinks that a person may have contravened the Act, she can investigate of her own initiative. She must notify the person concerned. She is given the authority to require production of documents. The investigation can result in the Commissioner taking the matter as a complaint to the Tribunal. This power might be useful, for example, where the Commissioner detects a systemic problem that requires attention, even though no-one has complained about it. It also means that the Government's actions are more open to investigation than at present because the Minister's permission is not needed. This bolsters the independence of the Commissioner and should help to promote equal opportunity.

The Commissioner will also be able to intervene in industrial proceedings under the *Fair Work Act* with the leave of the Industrial Commission. This might occur, for instance, when an award is being set or an enterprise agreement approved. The Commissioner will be able to make submissions on the matter before the court from an equal-opportunity perspective. This will help to ensure that conditions of employment are not discriminatory.

There are smaller changes. Section 6 of the Act is amended by the Bill to remove the 'substantial reason' requirement. As that section has been interpreted, it does not mean that the discriminatory reason must predominate or be more important than other reasons. It just means that it must not be a trivial or insubstantial reason for the act. Consequently, this requirement adds little to the meaning of the section and tends to confuse readers. The effect of the amended provision will be that if a person treats another unfavourably on a ground referred to in the Act, then the person discriminates, even if there are other grounds for the act as well. The law is re-expressed, rather than changed. It is not intended that this amendment should permit a complaint to be made over a reason is illusory or insubstan-

tial. What is intended is to simplify the provision so that it is easier to understand.

Sections 12 and 101 of the Act have never been proclaimed. Martin thought they should be repealed because they would contribute to conflict in the role of the Commissioner. There was no dissent on this in submissions to the review and the Bill proposes to repeal them. The Bill would also repeal ss. 41 to 44, dealing with sex discrimination in superannuation. These provisions have also never been proclaimed. The regulation of superannuation, other than State superannuation, is now largely a Commonwealth matter.

A change is made to the rules about disabled persons being accompanied by guide dogs. This protection is expanded to cover any animal of a class prescribed by regulation. The review heard from Assistance Dogs Australia, a non-profit organization that trains dogs to assist people with disabilities, for example, people in wheelchairs. Having regard to this work, it seemed that the present provisions, limited to guide dogs, are too narrow.

The Bill also adopts Martin's recommendation to change the wording of s. 85K, dealing with the charging of different fees to people of different ages. This provision is meant to allow concessions based on youth or age. It is not meant to allow surcharges to those groups because they have the benefit of other concessions. The provision has therefore been reworded to focus it more clearly on fee reductions to benefit particular age groups.

The Bill does not adopt the Martin recommendation to replace the Equal Opportunity Tribunal with a Division of the District Court. The Government cannot see any benefit in doing that and submissions to the review evinced general support for keeping the Tribunal.

Members will see that the Government has listened to the comment we received on the framework paper. We were persuaded not to include in this measure the proposed new grounds of political activity, industrial activity, irrelevant

criminal record or physical features, despite the existence of these grounds in some other jurisdictions. We propose to retain the rule permitting religious schools to exclude homosexual staff. We have, at several points, tried to make our law consistent with Commonwealth law that already applies here, to avoid burdening the business sector.

At the same time, the Bill makes important and long-overdue changes to the Act, including covering discrimination on the grounds of caring responsibilities and of mental illness which, from today's perspective, appear glaring omissions from our present law. It also adds to the Act the new grounds of association with a child, identity of spouse, area of residence and occupation or trade. The Bill proposes to protect independent contractors in the same way that the Act has always protected employees. It will provide, for the first time, a remedy for the vilification of any person or group on the grounds of age, sexuality, disability and other grounds. It will provide for representative complaints by persons not aggrieved on behalf of those who are. It offers an equal-opportunity remedy for sexual harassment in schools. The Bill also promotes the role of the Commissioner as an independent guardian of equal opportunity in our State. It removes the conflict of interest that has, with hindsight, probably damaged the confidence of the business sector in the Commission. It also removes the requirement for Ministerial approval for an investigation by the Commissioner, thereby subjecting Government to the same scrutiny as everyone else. This Bill fulfils the Government's election promise to amend this Act to give South Australians more comprehensive protection against unjustified discrimination. It does so, the Government believes, in a way that is fair to both complainants and respondents. It is not difficult for business to keep these proposed laws. What they require is that we act reasonably in the fields covered by the Act. We must disregard irrelevant personal characteristics. We must make sure our requirements are reasonable. We must take reasonable steps to prevent unlawful conduct by those under our control. No-one is asked by this Bill to accept unjustifiable hardship. No-one is expected to compromise on health or safety. No-one is required to act against conscience. Equal-opportunity laws, of all laws,

