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Dear Mr Blunt

Government response to Report 55

I enclose the New South Wales Government response to the Legislative Council Portfolio Committee No. 5 Report 55: *Anti-Discrimination Amendment (Complaint Handling) Bill 2020*.

Yours sincerely

Mark Speakman

17 March 2021

GOVERNMENT RESPONSE

to

REPORT 55 OF THE LEGISLATIVE COUNCIL PORTFOLIO COMMITTEE NO.5

on

THE ANTI-DISCRIMINATION AMENDMENT (COMPLAINT HANDLING) BILL 2020

No.	Recommendation	NSW Government Response
1	That sections 89B and 92 of the <i>Anti-Discrimination Act 1977 (ADA)</i> not be amended as proposed by the Anti-Discrimination Amendment (Complaint Handling) Bill 2020 (the Private Member's Bill).	<p>Supported</p> <p>The NSW Government supports the recommendation that sections 89B and 92 of the ADA not be amended as proposed by the Private Member's Bill.</p>
2	<p>That the NSW Government consider amending sections 89B and 92 of the ADA to allow the President of the Anti-Discrimination Board (ADB) to:</p> <ul style="list-style-type: none"> • refuse to accept a complaint where the President is satisfied that the complaint, or part of the complaint, is frivolous, vexatious, misconceived or lacking in substance, or where it does not make out a legal ground for complaints under the ADA. 	<p>Supported</p> <p>The NSW Government supports enabling the President to decline a complaint where the President is satisfied that the complaint, or part of the complaint, is frivolous, vexatious, misconceived or lacking in substance, or does not make out a legal ground for complaints under the ADA. Additional grounds may provide the President with the discretion to consider other relevant factors when making a decision to accept or decline a complaint.</p> <p>Some aspects of the recommendation do not require legislative amendment to achieve its intent. Existing section 89B(2)(a) already provides that the President may decline a complaint if no part of the conduct complained of could amount to a contravention of a provision of the ADA or the regulations. This allows the President to refuse to accept a complaint where it does not make out a legal ground for a complaint under the ADA.</p> <p>Similarly, amending section 92 is also not necessary because section 92(1)(a)(i) of the ADA provides that the President can decline a complaint during investigation where the President is satisfied that the complaint, or part of the complaint, is frivolous, vexatious, misconceived or lacking in substance. Section 92(1)(a)(ii) already provides that the President can decline a complaint during investigation if the President is satisfied that the conduct alleged, or part of the conduct alleged, if proven, would not disclose a contravention of the ADA.</p>
	<ul style="list-style-type: none"> • insert a new ground for refusal if the complaint falls within an exception to unlawful discrimination or vilification. 	<p>Supported in principle</p> <p>The NSW Government supports in principle the recommendation that there be a ground, on receipt of an application or during an investigation, to allow the President to refuse a complaint where the complaint falls within an exception to unlawful discrimination. Legislative reform is not considered necessary to achieve this because:</p> <ul style="list-style-type: none"> • existing section 89B(2)(a) already provides that the President may decline a complaint if no part of the

		<p>conduct complained of could amount to a contravention of a provision of the ADA; and</p> <ul style="list-style-type: none"> existing section 92(1)(a)(ii) already provides that the President may decline a complaint during investigation if the conduct alleged, or part of the conduct alleged, if proven, would not disclose the contravention of a provision of the ADA. <p>Where an exception to unlawful discrimination or vilification applies to a conduct, then the conduct would not amount to a contravention of the ADA.</p>
3	<p>That the NSW Government amend the ADA to provide the President with the power to refer a complainant to the Attorney General for consideration of whether the person should be the subject of an application to the Supreme Court for a declaration that the complainant is a vexatious litigant.</p>	<p>Supported in principle</p> <p>The NSW Government supports in principle the recommendation to amend the ADA to provide the President with the power to refer a complainant to the Attorney General for consideration of whether the person should be the subject of an application to the Supreme Court for a declaration that the complainant is a vexatious litigant.</p> <p>In particular, the NSW Government notes the Committee's recognition that there already exists in the legal system a well-established regime to deal with alleged vexatious litigants and recognises the President's stated support for a regime that would see potential vexatious complainants referred to the Supreme Court.</p> <p>This recommendation was not an aspect of the Private Member's Bill or considered in submissions to the Inquiry. The Government will therefore consult on its precise implementation.</p>
4	<p>That the NSW Government consider amending section 89 of the ADA to provide that the complainant must set out reasonable details of the alleged acts, omissions or practices.</p>	<p>Supported</p> <p>The NSW Government supports consideration of the recommendation that the complainant be required to set out reasonable details in a complaint.</p> <p>The Government notes that, in practice, ADNSW currently already seeks further information from a complainant where there is insufficient information upon which a decision to accept or refuse the complaint can be made under section 89B.</p>
5	<p>That the NSW Government undertake a thorough review of the ADA with the aim of updating and modernising it, in consultation with key stakeholders, and specifically addressing the committee comments and concerns identified by stakeholders as set out in this report.</p>	<p>Noted</p> <p>The Government will continue to review the ADA in response to identified issues and, where necessary, introduce amendments that reflect modern community values. For example, in 2018, the NSW Government introduced amendments to the <i>Crimes Act 1900</i> to prohibit publicly threatening or inciting violence on specified grounds. The new offence in 93Z of the <i>Crimes Act</i> replaced four vilification offences in the ADA.</p>
6	<p>That the NSW Government consider potential amendments to the ADA to ensure that:</p> <ul style="list-style-type: none"> a claim must have a material connection to New South Wales both the complainant and respondent are provided with assistance by the President to make or respond to a complaint, under section 88A 	<p>Supported</p> <p>The NSW Government supports consideration of these potential amendments.</p> <p>Some of these recommendations do not require further legislative reform to achieve their intent, as they are already covered by the existing law.</p> <p>For example, for NSW laws to operate extraterritorially, there must be a sufficient territorial nexus to NSW. Currently people who are not residents in New South Wales may be parties to vilification complaints under the ADA only if the subject matter of the complaint has a sufficient connection to NSW. If there is not</p>

	<ul style="list-style-type: none"> the President be allowed to refuse to accept a complaint under section 92 where the President is satisfied that the respondent has taken appropriate steps to remedy or redress the conduct the President be required to give a complainant reasonable notice of their intention to refuse to accept the complaint to allow the complainants to either make submissions as to why the complaint should not be dismissed, or amend the complaint, under section 89B(3). 	<p>a sufficient connection between the conduct and the State of NSW, the conduct will not contravene the ADA.</p> <p>Additionally, legislative amendment is not necessary to allow the President to refuse a complaint where the President is satisfied that the respondent has taken appropriate steps to remedy or redress the conduct complained of, because existing section 92(1)(a)(vi) already provides for this.</p>
7	<p>That the Legislative Council proceed to debate the Private Member's Bill, and that the committee comments and concerns identified by stakeholders as set out in this report be addressed during debate in the House.</p>	<p>Noted</p> <p>The NSW Government notes the Committee's recommendation for the Legislative Council proceed to debate the Private Member's Bill, and that the Committee comments and concerns identified by stakeholders as set out in the report be addressed during debate in the House.</p>