ought to be fair. The Bill seeks to enhance equality of opportunity in a way that is fair to all.

I commend the Bill to Members.

EXPLANATION OF CLAUSES

Part 1—Preliminary

1—Short title

2—Commencement

3—Amendment provisions

These clauses are formal.

Part 2—Amendment of *Equal Opportunity Act 1984*

4—Amendment of long title

This clause amends the long title to reflect the proposed new grounds of unlawful discrimination to be added to the Act.

5—Amendment of section 5—Interpretation

This clause defines a number of terms required as a consequence of the proposed new provisions.

Area of residence of a person is defined to mean the suburb, town or regional district in which the person resides.

Assistance animal is defined to mean a dog that is an accredited guide dog, hearing dog or disability dog under the *Dog and Cat Management Act 1995* or an animal of a class prescribed by regulation.

Caring responsibilities of a person is defined as meaning responsibility for providing ongoing care for another, whether or not as a dependant, other than in the course of paid employment or other remunerative activity.

Potential pregnancy of a woman is defined to mean that the woman is likely, or is perceived as being likely, to become pregnant.

This clause also proposes removing the term ***transsexual*** from the Act and replacing it with the concept of ***chosen gender***. ***Chosen gender*** is defined to mean that a person is a person of a ***chosen gender*** if—

- the person 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

- the person, being 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.

Under the current Act, it is unlawful to discriminate against a person on the ground of that person's physical or intellectual impairment. It is proposed to change the terminology to make it unlawful to discriminate on the ground of a person's **disability**. **Disability** is defined to mean—

- total or partial loss of the person's bodily or mental functions; or
- total or partial loss of a part of the body; or
- the presence in the body of organisms causing disease or illness; or
- the presence in the body of organisms capable of causing disease or illness; or
- the malfunction, malformation or disfigurement of a part of the person's body; or
- a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or
- a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour.

This clause also proposes widening the definition of **race** to include the past or proposed nationality of a person.

6—Amendment of section 6—Interpretative provisions

Clause 6 proposes to amend the interpretative provisions in the Act to provide that if an act that may be a discriminatory or unlawful act has been done for a number of reasons, the fact that one of those reasons is discriminatory is sufficient to bring an action under this Act.

This clause also proposes a new subsection to provide that if a person who is alleged to have committed a

discriminatory act did so on the basis of a mistaken assumption (for example, a mistaken assumption that another person was of a particular sexuality or a particular race or a person of a chosen gender) the act will still be regarded as a discriminatory act.

7—Amendment of section 10—Administration of Act and Ministerial direction

Section 10 of the principal Act provides that the Commissioner is subject to Ministerial direction in the administration of the Act. This clause proposes a new subsection (2) to provide that the Minister must not give a direction in relation to the manner in which action should be taken on a particular complaint or seek information tending to identify a party to proceedings under the Act.

8—Amendment of section 11—Functions of Commissioner

Clause 8 reflects the proposed new grounds of unlawful discrimination to be added to the Act.

9—Amendment of section 14—Annual report by Commissioner

Clause 9 brings the date of the Commissioner's annual report into line with the *Public Sector Management Act 1995*.

10—Amendment of section 25—General powers of Tribunal

Clause 10 updates the penalty provision.

11—Substitution of heading to Part 3

Clause 11 reflects the proposed change of structure of the Act (see clause 12) and the addition of the ground of chosen gender.

12—Amendment of section 29—Criteria for discrimination on ground of sex, chosen gender or sexuality

Section 29 of the principal Act provides the criteria for establishing discrimination on the ground of sex, sexuality, marital status and pregnancy. Clause 12 proposes removing the grounds of marital status and pregnancy and including them as part of the new Part 5B and adds the criteria for establishing discrimination on the ground of chosen gender. Clause 12 also proposes broadening the conduct that might amount to

discrimination on the ground of sex or sexuality by including the situation of a person treating another unfavourably—

- because of the sex or sexuality of a relative or associate of the other person; or

- because of the person's past sex or past sexuality.

Clause 12 also alters the burden of proof in section 29 in relation to whether a requirement is reasonable in the circumstances of a case. Currently, the complainant has to prove that a requirement imposed by a person was not reasonable. The proposed amendment provides that the respondent will be required to prove that a requirement is reasonable.

13—Substitution of heading to Part 3 Division 2

Clause 13 reflects the proposed inclusion of independent contractors within the scope of the Act.

14—Amendment of section 31—Discrimination against agents and independent contractors

Section 31 of the principal Act provides that it is unlawful for a principal for whom work is done by agents remunerated by commission to discriminate against those agents on the grounds covered by Part 3. Clause 14 proposes extending the section to make it unlawful for a principal to discriminate on the same grounds against independent contractors engaged under a contract for services.

15—Amendment of section 32—Discrimination against contract workers

Section 32 of the principal Act makes it unlawful for a principal to enter into an arrangement with an employer of contract workers under which the employer is to discriminate against a person. The proposed amendment extends the provision to cover workers who work under a contract for services and provides for the situation where there are a number of people linking the principal and the worker. ie, a principal who engages a contractor who engages a subcontractor who employs a worker.

16—Amendment of section 33—Discrimination within partnerships

The principal Act provides that if a firm consists of less than six members it is not unlawful to discriminate on the ground of sexuality in determining who should be

offered a position as a partner in the firm. The proposed amendment removes this exception to unlawful discrimination on the ground of sexuality.

17—Substitution of section 34

Section 34 of the principal Act provides that certain conduct that would amount to unlawful discrimination on the grounds of sex, sexuality, marital status or pregnancy in the area of employment is exempted from the provisions of the Act. As a consequence of the proposed new ground of chosen gender, the proposed new structure of the Act, and the proposed inclusion of independent contractors, these exemptions have had to be altered.

Currently, section 34 provides an exemption relating to employment in private households. The proposed expansion of the Act to include independent contractors necessitates a change to this provision to provide that it is not unlawful for a person to discriminate if the person employs another, or engages another as an independent contractor, for purposes not connected with a business carried on by the person.

This clause also proposes an expansion to the exemption in section 34 of the principal Act that provides that a person can discriminate on the ground of sex in relation to employment for which it is a genuine occupational requirement that a person be of a particular sex. The proposed clause expands this to include the grounds of chosen gender and sexuality.

This clause also proposes a new subsection (3) to provide that it is not unlawful to discriminate on the ground of chosen gender or sexuality in relation to employment or engagement for the purposes of an educational institution if—

- the educational institution is administered in accordance with the precepts of a particular religion and the discrimination is founded on the precepts of that religion; and

- the educational authority administering the institution has lodged a policy with the Commissioner stating its position in relation to the matter and that policy is made available—

(i) to employees and contractors and prospective employees and contractors of the authority to whom it relates or may relate; and

(ii) to students, prospective students and parents and guardians of students and prospective students of the institution.

The proposed clause also provides that a policy lodged under the clause may be published by the Commissioner.

18—Amendment of section 35—Discrimination by associations

The proposed amendments to section 35 make it unlawful for an association to discriminate on the ground of sexuality and provide for single sex associations to be covered by the Act. An exemption is proposed that provides that an association that is established for persons of a particular sex, or persons of a chosen gender or persons of a particular sexuality (other than heterosexuality) will not be unlawful and, consequently, such an association may discriminate against an applicant for membership so as to exclude from membership persons other than those for whom the association is established.

19—Repeal of section 35A

Clause 19 is consequential on the proposal that it be unlawful for associations to discriminate on the ground of sexuality.

20—Amendment of section 40—Discrimination in relation to accommodation

Clause 20 proposes to alter the exemption currently in section 40 to provide that the section does not apply to discrimination in relation to the provision of accommodation if the person who provides the accommodation, or a near relative of that person, resides, and intends to continue to reside, in the same household as the person requiring the accommodation.

21—Amendment of section 45—Charities

Clause 21 is a consequential amendment as a result of the proposed inclusion of the ground of chosen gender and the proposed restructure of the Act.

22—Repeal of section 46

Clause 22 is a consequential amendment as a result of the proposed restructure of the Act.

23—Amendment of section 47—Measures intended to achieve equality

Section 47 provides that it is not unlawful for an act to be done for the purpose of carrying out a scheme or undertaking intended to ensure that persons of the one sex, or of a particular marital status, have equal opportunities with persons of the other sex, or of another marital status. Clause 23 removes the reference to marital status as is required by the proposed restructuring of the Act, and extends the provision to include schemes or undertakings intended to ensure that persons of a chosen gender or persons of a particular sexuality, have equal opportunities with persons who are not persons of a chosen gender or persons of another sexuality.

24—Amendment of section 50—Religious bodies

Clause 24 proposes repealing an exemption in relation to sexuality for educational and other institutions that are administered in accordance with the precepts of a particular religion. The exemption is partially reinstated (in relation to employment) by proposed new section 34(3)—see clause 17.

25—Amendment of section 51—Criteria for establishing discrimination on ground of race

Section 51 of the principal Act provides the criteria for establishing discrimination on the ground of race. Clause 25 proposes broadening the type of conduct that amounts to discrimination on this ground to include the situation where a person treats another unfavourably because of the race of a relative of the other person. Clause 25 also proposes altering the burden of proof in section 51 in relation to whether a requirement is reasonable in the circumstances of a case. Currently, the complainant has to prove that a requirement imposed by a person was not reasonable. The proposed amendment provides that the respondent will be required to prove that a requirement is reasonable.

26—Substitution of heading to Part 4 Division 2

Clause 26 substitutes the heading to Part 4 Division 2 to reflect the proposed inclusion of independent contractors within the scope of the Act.

27—Amendment of section 53—Discrimination against agents and independent contractors

Section 53 of the principal Act provides that it is unlawful for a principal for whom work is done by agents remunerated by commission to discriminate against those agents on the ground of race. Clause 27 proposes extending the section to make it unlawful for a principal to discriminate on the ground of race against independent contractors engaged under a contract for services.

28—Amendment of section 54—Discrimination against contract workers

Section 54 of the principal Act makes it unlawful for a principal to enter into an arrangement with an employer of contract workers under which the employer is to discriminate against a person. The proposed amendment extends the provision to cover workers who work under a contract for services and provides for the situation where there are a number of people linking the principal and the worker. ie, a principal who engages a contractor who engages a subcontractor who employs a worker.

29—Amendment of section 56—Exemptions

Section 56 of the principal Act provides an exemption relating to employment in private households. The proposed expansion of the Act to include independent contractors necessitates a change to this provision to provide that it is not unlawful for a person to discriminate if the person employs another, or engages another as an independent contractor, for purposes not connected with a business carried on by the person.

30—Amendment of section 62—Discrimination in relation to accommodation

Clause 30 proposes a new exemption in relation to the ground of race discrimination in the area of accommodation. The exemption provides that the section does not apply to discrimination in relation to the provision of accommodation if the person who provides, or proposes to provide, the accommodation, or a near relative of that person, resides, and intends to continue to reside, in the same household as the person requiring the accommodation.

31—Amendment of heading to Part 5

Clause 31 is consequential on the proposal to alter the terminology from discrimination on the ground of impairment to discrimination on the ground of disability.

32—Amendment of section 66—Criteria for establishing discrimination on ground of disability

Section 66 of the principal Act provides the criteria for establishing discrimination on the ground of disability. This clause proposes broadening the type of conduct that amounts to discrimination on this ground to include the situation where a person treats another unfavourably because of a disability that may exist in the future or because of the disability of a relative or associate of the other person. Clause 32 also proposes altering the burden of proof in section 66 in relation to whether a requirement is reasonable in the circumstances of a case. Currently, the complainant has to prove that a requirement imposed by a person was not reasonable. The proposed amendment provides that the respondent will be required to prove that a requirement is reasonable.

Clause 32 also proposes broadening the type of conduct that amounts to discrimination by providing that a person may discriminate on the ground of disability if he or she—

- fails to provide a safe and proper means of access to, or use of, a place or facilities for a person who requires special means of access to, or use of, the place or facilities as a consequence of the person's disability; or
 - treats another unfavourably because the other requires special means of access to, or use of, a place or facilities as a consequence of the other's disability,
- to the extent that he or she is able to effect the provision of access or use.

Section 66 of the principal Act states that discrimination may occur if a person treats another unfavourably because a person possesses or is accompanied by a guide dog. Clause 32 proposes broadening this by changing the reference to guide dog to an ***assistance animal***.

33—Substitution of heading to Part 5 Division 2

The substitution of the heading reflects the proposed inclusion of independent contractors within the scope of the Act.

34—Amendment of section 67—Discrimination against applicants and employees

Clause 34 is consequential on the proposal to alter the terminology from discrimination on the ground of impairment to discrimination on the ground of disability.

35—Amendment of section 68—Discrimination against agents and independent contractors

Section 68 of the principal Act provides that it is unlawful for a principal for whom work is done by agents remunerated by commission to discriminate against those agents on the ground of disability. Clause 35 proposes extending the section to make it unlawful for a principal to discriminate on the ground of disability against independent contractors engaged under a contract for services.

36—Amendment of section 69—Discrimination against contract workers

Section 69 of the principal Act makes it unlawful for a principal to enter into an arrangement with an employer of contract workers under which the employer is to discriminate against a person. The proposed amendment extends the provision to cover workers who work under a contract for services and provides for the situation where there are a number of people linking the principal and the worker. ie, a principal who engages a contractor who engages a subcontractor who employs a worker.

37—Amendment of section 70—Discrimination within partnerships

Clause 37 is consequential on the proposal to alter the terminology from discrimination on the ground of impairment to discrimination on the ground of disability.

38—Amendment of section 71—Exemptions

Section 71 of the principal Act provides an exemption relating to employment in private households. The proposed expansion of the Act to include independent contractors necessitates a change to this provision to provide that it is not unlawful for a person to discriminate if the person employs another, or engages

another as an independent contractor, for purposes not connected with a business carried on by the person.

39—Amendment of section 72—Discrimination by associations

Clause 39 is consequential on the proposal to alter the terminology from discrimination on the ground of impairment to discrimination on the ground of disability.

40—Amendment of section 73—Discrimination by qualifying bodies

Clause 40 is consequential on the proposal to alter the terminology from discrimination on the ground of impairment to discrimination on the ground of disability.

41—Amendment of section 74—Discrimination by educational authorities

Clause 41 is consequential on the proposal to alter the terminology from discrimination on the ground of impairment to discrimination on the ground of disability.

42—Amendment of section 75—Discrimination by person disposing of interest in land

Clause 42 is consequential on the proposal to alter the terminology from discrimination on the ground of impairment to discrimination on the ground of disability.

43—Amendment of section 76—Discrimination in provision of goods and services

Section 76 of the principal Act makes it unlawful for a person who offers or provides goods or services to which the principal Act applies to discriminate against another on the ground of disability. The proposed clause 43 provides that in relation to services comprised of access to or use of a place or facilities that members of the public are permitted to enter or use, both the owner and the occupier will be taken to provide the service.

44—Amendment of section 77—Discrimination in relation to accommodation

Clause 44 proposes a new exemption in relation to the ground of disability discrimination in the area of accommodation. The exemption provides that the section does not apply to discrimination in relation to the provision of accommodation if the person who provides, or proposes to provide, the accommodation, or a near relative of that person, resides, and intends to continue

to reside, in the same household as the person requiring the accommodation.

45—Amendment of section 78—Discrimination in relation to superannuation

Clause 45 is consequential on the proposal to alter the terminology from discrimination on the ground of impairment to discrimination on the ground of disability.

46—Amendment of section 79—Exemption in relation to remuneration

Clause 46 is consequential on the proposal to alter the terminology from discrimination on the ground of impairment to discrimination on the ground of disability.

47—Insertion of section 79A

Clause 47 proposes inserting a new exemption into the principal Act. The exemption provides that an act will not be regarded as discriminatory on the ground of disability in relation to infectious diseases if it is directed towards ensuring that an infectious disease is not spread and it is reasonable in all the circumstances.

48—Amendment of section 80—Exemption for charities

Clause 48 is consequential on the proposal to alter the terminology from discrimination on the ground of impairment to discrimination on the ground of disability.

49—Amendment of section 81—Exemption in relation to sporting activities

Clause 49 is consequential on the proposal to alter the terminology from discrimination on the ground of impairment to discrimination on the ground of disability.

50—Amendment of section 82—Exemption for projects for benefit of persons with particular disability

Clause 50 is consequential on the proposal to alter the terminology from discrimination on the ground of impairment to discrimination on the ground of disability.

51—Substitution of section 84

Clause 51 proposes a new exemption as a consequence of the proposed expansion of the principal Act to make it unlawful to fail to provide a safe and proper means of access to or use of a place or facilities. The proposed exemption provides that a person does not discriminate on the ground of disability if the provision of access or

use would impose unjustifiable hardship on the person. In determining what constitutes unjustifiable hardship, all relevant circumstances of the particular case are to be taken into account including—

- the nature of the benefit or detriment likely to accrue or be suffered by the persons concerned; and
- the effect of the disability of the person concerned; and
- the financial circumstances and the estimated amount of expenditure required to be made by the person claiming unjustifiable hardship.

52—Amendment of section 85—Exemption in relation to insurance

Clause 52 is consequential on the proposal to alter the terminology from discrimination on the ground of impairment to discrimination on the ground of disability.

53—Amendment of section 85A—Criteria for establishing discrimination on ground of age

Section 85A of the principal Act provides the criteria for establishing discrimination on the ground of age. Clause 53 proposes broadening the type of conduct that amounts to discrimination on this ground to include the situation where a person treats another unfavourably because of the age of a relative or associate of the other person. Clause 53 also proposes altering the burden of proof in section 85A in relation to whether a requirement is reasonable in the circumstances of a case. Currently, the complainant has to prove that a requirement imposed by a person was not reasonable. In contrast, the proposed amendment provides that the respondent will be required to prove that a requirement is reasonable.

54—Substitution of heading to Part 5A Division 2

The substitution of the heading reflects the proposed inclusion of independent contractors within the scope of the Act.

55—Amendment of section 85C—Discrimination against agents and independent contractors

Section 85C of the principal Act provides that it is unlawful for a principal for whom work is done by agents remunerated by commission to discriminate against those agents on the ground of age. Clause 55 proposes extending the section to make it unlawful for a principal

to discriminate on the ground of age against independent contractors engaged under a contract for services.

56—Amendment of section 85D—Discrimination against contract workers

Section 85D of the principal Act makes it unlawful for a principal to enter into an arrangement with an employer of contract workers under which the employer is to discriminate against a person. The proposed amendment extends the provision to cover workers who work under a contract for services and provides for the situation where there are a number of people linking the principal and the worker. ie, a principal who engages a contractor who engages a subcontractor who employs a worker.

57—Amendment of section 85F—Exemptions

Section 85F of the principal Act provides an exemption relating to employment in private households. The proposed expansion of the Act to include independent contractors necessitates a change to this provision to provide that it is not unlawful for a person to discriminate if the person employs another, or engages another as an independent contractor, for purposes not connected with a business carried on by the person.

58—Amendment of section 85K—Discrimination in provision of goods and services

Section 85K of the principal Act provides that it is unlawful to discriminate on the ground of age in the provision of goods and services. Subsection (2) provides that it is unlawful to refuse to supply goods or perform services to another on the ground that the other person is accompanied by a child. This clause proposes relocating subsection (2) to the proposed new Part 5B under the new ground of association with a child.

59—Amendment of section 85L—Discrimination in relation to accommodation

Section 85L of the principal Act provides that it is unlawful to discriminate on the ground of age in relation to the provision of accommodation. Subsection (2) provides that it is unlawful to refuse accommodation on the ground that the other person intends to share the accommodation with a child. This clause proposes relocating subsection (2) to a new section 87A—Sharing accommodation with a child.

60—Insertion of Part 5B

Clause 60 proposes to insert a new Part 5B into the Act to prohibit discrimination on a number of grounds that have not previously been unlawful. The new proposed grounds of discrimination are the grounds of identity of a spouse, association with a child, caring responsibilities, profession, trade or lawful occupation, area of residence and religious appearance or dress. It is also proposed that the Part include within it the grounds of marital status and pregnancy which were previously included in Part 3 of the Act.

Each of the proposed new grounds makes it unlawful to discriminate in particular areas. In relation to the ground of identity of a spouse, it will be unlawful to discriminate in the area of work, by associations or qualifying bodies, in education, in relation to land, in the provision of goods and services and in relation to accommodation.

In relation to the ground of association with a child, it will be unlawful to discriminate in the provision of goods and services.

In relation to the ground of caring responsibilities, it will be unlawful to discriminate in the area of work, by associations and qualifying bodies, in education, in relation to land, in the provision of goods and services and in relation to accommodation.

In relation to the ground of profession, trade or lawful occupation, it will be unlawful to discriminate in the areas of education, land, the provision of goods and services and accommodation.

In relation to area of residence, it will be unlawful to discriminate in the area of work.

In relation to religious appearance or dress, it will be unlawful to discriminate in the areas of work and education.

The proposed new Part provides for some specific exemptions and some general exemptions in relation to charities and measures intended to achieve equality.

61—Amendment of section 86—Victimisation is unlawful

Section 86 of the principal Act makes it unlawful for a person to commit an act of victimisation. The proposed clause 61 expands the behaviour that constitutes an act

of victimisation to include a person engaging in a public act inciting hatred, serious contempt or severe ridicule of a person on a ground of discrimination that is unlawful under the Act.

The proposed clause also provides that it is unlawful for an educational authority administering a secondary education institution to fail to have a written policy against victimisation by students that incorporates procedures for resolving complaints and is made readily available to students.

62—Amendment of section 87—Sexual harassment

Section 87 of the principal Act provides that sexual harassment is unlawful in certain situations. Clause 62 proposes that sexual harassment also be unlawful in the situations where—

(a) a person to whom goods, services or accommodation are being offered, supplied, performed or provided by another person subjects that other person to sexual harassment; or

(b) a member of an authority or body empowered to confer an authorisation or qualification subjects an applicant for the conferral of such an authorisation or qualification to sexual harassment; or

(c) a member of the governing body of an association subjects a member of the association, or a person applying to become a member of the association, to sexual harassment.

Clause 62 also proposes substituting the definition of conduct that amounts to sexual harassment to provide that a person sexually harasses another if—

(a) the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or

(b) engages in other unwelcome conduct of a sexual nature in relation to the person harassed, in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the person harassed would be offended, humiliated or intimidated.

63—Substitution of section 88

Section 88 of the principal Act makes it an offence to separate a person from his or her guide dog. Clause 63

proposes extending the operation of this section to include other animals prescribed by regulation. The clause also proposes 3 new sections. New section 87A is the relocation of the provision in the principal Act that makes it unlawful to refuse accommodation to a person on the ground that the other person intends to share the accommodation with a child. New section 87B makes it unlawful for an educational authority to discriminate against a student by denying or limiting access to the educational services provided by the authority on the ground that the student is breast feeding an infant or proposes to do so. New section 88A makes it unlawful for a person to be refused accommodation on the ground that the person intends to keep a therapeutic animal at that accommodation. A therapeutic animal is defined as an animal certified by a medical practitioner as being required to assist a person as a consequence of the person's disability.

64—Substitution of section 91

Section 91 of the principal Act provides for the vicarious liability of employers and principals for discriminatory or unlawful acts of agents or employees. Clause 64 removes the subsection that provides that a person is not vicariously liable for an act of sexual harassment committed by an agent or employee unless the person instructed, authorised or connived that act.

65—Substitution of heading to Part 8 Division 1

Clause 65 is a drafting amendment.

66—Amendment of section 93—Making of complaints

Clause 65 proposes to amend section 93 of the principal Act to increase the time within which a complaint must be lodged from 6 months to 12 months and provides that the Commissioner may extend the time for lodging a complaint.

67—Amendment of section 93A—Investigation initiated by Commissioner

Clause 67 proposes amending section 93A of the principal Act to provide that where it appears to the Commissioner that a person may have acted in contravention of the Act, the Commissioner may investigate the matter. The Act currently provides that

such matters have to be referred to the Commissioner from the Tribunal.

68—Amendment of section 94—Investigations

Clause 68 proposes amending section 94 of the principal Act to provide that in the course of an investigation by the Commissioner, the Commissioner cannot, without the consent of the person concerned, require production of records of counselling or therapy sessions or records or notes made by an advocate for the person.

69—Substitution of section 95

Clause 69 proposes substituting section 95 of the principal Act for sections 95, 95A, 95B and 95C. The proposed new section 95 deals with the conciliation of complaints lodged with the Commissioner. New section 95A sets out the circumstances in which the Commissioner may decline to recognise a complaint as one on which action should be taken by the Commissioner. New section 95B details the situation in which the Commissioner must refer a complaint to the Tribunal for hearing and determination and new section 95C provides for the referral of matters initiated by the Commissioner to the Tribunal for hearing and determination.

70—Amendment of section 96—Power of Tribunal to make certain orders

Section 96 of the principal Act provides for the Tribunal to make certain orders. The proposed clause 70 provides that in awarding compensation the Tribunal must take into account the amount of damages or compensation awarded in other proceedings in respect of the same act, and that an award of compensation may not be made against a child.

71—Insertion of section 96A

Clause 71 proposes a new section 96A to provide that a person must not publish a report of proceedings under the Act to which a child is a party if the report identifies the child or contains information tending to identify the child.

72—Amendment of heading to Part 8 Division 2

Clause 72 is a consequential amendment.

73—Insertion of section 96B

Clause 73 proposes a new section 96B as a consequence of the new provision allowing the Commissioner to extend the time within which a person may lodge a complaint. New section 96B provides that where the Commissioner refuses an application for an extension of time, the applicant may apply to the Tribunal for a review of the decision.

74—Insertion of section 99A

Clause 74 proposes a new section 99A to provide that nothing in the Act prevents the imposition of a requirement for a worker or student to comply with a reasonable standard of appearance or dress.

75—Amendment of section 100—Proceedings under *Fair Work Act 1994*

Clause 75 proposes a new subsection to section 100 to provide that the Commissioner may, with leave of the Industrial Relations Commission of South Australia, make submissions and present evidence in proceedings before the Commission under the *Fair Work Act 1994*.

76—Amendment of section 102—Offences against Commissioner

Clause 76 updates the penalty provision.

77—Amendment of section 103—Discriminatory advertisements

Clause 77 updates the penalty provision.

78—Substitution of section 104

Clause 78 proposes a new section 104 to provide for the service of documents.

79—Amendment of section 106—Regulations

Clause 79 updates the fines that may be imposed for offences against the regulations.

Schedule 1—Related amendments

Part 1—Amendment of *Civil Liability Act 1936*

1—Amendment of section 73—Racial victimisation

This clause proposes an amendment to the *Civil Liability Act 1936* to provide that an action for damages for racial victimisation brought under the *Civil Liability Act 1936* prevents the making of a complaint under the *Equal Opportunity Act 1984*.

Part 2—Amendment of *Racial Vilification Act 1996*

2—Amendment of section 6—Damages

This clause proposes an amendment to the *Racial Vilification Act 1996* to provide that in determining the total amount of damages awarded under the *Racial Vilification Act 1996*, the court must take into account the amount awarded on a complaint under the *Equal Opportunity Act 1984* as well as any amount awarded under the *Civil Liability Act 1936*.

Schedule 2—Statute law revision amendment of *Equal Opportunity Act 1984*

Schedule 2 makes statute law revision amendments to the principal Act.

Ms CHAPMAN secured the adjournment of the debate.